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2. *Alabama.* — George *v.* Ross, 128 Ala. 666, 29 So. 651.

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Of Parol Authority To Sell Real Estate. — A purchaser who relies upon parol authority of an agent to sell real estate must establish the authority by clear, certain and specific evidence.[4]

(B.) WHERE AUTHORITY IS LIMITED. — Where the authority is limited it must be shown that the conditions under which a conveyance was to be made have been fulfilled.[5]

(C.) WHERE AUTHORITY IS GENERAL. — Where the land is not described in the power of attorney, the evidence must show otherwise that the land conveyed was covered by the authority.[6]

(3.) Authority To Execute Lease. — A lease executed by an agent is not admissible until the authority is shown by clear evidence.[7]

(4.) Authority To Make or Indorse Bills or Notes. — The authority of an agent to make or indorse bills, notes and other instruments sued upon must be proved;[8] but it may be inferred from circumstances.[9]

(5.) Authority To Buy Goods. — The burden is on the party who sells goods to an agent to prove that the goods sold are of such character as the nature of the business authorized the agent to purchase.[10]

B. Mon. (Ky.) 430; Herndon *v.* Bascom, 8 Dana (Ky.) 113; Davenport *v.* Parsons, 10 Mich. 42, 81 Am. Dec. 772; Yarborough *v.* Beard, 1 Tayl. (N. C.) 25; Territory *v.* Klee, 1 Wash. 183, 23 Pac. 417. See also Union Mut. Life Ins. Co. *v.* Masten, 3 Fed. 881.

The power must be shown by some evidence other than the muniment of title. Blume *v.* Rice, 12 Tex. Civ. App. 1, 32 S. W. 1056.

Authority To Make Contract To Sell must be proved. Clark *v.* Gordon, 35 W. Va. 735, 14 S. E. 255.

4. Proudfoot *v.* Wightman, 78 Ill. 553; Challoner *v.* Bouck, 56 Wis. 652, 14 N. W. 810.

"It is not doubted that parol authority would be sufficient for this purpose, but then it must be clear and explicit, and not clouded with any uncertainty. A party may not be deprived of his property without his consent, and where an agent undertakes to bind his principal in a contract for the conveyance of real estate, his authority so to do must be certain and specific." Taylor *v.* Merrill, 55 Ill. 52.

5. McConnell *v.* Bowdry's Heirs, 4 T. B. Mon. (Ky.) 392.

6. Dunnegan *v.* Butler, 25 Tex. 501.

7. Humphreys *v.* Browne, 19 La. Ann. 158.

Where an oral lease is claimed, and all the circumstances tend to show authority in the agent, the silence of the principal, who has the conclusive evidence peculiarly within his possession, goes strongly to support the fact of authority. Grigsby *v.* Western Union Tel. Co., 5 S. D. 561, 59 N. W. 734.

8. Consolidated Nat. Bank *v.* Pacific Coast S. S. Co., 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85; Rio Grande Extension Co. *v.* Coby, 7 Colo. 299, 3 Pac. 481; Folger *v.* Peterkin, 39 La. Ann. 815, 2 So. 579; Flax & Hemp Mfg. Co. *v.* Ballentine, 16 N. J. L. 454; Connell *v.* McLoughlin, 28 Or. 230, 42 Pac. 218. But it is not necessary to show written authority. Garrott *v.* Ratliff, 83 Ky. 384; Trundy *v.* Farrar, 32 Me. 225.

A failure by an agent to produce a power of attorney does not raise any inference that it authorized him to sign a note. Connell *v.* McLoughlin, 28 Or. 230, 42 Pac. 218.

9. Trundy *v.* Farrar, 32 Me. 225.

10. Wallis Tobacco Co. *v.* Jackson, 99 Ala. 460, 13 So. 120; Odell Typewriter Co. *v.* Sears, Roebuck & Co., 86 Ill. App. 621. See, however, Thurber *v.* Anderson, 88 Ill. 167. An agent for one who kept a grocery and saloon bought imported ale and cigars. It was objected that the goods were not suited to the business, but the court disposed of this by saying: "The evidence fails to show that the goods ordered were

(6.) Authority To Employ. — A party suing for services rendered under a contract with an agent must show the latter's authority;[11] but where the agent is one of the chief officers of a corporation, and the services are such as the corporation would require, the authority may be presumed.[12] Likewise, where the president of a corporation hires an employe, it will be presumed that he had authority to agree upon a compensation.[13]

(7.) Authority To Make Guaranties and Warranties. — A party seeking to hold a principal on a guaranty or warranty made by an agent has the burden of showing the latter's authority.[14] When an agent is sued upon a warranty, he has the burden of showing his authority.[15]

(8.) Authority To Receive Payment. — (A.) In General. — The authority of an agent to receive payment for his principal must be proved by the party making payment;[16] but the proof need not be

not such as are within the line of business in which appellee was engaged."

In general, to the effect that plaintiff has the burden of showing the authority of the agent to buy, see Cassidy *v.* Aldhous, 3 Misc. 627, 23 N. Y. Supp. 318.

11. Schlapbach *v.* Richmond & D. R. Co., 35 S. C. 517, 15 S. E. 241 (authority of railroad station agent to employ detective to find persons who had been robbing cars must be proved); Stinson *v.* Sachs, 8 Wash. 391, 36 Pac. 287; Ames *v.* Murray Mfg. Co., 114 Wis. 85, 89 N. W. 836.

12. Cincinnati, I., St. L. & C. R. Co. *v.* Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503. "An officer of such a high rank as general superintendent is presumed to possess authority to employ surgeons and nurses to render service to persons injured by the trains of the company."

13. Steel *v.* Solid Silver Gold & Silv. Min. Co., 13 Nev. 486.

14. Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Lake Erie & W. R. Co. *v.* Faught, 31 Ill. App. 110.

Where an agent is authorized to sell machines which are sold with a printed warranty, the legal presumption is that he is authorized to make sales upon the terms and conditions therein contained, and not otherwise. Richmond *v.* Greeley, 38 Iowa 666.

15. Wheeler *v.* Reed, 36 Ill. 81.

16. *Illinois.* — Garrels *v.* Morton, 26 Ill. App. 433.

Iowa. — Tappan *v.* Morseman, 18 Iowa 499; Harrison *v.* Legore, 109 Iowa 618, 80 N. W. 670.

Massachusetts. — Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

Missouri. — Hefferman *v.* Boteler, 87 Mo. App. 316.

Oregon. — Rhodes *v.* Belchee, 36 Or. 141, 59 Pac. 117.

South Carolina. — Dixon *v.* Haslett, 2 Tread. Const. 615 (authority to receive bills of exchange in payment must be proved); Columbia Phosphate Co. *v.* Farmers' Alliance Store, 47 S. C. 358, 25 S. E. 116 (authority to receive collaterals must be proved).

Virginia. — Wooding's Ex'x *v.* Bradley's Ex'r., 76 Va. 614.

Washington. — Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567.

See also Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Supp. 252, *affirmed* 138 N. Y. 631, 33 N. E. 1084.

Authority to receive payment in depreciated currency must be proved. Purvis *v.* Jackson, 69 N. C. 474.

Where revocation of a prior authority is shown, the burden is upon the party paying to show that he paid in good faith. Whitaker *v.* Ballard, 178 Mass. 584, 60 N. E. 379.

Authority To Release Mortgage. Upon the same principle, a party paying a mortgage debt to an agent has the burden of proving the agent's authority to release. Knoche *v.* Whiteman, 86 Mo. App. 568.

direct, it may be inferred from the circumstances of the case.[17]

(B.) Where Agent Is in Possession of Securities. — While authority to receive payment may be inferred from the fact of the agent's having made the loan and retained the securities, or from mere possession of the securities, the burden of proof is on the debtor to show that the securities were in the custody of the agent at the time of the payment.[18]

c. *Continuance of Special Agency.* — A special agency terminates when the act authorized is done; and a party claiming a continuance of the relation has the burden of proof.[19]

d. *Of Ostensible Agency.* — A party relying upon an ostensible agency has the burden of proving the holding out and his knowledge thereof.[20]

e. *Of Execution of Contract.* — A party suing a principal upon a contract alleged to have been made by an agent has the same burden of proving execution that he would have if he claimed under a contract made by the principal personally.[21]

B. Presumptions. — a. *Act Inuring to Benefit of Principal.* Where an act purports to be that of an agent, and it inures to the benefit of the alleged principal, it will be presumed that the relation existed.[22]

b. *Prior Acts With Knowledge of Principal.* — Where a party has acted as agent for a considerable time, with the knowledge of the alleged principal, it will be presumed that the relation exists.[23]

17. Norton *v.* Bull, 43 Mo. 113.

18. Garrels *v.* Morton, 26 Ill. App. 433; Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 325.

Possession of a bond and mortgage by an agent is sufficient evidence of authority to collect. O'Loughlin *v.* Billy, 95 App. Div. 99, 88 N. Y. Supp. 567.

19. Fullerton *v.* McLaughlin, 70 Hun 568, 24 N. Y. Supp. 280.

20. Rodgers *v.* Peckham, 120 Cal. 238, 52 Pac. 483.

"There are two essential features of an authority of this character; viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held." Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758.

21. Russ *v.* Telfener, 57 Fed. 973.

He has the burden of showing performance of conditions (Denver & R. G. R. Co. *v.* Neis, 10 Colo. 56, 14 Pac. 105), and of showing that the agent was acting for the principal (St. Landry State Bank *v.* Meyers, 52 La. Ann. 1769, 28 So. 136).

As to the general burden of proof in actions on contracts, see article "Contracts," Vol. III.

22. Potter *v.* Lansing, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310; Wyllie *v.* Wynne, 26 Tex. 42.

It will be presumed that a person who takes possession of property and claims to act as agent is the agent of the owners. Succession of Labat, 110 La. 986, 35 So. 257.

Possession of an unindorsed bill of lading by a person other than the consignor or consignee raises no presumption that such person is the agent of the consignor. Stewart *v.* Gregory, Carter & Co., 9 N. D. 618, 84 N. W. 553.

Where the principal received the purchase price, it will be presumed that the agent had authority. Bias *v.* Cockrum, 37 Miss. 509, 75 Am. Dec. 76.

23. Smith *v.* White, 5 Dana (Ky.) 376; Rawson *v.* Curtiss, 19 Ill. 456.

Persons Acting for Corporations Presumed To Have Authority. — Corporations can act only by agents; and therefore authority will be presumed

c. *Special Authorization at Another Time.* — One authorization, however, does not justify the presumption that another or different one has been given at a later time.[24]

d. *Presumption That Authority Is General.* — **(1.) Generally.** Parties dealing with a known agent have a right to presume that the agency is general, and not special;[25] and the presumption is that one known to be an agent is acting within the scope of his authority.[26]

(2.) Possession for Twenty Years. — Possession for more than twenty years under a deed executed by an agent raises a presumption of authority to execute the deed.[27]

(3.) Ancient Documents. — It will be presumed that an ancient document, purporting to be executed under a power of attorney, was executed under due authority.[28]

(4.) No Presumption From Acknowledgment. — A certificate of acknowledgment of a deed executed by an attorney raises no presumption that he was acting with authority.[29]

in persons who are permitted to act for them. Rockford, R. I. & St. L. R. Co. *v.* Wilcox, 66 Ill. 417; Singer Mfg. Co. *v.* Holdfodt, 86 Ill. 455, 29 Am. Rep. 43.

24. Green *v.* Hinkley, 52 Iowa 633, 3 N. W. 688; Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156 (agency for borrowing raises no presumption of agency for paying). See also Cobb *v.* Hall, 49 Iowa 366.

The fact that one acted as agent for plaintiff in the negotiations for a loan raises no presumption of agency to collect. Werth *v.* Ollis, 70 Mo. App. 318.

Agency for One Purpose Is Not Presumed To Continue. — In case of a special agency, limited to one particular transaction, the law raises no inference that it continues or extends to other matters. Reed *v.* Baggott, 5 Ill. App. 257.

Special Agency Presumed To Continue for the Purpose. — But when an agency for a special purpose is proved to have existed at one time, it is presumed to continue. Hensel *v.* Maas, 94 Mich. 563, 54 N. W. 381; Columbus Co. *v.* Hurford, 1 Neb. 146.

25. Maher *v.* Moore (Del.), 42 Atl. 721; Methuen *v.* Hayes, 33 Me. 169; Trainer *v.* Morison, 78 Me. 160, 3 Atl. 185, 57 Am. Rep. 790; Wood *v.* Finson, 89 Me. 459, 36 Atl. 911; Austrian & Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; Missouri Pac. R. Co. *v.* Simons, 6 Tex. Civ. App. 621, 25 S. W. 996. This presumption relates to a known agency. It does not relate to an agency not proved or admitted. *Contra,* Dickinson Co. *v.* Mississippi Val. Ins. Co., 41 Iowa 286, *holding* that there are no presumptions on the subject.

26. Austrian & Co. *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350. See also Bessemer Land & Imp. Co. *v.* Campbell, 121 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17.

Apparent Scope of Authority. — A deed executed by an attorney apparently within the scope of his authority raises a presumption of authority, and makes the recitals therein contained evidence against the principal; but the principal may rebut the presumption. Morrill *v.* Cone, 22 How. (U. S.) 75.

27. Jarboe *v.* McAtee's Heirs, 7 B. Mon. (Ky.) 279 (possession for fifty years); Tarvin *v.* Walker's Creek Coal & Coke Co., 25 Ky. L. Rep. 2246, 80 S. W. 504; Buhols *v.* Boudousquie, 6 Mart. N. S. 153 (possession for twenty-three years); Bedford *v.* Urquhart, 8 La. 241; Inhabitants of Stockbridge *v.* Inhabitants of West Stockbridge, 14 Mass. 257; Folts *v.* Ferguson (Tex. Civ. App.), 24 S. W. 657; Goodwin *v.* M'Cluer, 3 Gratt. (Va.) 278.

28. Williams *v.* Conger, 125 U. S. 397, 8 Sup. Ct. 933; Cochran *v.* Linville Imp. Co., 127 N. C. 386, 37 S. E. 496.

29. "The officer merely certified,

(5.) No Presumption From Recital of Authority. — Nor will a recital of authority in the deed raise any presumption or be any evidence whatever of authority.[30]

e. *Authority to Receive Payment.* — **(1.) Limited Authority.** — An authority to receive interest does not raise any presumption of authority to receive a portion of the principal sum;[31] nor does the fact that an agent has negotiated a loan give rise to any presumption of authority to collect.[32]

(2.) Where Agent Has Acted as Principal. — Where, however, the agent has acted throughout as a principal, the undisclosed principal will not be permitted to deny the authority to collect.[33]

f. *Letters Purporting to Answer Plaintiff's Letters to Principal.* Where letters to plaintiff signed with defendant's name by one purporting to be his agent show on their face that they were answers to letters which plaintiff had written to defendant, a presumption arises of authority in the agent.[34]

g. *No Presumption of Authority To Do an Illegal Act.* — It will not be presumed that an agent was authorized to do an illegal act.[35]

h. *No Presumption of Authority to Buy From Authority to Sell.* An authority to buy goods can not be inferred from an authority to sell.[36]

i. *No Presumption as to Presence of Principal.* — There is no presumption that a principal was present when his name was signed by one claiming to act as agent.[37]

C. Order of Proof. — Where an instrument under seal appears to have been executed by attorney, and authority is disputed, the power of attorney must be produced;[38] but the order of proof is immaterial.[39]

that the (one) claiming to act for the grantor acknowledged the execution. He is not made judge of the supposed agent's authority, and if no proof of such authority is now to be given, one's land is at the disposal of any person conveying it as agent, *without* authority." Telford *v.* Barney, 1 Greene (Iowa) 575.

30. Waggener *v.* Waggener, 3 T. B. Mon. (Ky.) 542.

31. Dewey *v.* Bradford (Neb.), 89 N. W. 249.

32. Hefferman *v.* Boteler, 87 Mo. App. 316.

33. Cheshire Provident Inst. *v.* Feusner, 63 Neb 682, 88 N. W. 849.

34. The presumption is especially strong when the defendant himself introduces letters so signed. Kinder *v.* Pope, 106 Mo. App. 536, 80 S. W. 315.

35. Stover *v.* Flower, 120 Iowa 514, 94 N. W. 1100 (not presumed that he had authority to lease property for an illegal purpose).

36. Thurber *v.* Anderson, 88 Ill. 167.

37. "This question arises where an exception to the rule requiring authority to sell real estate to be in writing is claimed. A principal may orally instruct his agent to sign his name in his presence. But such presence is not to be inferred from any coincidence between the date of the deed and the acknowledgment of the principal that it was executed by his authority. Videau *v.* Griffin, 21 Cal. 389.

38. Videau *v.* Griffin, 21 Cal. 389; Tolman *v.* Emerson, 4 Pick. (Mass.) 160. In Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66, the court said that an instrument under seal purporting to be executed under a power of attorney cannot be admitted in evidence until the power of attorney is produced.

39. Emerson *v.* Providence Hat

D. Mode of Proof. — a. *Generally.* — In general, whatever evidence has a tendency to prove agency is admissible, even though it be not full and satisfactory.[40]

b. *Parol Evidence.* — **(1.) In General.** — In general, parol evidence is admissible to establish the fact of agency, as well as the extent of authority.[41]

Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66. In Erie & P. Despatch Co. *v.* Cecil, 112 Ill. 180, the court said: "In all cases where the power of an agent to make a contract is questioned, the most convenient and natural course to pursue, is to establish the fact that an agreement was made, by showing its terms and the names of the parties who officiated in settling them. The next step is to show that those who assumed to act had the requisite authority to do so."

40. Dickinson *v.* Salmon, 36 Misc. 169, 73 N. Y. Supp. 196, *affirming* 35 Misc. 838, 72 N. Y. Supp. 1099.

Thus, in Sellers *v.* Commercial Fire Ins. Co., 105 Ala. 282, 16 So. 798, the court said: "If there was legal evidence having a tendency to support the affirmative of this inquiry, the evidence excluded ought to have been received, leaving the jury to pass upon its sufficiency and credibility, however much may have been the conflict in the evidence touching the transaction to which it related."

How Fact May Be Shown. — "It may be shown directly, by express words of appointment, either spoken or written. Or, it may be implied or inferred, or indirectly shown, by evidence of the relative situation of the parties, the nature of the business which is the subject of controversy, and the character of the intercourse between them, provided the facts and circumstance disclosed by the evidence, fairly justify such an inference. The acts and doings of the party sought to be charged as principal, in relation to the subject matter, may be, and often are, quite as expressive and significative as words spoken." Geylin *v.* De Villeroi, 2 Houst. (Del.) 311.

Where, however, the evidence shows that the third party inquired of the principal as to the extent of authority before the transaction, he is bound by the result of the inquiry, and other evidence is not admissible to contradict it. Norton *v.* Richmond, 93 Ill. 367.

41. *Alabama.* — Gibson *v.* Snow Hdw. Co., 94 Ala. 346, 10 So. 304; Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283.

California. — Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738.

Colorado. — Gambrill *v.* Brown Hotel Co., 11 Colo. App. 529, 54 Pac. 1025.

Indiana. — Indiana, B. & W. R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Iowa. — Lyons *v.* Thompson, 16 Iowa 62.

Minnesota. — Stewart *v.* Cowles, 67 Minn. 184, 69 N. W. 694; Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743.

Missouri. — Crosno *v.* Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275; Mosby *v.* McKee, 91 Mo. App. 500; Haubelt Bros. *v.* Rea & Page Mill Co., 77 Mo. App. 672; Sharp *v.* Knox, 48 Mo. App. 169; Roberson *v.* Clevenger (Mo. App.), 86 S. W. 512.

Nebraska. — Columbus Co. *v.* Hurford, 1 Neb. 146.

New Hampshire. — Kent *v.* Tyson, 20 N. H. 121.

New York. — Richards *v.* Millard, 56 N. Y. 574, *reversing* 1 Thomp. & C. 574; Nutting *v.* Kings County El. R. Co., 21 App. Div. 72, 47 N. Y. Supp. 327; Smith *v.* Martin Anti-Fire Car Heater Co., 64 Hun 639, 19 N. Y. Supp. 285.

North Carolina. — Gilbraith *v.* Lineberger, 69 N. C. 145.

Pennsylvania. — Patterson *v.* Van Loon, 186 Pa. St. 367, 40 Atl. 495.

Rhode Island. — Ward *v.* Trustees of New England S. C. 27 R. I. 262, 61 Atl. 651.

Texas. — Hamm *v.* Drew, 83 Tex. 77, 18 S. W. 434.

Vermont. — Daggett *v.* Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755.

(2.) Where Written Power of Attorney Not Essential. — Where a written power of attorney is not required, but exists, parol evidence is still admissible on behalf of the plaintiff to establish the authority.[42] And it is not necessary to give notice to produce the original.[43]

(3.) To Enlarge Written Power of Attorney. — Where the agent's authority is conferred by a writing, parol evidence is not admissible to enlarge the written authority.[44]

Virginia. — Lunsford *v.* Smith, 12 Gratt. 554; Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291. See also cases cited *post* under "CIRCUMSTANTIAL EVIDENCE."

Such evidence is admissible although deeds have passed in consummation of the transaction. "The legal effect of the instruments themselves, as between the parties thereto, was not varied by this proof. The proof related only to the accountability of the agent to his principal in respect to the price paid for a purchase made by the agent, formally, in his own name, but, in fact, for the benefit of the principal, and by the agent transferred to the principal." Richards *v.* Millard, 56 N. Y. 574, *reversing* 1 Thomp. & C. 574.

42. Phelps *v.* Livingston, 2 Root (Conn.) 495; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Williams *v.* Cochran, 7 Rich. L. (S. C.) 45.

A parol acknowledgment by the principal of an authority under seal is sufficient. Blood *v.* Goodrich, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152. But see *contra,* Paine *v.* Tucker, 21 Me. 138, 38 Am. Dec. 255.

The reason for this rule is twofold. In the first place, such special evidence must be in the possession of the other parties. In the second place, the plaintiff is not bound by the written authority unless he knows of it. He is entitled to act upon the ostensible authority of the agent. It is sometimes stated, however, that "if the authority be created by power of attorney, or other writing, the instrument itself must in general be produced." London Sav. Fund Soc. *v.* Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390. See also Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Willcox *v.* Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761. *Compare* Hovey *v.* Deane, 13 Me. 31, where a power of attorney was held inadmissible because not properly executed, and parol evidence was not allowed.

In Lee *v.* Agricultural Ins. Co., 79 Iowa 379, 44 N. W. 683, an agent testified that his authority was in writing. It was held that the writing was the best evidence of the extent of his authority.

43. It was so held in Curtis *v.* Ingham, 2 Vt. 287, where the defendant was permitted to prove agency of plaintiff's wife to receive payment by parol without notice to produce written authority.

44. *Alabama.* — Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731.

California. — Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Georgia. — Claflin *v.* Continental Jersey Wks., 85 Ga. 27, 11 S. E. 721; Neal *v.* Patten, 40 Ga. 363.

Minnesota. — Allis *v.* Goldsmith, 22 Minn. 123.

Missouri. — Mechanics' Bank *v.* Schaumburg, 38 Mo. 228.

North Dakota. — Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Ohio. — Pollock *v.* Cohen, 32 Ohio St. 514.

Wisconsin. — Gee *v.* Bolton, 17 Wis. 605, 610.

"The very purpose of a power of attorney is to prescribe and publish the limits within which the agent shall act, so as not to leave him to the uncertainty of memory, and those who deal with him to the risk of misrepresentation or misconception as to the extent of his authority. To confer express authority is to withhold implied authority." Claflin *v.* Continental Jersey Wks., 85 Ga. 27, 11 S. E. 721.

But an unsigned memorandum is not such a writing as will prevent the admission of parol evidence. Snow *v.* Warner, 10 Metc. (Mass.) 132, 43 Am. Dec. 417.

Testimony of parties who have seen a written power of attorney, as to its contents, is not admissible as

(4.) To Explain or Interpret Written Power of Attorney. — But parol evidence is admissible to explain or interpret a written power of attorney.[45]

(5.) Where Written Power of Attorney is Essential. — Where statute requires authority to be in writing, a written power of attorney must be produced, if accessible.[46] And notice to produce should be given before parol evidence of its contents is admitted.[47]

c. *Testimony of Agent.* — **(1.) As to Fact of Agency.** — Where an agency can be established by parol, the agent is a competent witness to prove it.[48]

primary evidence. Neal *v.* Patten, 40 Ga. 363; Rawson *v.* Curtiss, 19 Ill. 456.

In general, see article "PAROL EVIDENCE."

45. Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731 (where power of attorney is general, parol evidence as to extent of business and usage is admissible); Frink *v.* Roe, 70 Cal. 296; Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271.

A receipt made at the same time as a power of attorney is admissible to explain it. Rogers *v.* Bracken's Adm'r., 15 Tex. 564.

46. Elliott *v.* Stocks, 67 Ala. 336; Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738; Hackenburg *v.* Gartskamp, 30 La. Ann. 898; Fitzgerald *v.* Morrissey, 14 Neb. 198, 15 N. W. 233. But the evidence may be informal, and be in the form of a letter. Whelage *v.* Lotz, 44 La. Ann. 600, 10 So. 933.

47. Curtis *v.* Ingham, 2 Vt. 287.

48. *Alabama.* — Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

California. — McRae *v.* Argonaut Land & Dev. Co., 54 Pac. 743.

Georgia. — Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787; Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. 453; Collins *v.* Lester, 16 Ga. 410.

Illinois. — Phillips *v.* Poulter, 111 Ill. App. 330; St. Louis S. W. R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619; Thayer *v.* Meeker, 86 Ill. 470; Calwell *v.* Meek, 17 Ill. 220.

Iowa. — Van Sickle *v.* Keith, 88 Iowa 9, 55 N. W. 42; Hall *v.* Aetna Mfg. Co., 30 Iowa 215 (*semble*); Moffitt *v.* Cressler, 8 Iowa 122; O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686; O'Neill *v.* Wilcox, 115 Iowa 15, 87 N. W. 742.

Kansas. — Howe Mach. Co. *v.* Clark, 15 Kan. 492; Cowles *v.* Burns, 28 Kan. 32; Ream *v.* McElhone, 50 Kan. 409, 31 Pac. 1075; Aultman Thresh. & Eng. Co. *v.* Knoll, 79 Pac. 1074; Jahren *v.* Palmer, 79 Pac. 1081.

Maine. — Methuen Co. *v.* Hayes, 33 Me. 169.

Michigan. — Cleveland Co-op. Stove Co. *v.* Mallery, 111 Mich. 43, 69 N. W. 75.

Missouri. — Christian *v.* Smith, 85 Mo. App. 117; State *ex rel* Fleming *v.* Henderson, 86 Mo. App. 482; Haubelt Bros. *v.* Rea & Page Mill Co., 77 Mo. App. 672.

Montana. — Nyhart *v.* Pennington, 20 Mont. 158, 50 Pac. 413.

Nebraska. — Nostrum *v.* Halliday, 39 Neb. 828, 58 N. W. 429 (admissible if otherwise competent).

New Hampshire. — Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384; Downer *v.* Button, 26 N. H. 338.

New York. — Joseph *v.* Struller, 25 Misc. 173, 54 N. Y. Supp. 162; Stone *v.* Cronin, 72 App. Div. 565, 76 N. Y. Supp. 605; Brown *v.* Cone, 80 App. Div. 413, 81 N. Y. Supp. 89; Commercial Bank *v.* Norton, 1 Hill 501.

North Carolina. — New Home S. M. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805.

Pennsylvania. — Jordan *v.* Stewart, 23 Pa. St. 244; M'Gunnagle *v.* Thornton, 10 Serg. & R. 251; Lawall *v.* Groman, 180 Pa. St. 532, 37 Atl. 98, 57 Am. St. Rep. 662; M'Dowell *v.* Simpson, 3 Watts 129, 27 Am. Dec. 338.

South Carolina. — Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240.

Texas. — American Tel. & Tele. Co. *v.* Kersh, 27 Tex. Civ. App. 127, 66 S. W. 74.

Utah. — McCornick *v.* Queen of Sheba Gold M. & M. Co., 23 Utah 71, 63 Pac. 820.

(2.) As to Extent of Authority. — The testimony of an agent is admissible to establish the extent of his authority.[49] It is also held admissible to show that he had no authority;[50] although the contrary has been held where the facts were sufficient to work an estoppel.[51]

d. *Declarations of Agent.* — **(1.) As to Agency.** — Agency can not be proved, as against others than the alleged agent, by his declarations.[52]

Virginia. — Fisher *v.* White, 94 Va. 236, 26 S. E. 573.

West Virginia. — Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. *222*; Piercy *v.* Hedrick, 2 W. Va. 458, 98 Am. Dec. 774.

Wisconsin. — Roberts *v.* Northwestern Nat. Ins. Co., 90 Wis. 210, 62 N. W. 1048; O'Conner *v.* Hartford Fire Ins. Co., 31 Wis. 160. But see Guy *v.* Lee, 81 Ala. 163, 2 So. 273.

To Disprove Agency. — It follows, of course, that evidence of an alleged agent is admissible to disprove the existence of the relation. McFarland *v.* Lowry, 40 Iowa 467; Dowell *v.* Williams, 33 Kan. 319, 6 Pac. 600.

An agent who has no interest in a suit against a deceased person may testify on behalf of his principal in regard to his agency; the rule forbidding interested parties from testifying as to transactions with decedents does not apply. O'Neill *v.* Wilcox, 115 Iowa 15, 87 N. W. 742.

Such testimony may involve only a statement of the fact of agency, without going into the details of how it was brought about. Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

49. *United States.* — Aetna Ins. Co. *v.* Ladd, 135 Fed. 636.

Arkansas. — Liddell *v.* Sahline, 55 Ark. 627, 17 S. W. 705.

Connecticut. — Appeal of National Shoe & Leather Bank, 55 Conn. 469, 12 Atl. 646.

Kansas. — French *v.* Wade, 35 Kan. 391, 11 Pac. 138.

Massachusetts. — Rice *v.* Gove, 22 Pick. 158, 33 Am. Dec. 724; Gould *v.* Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50.

New York. — Flomerfelt *v.* Dillon, 88 N. Y. Supp. 132.

North Dakota. — Reeves & Co. *v.* Bruening, 100 N. W. 241.

See also Chiles *v.* Southern R., 69 S. C. 327, 48 S. E. 252 (where corporation is agent, its officer may so testify).

The agent may testify as to similar transactions. Gallinger *v.* Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790.

50. John's Adm'r *v.* McConnell, 19 Mo. 38; Dowell *v.* Williams, 33 Kan. 319, 6 Pac. 600; Gilliland *v.* Dunn & Co., 136 Ala. 327, 34 So. 25; Robinson *v.* Aetna Fire Ins. Co., 135 Ala. 650, 34 So. 18. It is admissible where intent is material, as in an action for deceit. Wachsmuth *v.* Martini, 45 Ill. App. 244, *affirmed* in 154 Ill. 515, 39 N. E. 129.

51. Knap *v.* Sacket, 1 Root (Conn.) 501. See also Owings *v.* Nicholson, 4 Harr. & J. (Md.) 66.

52. *United States.* — Empire State Nail Co. *v.* Faulkner, 55 Fed. 819; Union Guar. & Trust Co. *v.* Robinson, 79 Fed. 420, 24 C. C. A. 650; James *v.* Stookey, 1 Wash. C. C. 330, 13 Fed. Cas. No. 7,184.

Alabama. — Tanner & De Laney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584; Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Huntsville Belt Line & M. S. R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295.

Arkansas. — Holland *v.* Rogers, 33 Ark. 251 (not admissible against principal); Howcott *v.* Kilbourn, 44 Ark. 213; Turner *v.* Huff, 46 Ark. 222, 55 Am. Rep. 580 (declarations made in absence of party to be affected not admissible).

California. — Ferris *v.* Baker, 127 Cal. 520, 59 Pac. 937; Bergtholdt *v.* Porter Bros. Co., 114 Cal. 681, 46 Pac. 738; Santa Cruz Butchers' Union *v.* I X L Lime Co., 46 Pac. 382; Van Dusen *v.* Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209; Petterson *v.* Stockton & T. R. Co., 134 Cal. 244, 66 Pac. 304.

Colorado. — Fisher *v.* Denver Nat. Bank, 22 Colo. 373, 45 Pac. 440; Burson *v.* Bogart, 18 Colo. App. 449, 72 Pac. 605; Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951; Omaha & G. S. & R. Co. *v.* Tabor, 13 Colo.

41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Connecticut. — Fitch *v.* Chapman, 10 Conn. 8.

Georgia. — Colquitt *v.* Thomas, 8 Ga. 258; Florida, M. & G. R. Co. *v.* Varnedoe, 81 Ga. 175, 7 S. E. 129; Holland *v.* Van Beil, 89 Ga. 223, 15 S. E. 302; Hirsch *v.* Oliver, 91 Ga. 554, 18 S. E. 354; Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787; Americus Oil Co. *v.* Gurr, 114 Ga. 624, 40 S. E. 780; Almand *v.* Equitable Mtg. Co., 113 Ga. 983, 39 S. E. 421; Jones *v.* Harrell, 110 Ga. 373, 35 S. E. 690; Massillon Eng. & Thresh. Co. *v.* Akerman, 110 Ga. 570, 35 S. E. 635; Grand Rapids School Furn. Co. *v.* Morel, 110 Ga. 321, 35 S. E. 312; Harris Loan Co. *v.* Elliott & Hatch Book-Typewriter Co. (Ga.), 34 S. E. 1003; Alger *v.* Turner, 105 Ga. 178, 31 S. E. 423; Wynne *v.* Stevens, 101 Ga. 808, 28 S. E. 1000; Abel *v.* Jarratt, 100 Ga. 732, 28 S. E. 453; Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 79; Hood *v.* Hendrickson, 122 Ga. 795, 50 S. E. 994; Nelson *v.* Tumlin, 74 Ga. 171.

Illinois. — Proctor *v.* Tows, 115 Ill. 138, 3 N. E. 569; Osgood *v.* Pacey, 23 Ill. App. 116; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Boyd *v.* Jennings 46 Ill. App. 290; Mellor *v.* Carithers, 52 Ill. App. 86; Peter Schoenhofer Brew. Co. *v.* Wengler, 57 Ill. App. 184; Ransom *v.* Duckett, 48 Ill. App. 659; Currie *v.* Syndicate Des Cultivators Des Oignons a Fleur, 104 Ill. App. 165; McClure *v.* Osborne & Co., 86 Ill. App. 465; Cleveland, C. C. & St. L. R. Co. *v.* Jenkins, 75 Ill. App. 17.

Indiana. — Johnston Harvester Co. *v.* Bartley, 81 Ind. 406; Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488; Blair-Baker Horse Co. *v.* First Nat. Bank, 164 Ind. 77, 72 N. E. 1027; Broadstreet *v.* Hall, 32 Ind. App. 122; 69 N. E. 415.

Iowa. — Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250; Philp *v.* Covenant Mut. Ben. Ass'n, 62 Iowa 633, 17 N. W. 903; Clanton *v.* Des Moines, O. & S. R. Co., 67 Iowa 350, 25 N. W. 277; Wood Mowing Mach. Co. *v.* Crow, 70 Iowa 340, 30 N. W. 609; Butler *v.* Chicago, B. & Q. R. Co., 87 Iowa 206, 54 N. W. 208; Whitam *v.* Dubuque & S. C. R. Co., 96 Iowa 737, 65 N. W. 403; Sax *v.* Davis, 71 Iowa 406, 32 N. W. 403 (what alleged agent said when he purchased goods is inadmissible); Mentzer *v.* Sargeant, 115 Iowa 527, 88 N. W. 1068.

Kansas. — Streeter *v.* Poor, 4 Kan. 412; Missouri Pac. R. Co. *v.* Stults, 31 Kan. 752, 3 Pac. 522; French *v.* Wade, 35 Kan. 391, 11 Pac. 138; St. Louis & S. F. R. Co. *v.* Kinman, 49 Kan. 627, 31 Pac. 126; Ream *v.* McElhone, 50 Kan. 409, 31 Pac. 1075; Leu *v.* Mayer, 52 Kan. 419, 34 Pac. 969; Missouri Pac. R. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641; St. Louis & S. F. R. Co. *v.* Brown, 3 Kan. App. 260, 45 Pac. 118; Donaldson *v.* Everhart, 50 Kan. 718, 32 Pac. 405; Fourth Nat. Bank *v.* Frost, 70 Kan. 480, 78 Pac. 825; Hutchinson Wholesale Grocery Co. *v.* R. L. McDonald & Co. (Kan.), 80 Pac. 950; Kane *v.* Barstow, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490; Howe Mach. Co. *v.* Clark, 15 Kan. 492.

Kentucky. — Dieckman *v.* Weirich, 24 Ky. L. Rep. 2340, 73 S. W. 1119.

Louisiana. — State *v.* Harris, 51 La. Ann. 1105, 26 So. 64; *In re* Lafourche Transp. Co., 52 La. Ann. 1517, 27 So. 958.

Maine. — Eaton *v.* Granite State Provident Ass'n, 89 Me. 58, 35 Atl. 1015.

Maryland. — National Mechanics' Bank *v.* National Bank of Baltimore, 36 Md. 5; Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670; Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125.

Massachusetts. — Mussey *v.* Beecher, 3 Cush. 511.

Michigan. — Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276; McPherson *v.* Pinch, 119 Mich. 36, 77 N. W. 321; Fontaine Crossing & Elec. Co. *v.* Rauch, 117 Mich. 401, 75 N. W. 1063; Bond *v.* Pontiac, O. & P. A. R. Co., 62 Mich. 643, 29 N. W. 482, 4 Am. St. Rep. 885; Three Rivers Nat. Bank *v.* Gilchrist, 83 Mich. 253, 47 N. W. 104.

Minnesota. — Larson *v.* Lombard Inv. Co., 51 Minn. 141, 53 N. W. 179.

Mississippi. — Memphis & V. R. Co. *v.* Cocke, 64 Miss. 713, 2 So. 495; Kinnare *v.* Gregory, 55 Miss. 612.

Montana. — Nyart *v.* Pennington, 20 Mont. 158, 50 Pac. 413.

Missouri. — Craighead *v.* Wells, 21 Mo. 404; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Lind-

say's Ex'rs *v.* Singer Mfg. Co., 4 Mo. App. 571; Waters Pierce Oil Co. *v.* Jackson Jr. Zinc Co., 98 Mo. 324, 73 S. W. 272; Peninsular Stove Co. *v.* Adams Hdw. & F. Co., 93 Mo. App. 237; State *ex rel* Fleming *v.* Henderson, 86 Mo. App. 482; Christian *v.* Smith, 85 Mo. App. 117; Murphy *v.* Mechanics' & Traders' etc. Ins. Co., 83 Mo. App. 481; Peck *v.* Ritchey, 66 Mo. 114.

Nebraska. — Burke *v.* Frye, 44 Neb. 223, 62 N. W. 476; Richardson & Boynton Co. *v.* School Dist. No. 11, 45 Neb. 777, 64 N. W. 218; Anheuser-Busch Brew. Ass'n *v.* Murray, 47 Neb. 627, 66 N. W. 635; Blanke Tea & Coffee Co. *v.* Rees Printing Co., 97 N. W. 627.

New Jersey. — Gifford *v.* Landrine, 37 N. J. Eq. 127; Fuller *v.* Saxton, 20 N. J. L. 61; Smith *v.* Delaware & A. T. & T. Co., 64 N. J. Eq. 770, 53 Atl. 818, *affirming* 51 Atl. 464; Pederson *v.* Kiensel, 71 N. J. L. 525, 58 Atl. 1088; Brounfield *v.* Denton, 61 Atl. 378.

New York. — Ellis *v.* Messervie, 11 Paige 467; Bowen *v.* Powell, 1 Lans. 1 (recital of agency in affidavit of alleged agent not admissible); Howard *v.* Norton, 65 Barb. 161; Wise *v.* International Soc., 37 Misc. 871, 76 N. Y. Supp. 997; American Box Mach. Co. *v.* Bolnick, 36 Misc. 765, 74 N. Y. Supp. 846; Le Valley *v.* Overacker, 64 App. Div. 612, 72 N. Y. Supp. 12; Moore *v.* Rankin, 33 Misc. 749, 67 N. Y. Supp. 179; Reid *v.* Horn, 25 Misc. 523, 54 N. Y. Supp. 1042; Lyon *v.* Brown, 52 N. Y. Supp. 531, 31 App. Div. 67; Roberge *v.* Monheimer, 21 Misc. 491, 47 N. Y. Supp. 655; Booth *v.* Newton, 46 App. Div. 175, 61 N. Y. Supp. 727; Leary *v.* Albany Brew. Co., 77 App. Div. 6, 79 N. Y. Supp. 130.

North Carolina. — Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359; Summerrow *v.* Baruch, 128 N. C. 202, 38 S. E. 861.

North Dakota. — Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924; Loverin-Browne Co. *v.* Bank of Buffalo, 7 N. D. 569, 75 N. W. 923; Gordon *v.* Vermont Loan & Trust Co., 6 N. D. 454, 71 N. W. 556.

Oregon. — Sloan *v.* Sloan, 73 Pac. 893.

Pennsylvania. — Chambers *v.* Davis, 3 Whart. 40; Jordan *v.* Stewart, 23 Pa. 244; McInnes *v.* Rittenhouse, 16 Atl. 818; Irvine *v.* Buckaloe, 12 Serg. & R. 35; Baltimore & O. Employes Relief Ass'n *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147; Pepper *v.* Cairns, 133 Pa. St. 114, 19 Atl. 336, 19 Am. St. Rep. 625.

South Carolina. — Renneker *v.* Warren, 17 S. C. 139; Martin *v.* Suber, 39 S. C. 525; 18 S. E. 125; New England Mtg. Security Co. *v.* Baxley, 44 S. C. 81, 21 S. E. 444, 885; Smith *v.* Asbell, 2 Strob. 141; Ehrhardt *v.* Breeland, 57 S. C. 142, 35 S. E. 537.

Tennessee. — Floyd *v.* Woods, 4 Yerg. 165.

Texas. — Latham *v.* Pledger, 11 Tex. 439; Mills *v.* Berla (Tex. Civ. App.), 23 S. W. 910 (neither express nor ostensible agency can be so proved); Brady *v.* Nagle (Tex. Civ. App.), 29 S. W. 943; Western Industrial Co. *v.* Chandler (Tex. Civ. App.), 31 S. W. 314; Page *v.* Cortez (Tex. Civ. App.), 31 S. W. 1071; Owen *v.* New York & T. Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553; Aultman & Taylor Mach. Co. *v.* Cappleman, 36 Tex. Civ. App. 523, 81 S. W. 1243; Eastland *v.* Maney, 36 Tex. Civ. App. 147, 81 S. W. 574; Tabet *v.* Powell (Tex. Civ. App.), 78 S. W. 997; Dyer *v.* Wiston, 33 Tex. Civ. App. 412, 77 S. W. 227; Cooper & Co. *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992; Ft. Worth Livestock Com. Co. *v.* Hitson (Tex. Civ. App.), 46 S. W. 915; Higley *v.* Dennis (Tex. Civ. App.), 88 S. W. 400.

Vermont. — Dickerman *v.* Quincy Mut. Fire Ins. Co., 67 Vt. 609, 32 Atl. 489.

Virginia. — Poore *v.* Magruder, 24 Gratt. 197; Fisher *v.* White, 94 Va. 236, 26 S. E. 573.

Washington. — Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

West Virginia. — Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555.

Wisconsin. — Davis *v.* Henderson, 20 Wis. 520.

Thus a letter of the alleged agent is inadmissible. Sax *v.* Davis, 81 Iowa 692, 47 N. W. 990; Texas Land & Loan Co. *v.* Watson, 3 Tex. Civ. App. 233, 22 S. W. 873.

Not Admissible To Show That Agency Did Not Exist. — Peck *v.*

(2.) As to Extent of Authority. — Evidence of the declarations of an agent is not admissible to prove the extent of his authority.[53]

(3.) Not Admissible Although Accompanied by Acts. — Such declarations are not admissible although accompanied by acts of the agent consistent therewith.[54]

As Part of Res Gestae. — It has been held, however, that declarations of an agent, made on the very occasion of the taking of a bond

Ritchey, 66 Mo. 114. Nor are declarations made by an agent to a third party admissible to show that the third party was not an agent. Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197.

Reasons. — Such evidence is hearsay. Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787; Osgood *v.* Pacey, 23 Ill. App. 116; Missouri Pac. R. Co. *v.* Johnson, 55 Kan. 344, 40 Pac. 641.

53. *United States.* — Walmsley *v.* Quigley, 129 Fed. 583, 64 C. C. A. 151; W. K. Niver Coal Co. *v.* Piedmont & Georges Creek Coal Co., 136 Fed. 179.

Alabama. — Hill *v.* Helton, 80 Ala. 528, 1 So. 340.

Arkansas. — Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381; Carter *v.* Burnham, 31 Ark. 212.

Colorado. — Burson *v.* Bogart (Colo. App.), 73 Pac. 605.

Florida. — Orange Belt R. Co. *v.* Cox, 44 Fla. 645, 33 So. 403.

Georgia. — Mapp *v.* Phillips, 32 Ga. 72.

Illinois. — Chicago, B. & Q. R. Co. *v.* Willard, 68 Ill. App. 315; Mann *v.* Sodakat, 66 Ill. App. 393; Currie *v.* Syndicate Des Cultivators Des Oignons a Fleur, 104 Ill. App. 165.

Iowa. — Winch *v.* Baldwin, 68 Iowa 764, 28 N. W. 62; Grant *v.* Humerick, 94 N. W. 510.

Kansas. — Clark *v.* Folscroft, 67 Kan. 446, 73 Pac. 86.

Louisiana. — Dawson *v.* Landreaux, 29 La. Ann. 363.

Michigan. — Bacon *v.* Johnson, 56 Mich. 182, 22 N. W. 276.

Minnesota. — Sencerbox *v.* McGrade, 6 Minn. 484; Halverson *v.* Chicago, M. & St. P. R. Co., 57 Minn. 142, 58 N. W. 871.

Missouri. — Hackett *v.* Van Frank (Mo. App.), 79 S. W. 1013.

Nebraska. — Norberg *v.* Plummer, 58 Neb. 410, 78 N. W. 708.

New Hampshire. — Bohanan *v.* Boston & M. R., 70 N. H. 526, 49 Atl. 103.

New York. — Fulton *v.* Lydecker, 19 N. Y. Supp. 374; Fullerton *v.* McLaughlin, 70 Hun 568, 24 N. Y. Supp. 280; Duffus *v.* Schwinger, 79 Hun 541, 29 N. Y. Supp. 930, *reversing* 7 Misc. 499, 27 N. Y. Supp. 949; Fleming *v.* Ryan, 9 Misc. 496, 30 N. Y. Supp. 224; Excelsior Consumers Cigar Co. *v.* Stracherjan, 87 N. Y. Supp. 489.

North Carolina. — Parker *v.* Brown, 131 N. C. 264, 42 S. E. 605; Daniel *v.* Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455; Smith *v.* Browne, 132 N. C. 365, 43 N. E. 915; West *v.* A. P. Messick Grocery Co., 138 N. C. 166, 50 S. E. 565.

North Dakota. — Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Pennsylvania. — Whiting *v.* Lake, 91 Pa. 349.

Texas. — Fine *v.* Freeman, 83 Tex. 529, 17 S. W. 783.

54. Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250 (agreement of guaranty made when note indorsed); Brigham *v.* Peters, 1 Gray (Mass.) 139; McDonough *v.* Heyman, 38 Mich. 334; Dowden *v.* Cryder, 55 N. J. L. 329, 26 Atl. 941; Wolfe *v.* Benedict, 65 Hun 624, 20 N. Y. Supp. 585 (statement made when party was employed); Comegys *v.* American Lumb. Co., 8 Wash. 661, 36 Pac. 1087 (declarations made when lumber was purchased). But see Seymour *v.* Matteson, 42 How. Pr. (N. Y.) 496.

"The declarations of a professed agent, however publicly made, and although accompanied by an actual signature of the name of the principal, are not competent evidence to prove the authority of such agent, when questioned by the principal." Brigham *v.* Peters, 1 Gray (Mass.) 139.

and mortgage, in relation to payment to himself, are part of the *res gestae* and admissible.[55]

(4.) Admissible In Support of Other Evidence. — But evidence of acts and declarations of the alleged agent is admissible when there is some other evidence of agency, the jury being the judge of its sufficiency.[56]

(5.) Admissible To Explain Acts. — And such evidence is admissible to explain acts of an agent.[57]

(6.) Admissible To Show a Holding Out. — Declarations of a purported agent are admissible to show that he purported to act for his principal.[58]

55. Knight *v.* Jackson, 36 S. C. 10, 14 S. E. 982. See also Seymour *v.* Matteson, 42 How. Pr. (N. Y.) 496. *Compare* Graul *v.* Strutzel, 53 Iowa 712, 6 N. W. 119, 36 Am. Rep. 250.

56. *Alabama.* — South & N. A. R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Tanner & Delaney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584; Birmingham Mineral R. Co. *v.* Tennessee Coal, Iron & R. Co., 127 Ala. 137, 28 So. 679; McClung's Ex'rs. *v.* Spotswood, 19 Ala. 165.

Colorado. — Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

Maryland. — National Mechanics' Bank *v.* National Bank of Baltimore, 36 Md. 5.

Pennsylvania. — Stewartson *v.* Watts, 8 Watts 392; Central Pennsylvania Tel. & Supply Co. *v.* Thompson, 112 Pa. St. 118, 3 Atl. 439.

South Carolina. — Land Mtg. Inv. & Agency Co. *v.* Gillam, 49 S. C. 345, 26 S. E. 990.

"The correct rule is this, if there is no proof whatever tending to prove the agency, the act may be excluded from the jury by the court, but if there is any evidence tending to prove the authority of the agent, then the act can not be excluded from them, for they are the judges of the sufficiency and weight of the testimony." McClung's Ex'rs. *v.* Spotswood, 19 Ala. 165.

In Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414, letters written by an alleged agent were admitted when there was other evidence of agency, but the jury were instructed that the agency must be made out from the other evidence alone.

Evidence of declarations of an alleged agent made at the time of purchase of certain personal property is admissible in connection with evidence of user of the property by the principal. Davis *v.* Valley Elec. Light Co., 61 N. Y. Supp. 580.

Admissibility To Impeach Witness. Where an alleged agent testifies that he acted for himself, a letter from him to the plaintiff is admissible to contradict him. Gregg *v.* Berkshire, 10 Kan. App. 579, 62 Pac. 550.

57. Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

A declaration illustrative of possession is admissible. Jones *v.* Hess (Tex. Civ. App.), 48 S. W. 46.

58. Nowell *v.* Chipman, 170 Mass. 340, 49 N. E. 631. In this case the court, after stating that agency cannot be proved by the declarations of the agent, said: "But, as one step in establishing the defendant's liability in this aspect of the case, it was necessary to show that in what they said and did, they purported to act for her, and not for some one else. And for this purpose what they said and did was competent." See also Small *v.* Williams, 87 Ga. 681, 13 S. E. 589; Le Grand Quarry Co. *v.* Reichard, 40 Iowa 161 (admissible to show that agent understood he was acting as such); Christ *v.* Garretson State Bank, 13 S. D. 23, 82 N. W. 89; Land Mtg. Inv. & Agency Co. *v.* Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203.

In a suit by the principal, the declarations of the agent are admissible to show that the agent held himself out as such. Thus, in a suit on a note given for a life insurance policy, defendant was allowed to prove declarations of the person from whom he bought the policy to show that he held himself out as such, and that the company became liable for his representations by adopting his

(7.) Admissible When Ratification Relied Upon. — Where ratification is relied upon, evidence of acts and declarations of the alleged agent may be admitted in the first instance.[59]

(8.) Admissible When Principal Sues on Contract. — Declarations of an agent made at the time of a transaction are admissible against a principal suing upon the contract.[60]

e. *Admissions of Agent.* — **(1.) In General.** — Subject to the limitations that the fact of existence of the relation and the extent of authority can not be proved by the agent's declarations, his admissions made in the due course of business and within the scope of his authority are admissible to bind the principal.[61]

(2.) Conduct. — Upon the same principal, evidence of the conduct of an agent, both before and after a transaction, within the scope of his authority, is admissible.[62]

f. *Declarations and Admissions of Principal.* — **(1.) In General.** Evidence of admissions of the alleged principal is admissible against him.[63]

act. Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

59. Campbell *v.* Sherman, 49 Mich. 534, 14 N. W. 484. In this case the court said: "It is not to be denied that there is some danger that the jury may be misled into inferring agency from proof of the agent's acts and statements. But we are not satisfied that under such circumstances as were here presented the court was in error in treating the matter as one relating to the order of proof. There are always cases which would be best presented by following the order pursued here. Plaintiff was obliged to rely on circumstantial evidence of recognition or ratification, unless he chose to rest his case on the testimony of Cramb, who was interested against him, and who under the old rules might not have been competent at all. And where ratification is relied on proof of the dealings to be ratified must necessarily be put in first."

60. By suing upon the contract the principal ratifies the methods used and inducements held out to effect the contract. The declarations are also admissible as *res gestae.* Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336.

61. For a full discussion of this subject, see article "Admissions," Vol. I.

A conversation with an alleged agent prior to the time of his appointment is not admissible. Helfrich Lumb. & Mfg. Co. *v.* Bland, 21 Ky. L. Rep. 1185, 54 S. W. 728.

But Authority of Agent Must First Be Proved. — Bowker *v.* Delong, 141 Mass. 315, 4 N. E. 834. See also article "Admissions," Vol. I.

Receipts of Agent. — A receipt given by an authorized agent is admissible against the principal. Grant *v.* Humerick (Iowa), 94 N. W. 510; Starring *v.* Mason, 4 Neb. 367.

62. Baker *v.* Tibbetts, 164 Mass. 412, 41 N. E. 661; Wanamaker *v.* Megraw, 48 App. Div. 54, 62 N. Y. Supp. 692; Loeb *v.* Crow, 15 Tex. Civ. App. 537, 40 S. W. 506; International & G. N. R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795.

Evidence of Agent's Acts in Regular Course of Business. — Evidence of acts of the agent showing that a trespass committed by him was done in the regular course of his principal's business is admissible. Exum *v.* Brister, 35 Miss. 391 (evidence that agent was carrying out contract on behalf of the defendant to sell timber when he cut the timber on plaintiff's land, admissible).

63. Phleger *v.* Ivins, 5 Har. (Del.) 118; Kelly *v.* Shumway, 51 Ill. App. 634; Moffet *v.* Moffet, 90 Iowa 442, 57 N. W. 954; Haughton *v.* Maurer, 55 Mich. 323, 21 N. W. 426; Thiry *v.* Taylor Brew. & Malt. Co., 37 App. Div. 391, 56 N. Y. Supp. 85; McDonald *v.* Freed, 3 Wash. St. 468, 28 Pac. 915.

The acceptance by a railroad of a

(2.) Self-Serving Declarations. — Communications between the principal and other agents are not admissible on behalf of the principal.[64]

(3.) Repudiating Act. — Declarations by the alleged principal, repudiating the act of the alleged agent, made immediately upon the facts being called to his attention, are admissible in his favor.[65]

g. *Declarations and Admissions of Another Agent.* — Declarations of another agent of the same principal are not admissible;[66] but admissions of a general agent as to the extent of an inferior agent's authority may be received upon the same footing as admissions of the principal.[67]

h. *Circumstantial Evidence.* — **(1.) In General.** — Agency may be proved by circumstantial evidence.[68]

(2.) Great Latitude Allowed. — Great latitude is allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be inferred.[69]

ticket issued by an agent is some evidence of authority. Chiles *v.* Southern R. Co., 69 S. C. 327, 48 S. E. 252. As to effect of admission in answer, see Steel *v.* Solid Silver G. & S. M. Co., 13 Nev. 486. See also article "ADMISSIONS," Vol. I.

Letters. — Letters written by the principal are admissible to prove the agency as against him. Case *v.* Lyman, 66 Ill. 229.

A letter from the defendant stating that another is his agent is admissible against him. Thiry *v.* Taylor Brew. & Malt. Co., 37 App. Div. 391, 56 N. Y. Supp. 85.

A letter from defendant to plaintiff referring to a third person as "our late manager" is admissible. Foste *v.* Standard Life & Acc. Ins. Co., 34 Or. 125, 54 Pac. 811.

64. Erie & Pacific Despatch Co. *v.* Cecil, 112 Ill. 180.

65. Burns *v.* Campbell, 71 Ala. 271. Such evidence shows verbal acts, and tends to show a repudiation of the act of the agent. But a question whether "he approved or disapproved of it," is irrelevant if propounded with the view of eliciting a mere mental approval, unaccompanied with acts or words.

66. Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

67. Elfring *v.* New Birdsall Co., 16 S. D. 252, 92 N. W. 29.

68. *United States.* — United States Bank *v.* Dandridge, 12 Wheat. 64.

Colorado. — Gambrill *v.* Brown Hotel Co., 11 Colo. App. 529, 54 Pac. 1025.

Indiana. — Indiana, B. & W. R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Minnesota. — Stewart *v.* Cowles, 67 Minn. 184, 69 N. W. 694.

Missouri. — Crosno *v.* Bowser Milling Co., 106 Mo. App. 236, 80 S. W. 275; Mosby *v.* McKee, 91 Mo. App. 500; Haubelt *v.* Rea & Page Mill Co., 77 Mo. App. 672; Sharp *v.* Knox, 48 Mo. App. 169; Roberson *v.* Clevenger, 111 Mo. App. 622, 86 S. W. 512; Hull *v.* Jones, 69 Mo. 587; Hoppe *v.* Saylor, 53 Mo. App. 4.

Nebraska. — Columbus Co. *v.* Hurford, 1 Neb. 146.

New York. — Nutting *v.* Kings County El. R. Co., 21 App. Div. 72, 47 N. Y. Supp. 327.

Rhode Island. — Ward *v.* Trustees of New England S. C., 27 R. I. 262, 61 Atl. 651.

Vermont. — Walsh *v.* Pierce, 12 Vt. 130.

But agency cannot be proved by evidence of facts of a vague and uncertain nature. Fortescue *v.* Makeley, 92 N. C. 56.

Hearsay. — Of course hearsay evidence is not admissible. Ft. Worth Livestock Com. Co. *v.* Hitson (Tex. Civ. App.), 46 S. W. 915; Brown *v.* Prude, 97 Ala. 639, 11 So. 838. See also *ante*, "DECLARATIONS OF AGENT."

69. Patterson *v.* Van Loon, 186 Pa. St. 367, 40 Atl. 495. In this case the court said: "The evidence neces-

(3.) Acts Not Implying Knowledge and Consent of Principal. — Evidence of the acts of an agent is not admissible to show the fact or extent of his authority unless the acts are shown to have been performed under circumstances implying knowledge and consent of the principal.[70]

sary to establish such relation is very different from that required to prove an express agency. In the former greater latitude must necessarily be allowed in the admission of testimony tending to prove facts and circumstances from which the existence of an agency may be legitimately inferred. From the nature of the case, evidence that would tend to prove an implied agency, or subsequent ratification, would be inadmissible as proof of an express agency."

Defendant when sued as plaintiff's agent set up that he was acting as agent for the public, and not for the plaintiff. To establish this, it was held proper to admit communications between defendant and Congress, and resolutions adopted by Congress. Bingham *v.* Cabbot, 3 Dall. (U. S.) 19.

Evidence that the alleged agent opened a bank account in his own name as agent, and that he kept the principal's funds in it, is admissible. Appeal of National Shoe & Leather Bank, 55 Conn. 469, 12 Atl. 646.

Evidence that a party acted as agent in the borrowing of money is admissible upon the question of whether he was acting as such in the payment. Ballard *v.* Nye, 138 Cal. 588, 72 Pac. 156.

Conversations between the parties prior to the forming of the alleged relation are not admissible unless it is shown that there was a close connection between the negotiations and the agreement. Irving *v.* Shethar, 71 Conn. 434, 42 Atl. 258.

Pecuniary Condition of Alleged Agent. — Evidence of the pecuniary condition of the alleged agent was held not relevant on the issue of agency. North *v.* Metz, 57 Mich. 612, 24 N. W. 759.

Evidence of "apparent authority is not restricted to proof of general custom or to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business, usage not amounting to a general custom, and the fact, if it exists, that the principal is at a great distance and the agent apparently entirely in charge of the business, may in proper cases be, among other things, elements for consideration." Johnston *v.* Milwaukee & W. Inv. Co., 46 Neb. 480, 64 N. W. 1100.

70. *Alabama.* — Wright *v.* Evans, 53 Ala. 103.

Arkansas. — Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381.

Colorado. — Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

Connecticut. — Scott *v.* Crane, 1 Conn. 255. See also Plant *v.* McEwen, 4 Conn. 544.

Georgia. — Doonan *v.* Mitchell, 26 Ga. 472 (act of signing receipt as agent); Americus Oil Co. *v.* Gurr, 114 Ga. 624, 40 S. E. 780.

Illinois. — Peter Schoenhofer Brew. Co. *v.* Wengler, 57 Ill. App. 184.

Iowa. — Clanton *v.* Des Moines, O. & S. R. Co., 67 Iowa 350, 25 N. W. 277.

Kansas. — Streeter *v.* Poor, 4 Kan. 412; St. Louis & S. F. R. Co. *v.* Brown, 3 Kan. App. 260, 45 Pac. 118; Len *v.* Mayer, 52 Kan. 419, 34 Pac. 969; Fourth Nat. Bank *v.* Frost, 70 Kan. 480, 78 Pac. 825; Richards *v.* Newstifter, 70 Kan. 350, 78 Pac. 824.

Maine. — Eaton *v.* Granite State Provident Ass'n, 89 Me. 58, 35 Atl. 1015.

Michigan. — North *v.* Metz, 57 Mich. 612, 24 N. W. 759 (acts which are expressly repudiated by the alleged principal are not admissible); Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220.

Minnesota. — Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743; Sencerbox *v.* McGrade, 6 Minn. 484. *Compare* Best *v.* Krey, 83 Minn. 32, 85 N. W. 822.

Missouri. — Craighead *v.* Wells, 21 Mo. 404; Alt *v.* Grosclose, 61 Mo. App. 409.

Nebraska. — Burke *v.* Frye, 44 Neb. 223, 62 N. W. 476; C. F. Blanke Tea & Coffee Co. *v.* Rees Printing Co. 97 N. W. 627; Starring *v.* Mason, 4 Neb. 367.

(4.) Acts Implying Knowledge of Principal. — Evidence that one openly acts for another under circumstances implying a knowledge on the part of the supposed principal, makes a *prima facie* agency.[71]

New York. — Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827; Howard *v.* Norton, 65 Barb. 161; Molt *v.* Baumann, 65 App. Div. 445, 72 N. Y. Supp. 832.

North Dakota. — Loverin-Browne Co. *v.* Bank of Buffalo, 7 N. D. 569, 75 N. W. 923.

Oregon. — Sloan *v.* Sloan, 78 Pac. 893.

Pennsylvania. — Whiting *v.* Lake, 91 Pa. St. 349.

South Carolina. — Martin *v.* Suber, 39 S. C. 525, 18 S. E. 125.

Texas. — Cooper & Co. *v.* Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992; International & G. N. R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795.

Vermont. — Dickerman *v.* Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 Atl. 489.

Virginia. — Poore *v.* Magruder, 24 Gratt. 197.

Washington. — Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

West Virginia. — Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555.

Thus, evidence that the agent assumed the power, standing alone, is not admissible. International & G. N. R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; Reynolds *v.* Continental Ins. Co., 36 Mich. 131.

To the effect that such evidence is admissible in connection with other evidence, see Land Mtg. Inv. & Agency Co. *v.* Gillam, 49 S. C. 345, 26 S. E. 990, and further cases cited under next section.

A principal "is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent." Edwards *v.* Dooley, 120 N. Y. 540, 24 N. E. 827.

Evidence of publication by the alleged agent of an advertisement in a newspaper publicly announcing the relation is not admissible when it is not shown that the alleged principal knew or consented thereto. Schlitz Brew. Co. *v.* Barlow, 107 Iowa 252, 77 N. W. 1031. See also Nofsinger *v.* Goldman, 122 Cal. 609, 55 Pac. 425.

Where goods are entrusted to an agent and he wrongfully sells part to defendant, evidence that he sold some to others is not admissible. Thatcher *v.* Kaucher, 2 Colo. 698.

An advertisement in a newspaper is not admissible when inserted by the agent, and the principal had no knowledge of it. National Bldg. Ass'n *v.* Quin, 120 Ga. 358, 47 S. E. 962.

It is immaterial how many such acts there may be. Howard *v.* Norton, 65 Barb. (N. Y.) 161.

71. *Alabama.* — Reynolds *v.* Collins, 78 Ala. 94.

California. — Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

Georgia. — Weaver *v.* Ogletree, 39 Ga. 586.

Illinois. — Doan *v.* Duncan, 17 Ill. 272; Rockford, R. I. & St. L. R. Co. *v.* Wilcox, 66 Ill. 417.

Indiana. — Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927.

Kansas. — Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445.

Massachusetts. — Bragg *v.* Boston & W. R. Corp., 9 Allen 54.

Minnesota. — Fowlds *v.* Evans, 52 Minn. 551, 54 N. W. 743 ("acts of such a character and so continued as to justify a reasonable inference that the principal had knowledge of them").

Missouri. — Johnson *v.* Hurley, 115 Mo. 513, 22 S. W. 492.

New Hampshire. — Kent *v.* Tyson, 20 N. H. 121 ("open and public acts of a party claiming to be an agent" are admissible).

New York. — Smith *v.* Martin Anti Fire Car Heater Co., 64 Hun 639, 19 N. Y. Supp. 285.

Vermont. — Daggett *v.* Champlain Mfg. Co., 71 Vt. 370, 45 Atl. 755 (alleged agent put up posters indicating agency, which must have been seen by defendant; one of defendant's officers was present when the property was purchased; the alleged agent became a foreman of one of defendant's shops two years later).

(5.) Course of Dealing Between Parties. — Evidence of a course of dealing by an agent, sanctioned by the principal, is one of the recognized modes of proving the extent of an agency.[72]

(6.) Similar Transactions Acted Upon by Principal. — Evidence of similar transactions, acted upon by the principal, is admissible as tending to show the extent of the authority.[73]

Virginia. — Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291.

Wisconsin. — Hansen *v.* Flint & P. M. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

The frequency and amount of sales might furnish such evidence of general notoriety that a jury would be authorized to infer knowledge by the principal. Bragg *v.* Boston & W. R. Corp., 9 Allen (Mass.) 54.

An advertisement in a city directory may be admitted to show that the principal had allowed the agent to hold himself out as such. Graton & Knight Mfg. Co. *v.* Redelsheimer, 28 Wash. 370, 68 Pac. 879.

Evidence that for a period covering the time of the transaction the defendant's wife did all his business is admissible. Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

Evidence that the agent acted as general manager of defendant's hotel is admissible. Mullin *v.* Sire, 37 Misc. 807, 76 N. Y. Supp. 926.

Evidence Showing Knowledge. To show knowledge on the part of the principal, evidence that he saw the agent at work is admissible. Huntsvile Belt Line & M. S. R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295.

72. *United States.* — Kent *v.* Addicks, 126 Fed. 112, 60 C. C. A. 660.

Alabama. — Gibson *v.* Snow Hdw. Co., 94 Ala. 346, 10 So. 304; Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283; Lytle *v.* Bank of Dothan, 121 Ala. 215, 26 So. 6.

Colorado. — Union Gold Min. Co. *v.* Rocky Mt. Nat. Bank, 2 Colo. 565 (habit and course of dealing between the parties admissible).

Illinois. — Sun Mut. Ins. Co. *v.* Saginaw Barrel Co., 114 Ill. 99, 29 N. E. 477; Doan *v.* Duncan, 17 Ill. 272.

Indiana. — Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 927.

Kentucky. — Continental Tobacco Co. *v.* Campbell, 25 Ky. L. Rep. 569, 76 S. W. 125.

Maine. — Cobb *v.* Lunt, 4 Me. 503; Trull *v.* True, 33 Me. 367.

Massachusetts. — Bucknam *v.* Chaplin, 1 Allen 70.

Minnesota. — Hare *v.* Bailey, 73 Minn. 409, 76 N. W. 213.

Missouri. — Sharp *v.* Knox, 48 Mo. App. 169; Edwards *v.* Thomas, 66 Mo. 468; Franklin *v.* Globe Mut. Life Ins. Co., 52 Mo. 461; Brooks *v.* Jameson, 55 Mo. 505; Bonner *v.* Lisenby, 86 Mo. App. 666.

Nebraska. — Standley *v.* Clay, Robinson & Co., 94 N. W. 140.

New Hampshire. — Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

North Carolina. — Gilbraith *v.* Lineberger, 69 N. C. 145.

South Carolina. — Welch *v.* Clifton Mfg. Co. 55 S. C. 568, 33 S. E. 739.

Texas. — Missouri Pac. R. Co. *v.* Simons, 6 Tex. Civ. App. 621, 25 S. W. 996; International & G. N. R. Co. *v.* Ragsdale, 67 Tex. 24, 2 S. W. 515.

Vermont. — Walsh *v.* Pierce, 12 Vt. 130 (may be proved either by course of dealing or by subsequent recognition).

See also Woodwell *v.* Brown, 44 Pa. 121; Domasek *v.* Kluck, 113 Wis. 336, 89 N. W. 139.

Such evidence is admissible whether the party introducing it knew at the time of the transaction in controversy that the dealings had taken place or not. Sharp *v.* Knox, 48 Mo. App. 169; Bonner *v.* Lisenby, 86 Mo. App. 666.

Effect of Inquiry. — But when inquiry is made from the alleged principal, the course of dealing is important only as tending to show what answer was probably given. Norton *v.* Richmond, 93 Ill. 367.

73. *United States.* — White *v.* German Alliance Ins. Co., 103 Fed. 260, 43 C. C. A. 216.

Alabama. — Lytle *v.* Bank of Dotham 121 Ala. 215, 26 So. 6.

Illinois. — Thurber *v.* Anderson, 88 Ill. 167.

Iowa. — McCormick Harv. Mach.

(7.) Acts Must Be of Same Character. — But the prior acts from which authority may be inferred must be of the same character and effect as those for which authority is sought.[74] Evidence that a party has acted for the principal in another and entirely separate and distinct transaction of another character is not admissible.[75]

(8.) Authority for a Single Act. — Evidence of special authority to

Co. *v.* Lambert, 120 Iowa 181, 94 N. W. 497.

Maine. — Forsyth *v.* Day, 46 Me. 176 (agent signed principal's name to note; evidence that he had done this before and that the principal had recognized the notes is admissible).

Michigan. — Thompson *v.* Clay, 60 Mich. 627, 27 N. W. 699.

New York. — American Encaustic Tiling Co. *v.* Reich, 11 N. Y. Supp. 776.

Pennsylvania. — Stevenson *v.* Hoy, 43 Pa. 191.

South Carolina. — Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

Texas. — Texas Land & Loan Co. *v.* Watson, 3 Tex. Civ. App. 233, 22 S. W. 873; Osborne & Co. *v.* Gatewood (Tex. Civ. App.), 74 S. W. 72 (as evidence of authority to receive payment, evidence of receipt of payments in similar transactions is admissible); People's Bldg., Loan & Sav. Ass'n *v.* Keller, 20 Tex. Civ. App. 616, 50 S. W. 183.

But evidence that the principal became guarantor to others for articles purchased by agent in his own name is irrelevant. Williams *v.* Stearns, 59 Ohio St. 28, 51 N. E. 439.

In other words, evidence showing ratification of such acts is admissible as tending to prove original authority.

Alabama. — Tennessee River Transp. Co. *v.* Kavanaugh, 93 Ala. 324, 9 So. 395 (evidence that principal recognized property bought by agent in his own name as belonging to it).

Illinois. — Stastney *v.* Marschall, 37 Ill. App. 137; McGillis *v.* Anderson, 44 Ill. App. 601 (evidence that orders issued at same time and under same circumstances as plaintiff's were paid).

Indiana. — Jewett *v.* Lawrenceburgh & U. M. R. Co., 10 Ind. 539.

Maine. — Forsyth *v.* Day, 46 Me. 176.

Massachusetts. — Odiorne *v.* Maxcy, 15 Mass. 39; Williams *v.* Mitchell, 17 Mass. 98.

New York. — Beattie *v.* Delaware, L. & W. R. Co., 90 N. Y. 643.

Pennsylvania. — Stevenson *v.* Hoy, 43 Pa. 191.

South Carolina. — Thomson *v.* Dillinger, 35 S. C. 608, 14 S. E. 776.

Texas. — Mills *v.* Berla (Tex. Civ. App.), 23 S. W. 910; White *v.* San Antonio Waterworks Co., 9 Tex. Civ. App. 465, 29 S. W. 252.

Wisconsin. — Gallinger *v.* Lake Shore Traffic Co., 67 Wis. 529, 30 N. W. 790.

See also Haughton *v.* Maurer, 55 Mich. 323, 21 N. W. 426.

A circular from an agent soliciting business is admissible if brought home to the principal. Robinson *v.* Nevada Bank, 81 Cal. 106, 22 Pac. 478.

74. Keegan *v.* Rock (Iowa), 102 N. W. 85; Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111; Hazeltine *v.* Miller, 44 Me. 177; Humphrey *v.* Havens, 12 Minn. 298 (evidence that agent executed a note for principal is not evidence of agency for purpose of agreeing to pay a note and mortgage of a third person); Hackett *v.* Van Frank, 105 Mo. App. 384, 79 S. W. 1013 (evidence of authority to sell beer not admissible upon question of authority to sell whisky); Meredith's Lessee *v.* Macoss, 1 Yeates (Pa.) 200; Gregory *v.* Loose, 19 Wash. 599, 54 Pac. 33.

75. Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951; Watson *v.* Race, 46 Mo. App. 546; Scull *v.* Skillton, 70 N. J. L. 792, 59 Atl. 457; Duryea *v.* Vosburgh, 121 N. Y. 57, 24 N. E. 308, *reversing* 49 Hun 609, 1 N. Y. Supp. 833; Bartley *v.* Rhodes (Tex. Civ. App.), 33 S. W. 604. See also Maher *v.* Wilson, 50 Hun 605, 3 N. Y. Supp. 80, *affirmed* 123 N. Y. 655, 25 N. E. 954.

Evidence that the alleged agent had transacted other business for the principal at other places is not admissible. Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1, 13 So. 283.

make a particular or single contract is not admissible to show authority to make other similar contracts.[76]

(9.) **Dealings Between Principal and Agent.** — Evidence of the dealings between the alleged principal and agent is admissible to show the true relation of the parties.[77]

(10.) **Similar Transactions With Principal.** — Evidence of similar transactions with the principal, in which the agent was not involved, is not admissible.[78]

(11.) **Character of the Business.** — Evidence of the character of the business, the manner in which it is usual to carry on the work, and the manner in which it was carried on is admissible in order to determine the powers impliedly conferred upon the agent.[79]

(12.) **Business Customs.** — Where the authority is general, evidence of the custom of the business is admissible to show the extent of implied powers.[80]

Evidence that alleged principal had testified in another case that party was not his agent for another and unconnected purpose is immaterial. Smith *v.* Dodge, 49 Hun 611, 3 N. Y. Supp. 866.

Evidence of Agency for Another Branch of Business Not Admissible. Where a concern is engaged in two branches of business, evidence of agency for one has no tendency to establish agency for the other. Stratton *v.* Todd, 82 Me. 149, 19 Atl. 111 (business of selling logs in market distinct from business of operating in the woods; evidence of agency for one branch is not admissible to show agency for the other).

Nor Is Evidence of Subsequent Acts admissible out of the usual course of business. Lee *v.* Tinges, 7 Md. 215; Mills *v.* Berla (Tex. Civ. App.), 23 S. W. 910.

76. Stanley *v.* Sheffield Land, Iron & Coal Co., 83 Ala. 260, 4 So. 34. ("It is not any where intimated that this single exercise of agency was known to the plaintiffs, so that it was possible for their conduct to have been influenced or induced by it. And it certainly does not tend to prove such a habit and course of dealing between principal and agent, as is ordinarily permitted to justify an inference of like authority in other cases").

77. As tending to show that one was the agent for another, it is proper to show that the alleged principal had paid commissions. Slaughter *v.* Coke County, 34 Tex. Civ. App. 598, 79 S. W. 863.

Receipts given by the alleged agent to the alleged principal are admissible where they cast any light upon the question. Hallack - Sayre - Newton Lumb. Co. *v.* Blake, 4 Colo. App. 486, 36 Pac. 554.

78. In an action for services rendered under direction of an agent, evidence that plaintiff had rendered similar services for defendant before is not admissible when the prior employment was not by the agent in question. Cooper *v.* New York Cent. & H. R. R. Co., 6 Hun (N. Y.) 276.

79. Missouri Pac. R. Co. *v.* Simons, 6 Tex. Civ. App. 621, 25 S. W. 996.

Articles of incorporation of a corporation principal are admissible to show the nature of the business. Mahoney *v.* Butte Hdw. Co., 19 Mont. 377, 48 Pac. 545.

Where a power of attorney gives an agent power to do every act necessary in the transaction of the principal's business, evidence of the character and extent of the business is admissible. Brantley *v.* Southern Life Ins. Co., 53 Ala. 554.

80. *Alabama.* — Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Cawthon *v.* Lusk, 97 Ala. 674, 11 So. 731; Guesnard *v.* Louisville & N. R. Co., 76 Ala. 453.

Georgia. — Mott *v.* Hall, 41 Ga. 117 (custom of clerks of boats to sign notes).

Illinois. — Crain *v.* First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Bailey *v.* Bensley, 87 Ill. 556; Phillips *v.* Moir, 69 Ill. 155; Corbett *v.* Underwood, 83 Ill. 324, 25 Am. Rep. 392; Na-

(13.) Authority of Similar Employes. — Evidence that other employes occupying similar positions had a certain authority is admissible as tending to show authority in the agent in question.[81]

(14.) General Reputation. — Evidence that it is generally reputed or understood that the relation of principal and agent exists, or that an agent has a certain authority, is incompetent.[82]

(15.) Opinion of Witness. — Where the question of agency or of the extent of authority is made a principal issue, it is not competent for

tional Furnace Co. *v.* Keystone Mfg. Co., 110 Ill. 427.

Iowa. — Kaufman Bros. *v.* Farley Mfg. Co., 78 Iowa 679, 43 N. W. 612, 16 Am. St. Rep. 462.

Kansas. — American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533.

New Hampshire. — Haven *v.* Wentworth, 2 N. H. 93.

New York. — White *v.* Fuller, 67 Barb. 267.

Pennsylvania. — Sumner *v.* Stewart, 69 Pa. St. 321.

South Carolina. — Fraser *v.* Tenants, 5 Rich. L. 375.

Texas. — Missouri, K. & T. R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769; Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611.

Virginia. — Reese *v.* Bates, 94 Va. 321, 26 S. E. 865 (admissible to show general agent's right to make a warranty).

Wisconsin. — Pickert *v.* Marston, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.

Evidence that it was the custom of conductors to allow shippers of race animals and fine stock to ride in the car with them is admissible to show authority to waive a stipulation requiring plaintiff to ride in the caboose. Missouri, K. & T. R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769.

Evidence of custom of traveling agents to make certain contracts is admissible. Kaufman Bros. *v.* Farley Mfg. Co., 78 Iowa 679, 16 Am. St. Rep. 462, 43 N. W. 612.

Evidence of custom is admissible to show that the agent neglected a duty, and that the principal is liable therefor. Collings *v.* Hope, 3 Wash. C. C. 149, 6 Fed. Cas. No. 3,003.

The witnesses testifying as to custom must have knowledge as to the particular business. Thus, evidence of a custom as to traveling agents in general is not admissible upon the question of the custom in the sale of iron safes. Deane *v.* Everett, 90 Iowa 242, 57 N. W. 874.

But it is not necessary to show that the principal knew of the custom. Guesnard *v.* Louisville & N. R. Co., 76 Ala. 453.

To Show Want of Authority. Such evidence is admissible to show that the agent did not have implied authority for the act. United States Life Ins. Co. *v.* Advance Co., 80 Ill. 549; White *v.* Fuller, 67 Barb. (N. Y.) 267; Sumner *v.* Stewart, 69 Pa. St. 321.

Effect of Instructions. — Evidence of custom cannot overcome positive instructions known to the party. Clark *v.* Cumming, 77 Ga. 64, 4 Am. St. Rep. 72; Wanless *v.* McCandless, 38 Iowa 20.

81. Texas & P. R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058 (evidence that yard foremen at other stations were accustomed to employ and discharge hands, admissible).

82. *Alabama.* — Central R. & Bkg. Co. *v.* Smith, 76 Ala. 572, 52 Am. Rep. 353.

Connecticut. — Union Trust Co. *v.* McKeon, 76 Conn. 508, 57 Atl. 109.

Massachusetts. — Trowbridge *v.* Wheeler, 1 Allen 162.

Minnesota. — Graves *v.* Horton, 38 Minn. 66, 35 N. W. 568.

New York. — Perkins *v.* Stebbins, 29 Barb. 523; Litchfield Iron Co. *v.* Bennett, 7 Cow. 234 (not admissible to show who are the officers of a corporation); but see Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. 256.

Texas. — McGregor *v.* Hudson (Tex. Civ. App.), 30 S. W. 489; Dyer *v.* Winston, 33 Tex. Civ. App. 412, 77 S. W. 227.

As to the admissibility of evidence of general reputation to prove the existence of a partnership, see article "PARTNERSHIP," Vol. IX.

a witness to express an opinion upon the question.[83] He must state the facts. Testimony that a party is or is not an agent is a mere conclusion of law.[84] Likewise, testimony that an agent had authority to do a certain act is a conclusion of law.[85]

83. Farrell *v.* United States, 110 Fed. 942, 49 C. C. A. 183; John Stuart & Co. *v.* Asher, 15 Colo. App. 403, 62 Pac. 1051 (testimony that one acted as agent for another is a conclusion of law); McCluskey *v.* Minck, 18 Misc. 565, 42 N. Y. Supp. 462; Parker *v.* Brown, 131 N. C. 264, 42 S. E. 605; McCornick *v.* Queen of Sheba Gold M. & M. Co., 23 Utah 71, 63 Pac. 820 (question "were you manager of this English company, or for any of the gentlemen referred to," improper); Gore *v.* Canada Life Assur. Co., 119 Mich. 136, 77 N. W. 650.

Testimony of an agent as to the intention of his principals, not supported by facts, is not admissible. California Nav. & Imp. Co. *v.* Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825.

Testimony of a party that he believed he was employed by another is incompetent. Petterson *v.* Stockton & T. R. Co., 134 Cal. 244, 66 Pac. 304.

Evidence of a witness that he was under the impression that another had a certain authority is inadmissible. Eastman *v.* Martin, 19 N. H. 152.

"While a witness cannot be permitted to testify to a conclusion of fact, yet if he incidentally states a conclusion necessary to a clear understanding of his testimony, this will not be regarded as a violation of the rule." Thus, in Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794, the agent was asked: "What authority, if any, did you have to sign the name of Charles Hammond?" He answered: "I had direct authority, and also general authority by reason of the relation between Hammond and myself." The witness then proceeded to testify as to verbal authority. It was held that the statement, while a conclusion, was merely introductory, and that it was proper for the better understanding of what was to follow.

As to opinion evidence in general, see article "EXPERT AND OPINION EVIDENCE," Vol. V.

84. Goddard & Sons *v.* Garner, 109 Ala. 98, 19 So. 513; Young *v.* Newark Fire Ins. Co., 59 Conn. 41, 22 Atl. 32; Jackson *v.* Todd, 56 Ind. 406; Larson *v.* Lombard Inv. Co., 51 Minn. 141, 53 N. W. 179; Maurer *v.* Miday, 25 Neb. 575, 41 N. W. 395.

But see Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Gault *v.* Sickles, 85 Iowa 266, 52 N. W. 206; Knapp *v.* Smith, 27 N. Y. 277.

In Talladega Ins. Co. *v.* Peacock, 67 Ala. 253, the court said: "We do not think the statement of the witness that he regarded Huey as the general agent of the company falls within this rule of exclusion. If it stood alone, disconnected from the evidence given previously and subsequently by the witness, it might be objectionable. When considered in connection with that evidence, it is a statement in a guarded form of the fact that Huey was the general agent of the company, accompanied by a statement of the witness' means and sources of knowledge of the fact."

Plaintiff may testify that defendant was his lawyer, hired by him to act in his legal business. Spor *v.* Grau, 89 App. Div. 365, 85 N. Y. Supp. 876. See also cases cited in preceding note.

85. *Indiana.* — Hargrove *v.* John, 120 Ind. 285, 22 N. E. 132 (conclusion of witness based upon statements of agent, not admissible); American Tel. & Tele. Co. *v.* Green, 164 Ind. 349, 73 N. E. 707.

Massachusetts. — Providence Tool Co. *v.* United States Mfg. Co., 120 Mass. 35. And see Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197.

Michigan. — Gore *v.* Canada Life Assur. Co., 119 Mich. 136, 77 N. W. 650 (testimony of agent that he had authority is opinion).

New York. — Jaton *v.* Brentwood Hotel Co., 11 Misc. 325, 32 N. Y. Supp. 131.

Wisconsin. — Roche *v.* Pennington, 90 Wis. 107, 62 N. W. 946.

But a principal may testify that he did not give an agent a certain authority. Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285. See also Sax *v.* Davis, 81 Iowa 692, 47 N. W. 990.

(16.) Understanding of Party Dealing With Agent. — Upon the question of apparent authority, evidence showing the understanding of the party dealing with the agent is admissible.[86]

i. *Powers of Attorney.* — **Instructions.** — A power of attorney, or evidence of the actual agreement between the principal and the agent, is admissible to establish the extent of the authority.[87] And evidence of the instructions given to the agent is generally admissible.[88]

E. SUFFICIENCY. — a. *In General.* — It is impossible to lay down any inflexible rule by which it can be determined what evidence is sufficient to establish agency in any given case.[89]

And an agent may answer the question, "Did you have any power or authority to change that contract?" Joseph *v.* Struller, 25 Misc. 173, 54 N. Y. Supp. 162.

86. Curtin *v.* Ingle, 137 Cal. 95, 69 Pac. 836, 1013 (conversation of party with agent admitted to show that party was justified in believing him to have authority); Gore *v.* Canada Life Assur. Co., 119 Mich. 136, 77 N. W. 650.

Declarations of an agent at the time of a transaction are admissible to show that the party dealing with him acted in good faith. Christ *v.* Garretson State Bank (S. D.), 82 N. W. 89.

The party so dealing may testify that he relied upon the agent's representations. Geraghty *v.* Randall, 18 Colo. App. 194, 70 Pac. 767.

87. "A man who is sued upon a contract made in his name is not precluded from showing the limits of the powers expressly conferred by him, merely because the plaintiff has a right, and may attempt to show that the powers were enlarged by the defendant's subsequent conduct." Mt. Morris Bank *v.* Gorham, 169 Mass. 519, 48 N. E. 341. See also Fox *v.* Burlington Mfg. Co., 7 Wash. 391, 35 Pac. 126.

Evidence of an agent's actual authority is admissible although the issue is as to estoppel. Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570.

In Davis *v.* Benedict, 49 Neb. 119, 68 N. W. 398, a lessor was sued as principal for repairs made to the demised premises by order of the lessee. It was held that the lease was admissible to show that the lessee was bound to repair, and thus rebut the inference of agency.

Admissible Although Maker Dead. The fact that the maker of a power of attorney is dead is no objection to its admission in evidence, although it would be a valid objection to a deed executed thereunder after his death. Butler *v.* Dunagan, 19 Tex. 559.

Defective Execution. — Although defectively executed, a power of attorney may be admitted after confirmation. Crockett *v.* Campbell, 2 Humph. (Tenn.) 411.

88. Thatcher *v.* Kaucher, 2 Colo. 698; Nininger *v.* Knox, 8 Minn. 140; Gestring *v* Fisher, 46 Mo. App. 603; Hall *v.* Brown, 58 N. H. 93.

By Another Agent. — Instructions of one agent to another who was under him may be admitted. Bickford *v.* Menier, 36 Hun (N. Y.) 446.

Admissibility When Apparent Authority Relied Upon. — In some jurisdictions powers of attorney are admissible in evidence although apparent authority is relied upon. (See cases in preceding note.) In others, however, instructions to the agent, not communicated to the third party, are not admissible when apparent authority is relied upon. Oderkirk *v.* Fargo, 61 Hun 418, 16 N. Y. Supp. 220; Continental Tobacco Co. *v.* Campbell, 25 Ky. L. Rep. 569, 76 S. W. 125. See also Van Dyke *v.* Wilder, 66 Vt. 579, 29 Atl. 1016.

Where a power to sell personalty is admitted, power to warrant is implied; and in such a case evidence of conversations between the principal and the agent in regard to the warranty is incompetent. Manley *v.* Ackler, 76 Hun 546, 28 N. Y. Supp. 181.

89. Dickinson *v.* Salmon, 36 Misc. 169, 73 N. Y. Supp. 196 (*affirming* 35 Misc. 838, 72 N. Y. Supp. 1099).

b. *Principal's Conduct.* — Evidence of what the principal actually told the agent or of what he has allowed him to do may be sufficient to establish the authority of an agent.[90]

Rule the Same as in Cases of Ordinary Contracts. — In Louisiana, "the law requires the same amount of evidence to prove a verbal power of attorney, as it does to prove a verbal contract for money or personal property; and that when a party attempts to enforce a contract for the payment of money, above $500, made by an agent, he should prove, by at least one creditable witness and other corroborating circumstances, the verbal agency." Gardes *v.* Schroeder, 17 La. Ann. 142.

Note Payable to Third Party. Evidence that a note given in settlement of a transaction was made payable to and received by a third party is *prima facie* evidence of agency. Crowe *v.* Capwell, 47 Iowa 426.

90. Evidence Sufficient.

Alabama. — Fairbanks & Co. *v.* Cawthorn, 93 Ala. 287, 9 So. 282; Montgomery Brew. Co. *v.* Caffee, 93 Ala. 132, 9 So. 573; Rovelsky *v.* Scheuer, 114 Ala. 419, 21 So. 785.

California. — Bank of Ukiah *v.* Mohr, 130 Cal. 268, 62 Pac. 511; Union Pav. & Contract Co. *v.* Mowry, 137 Cal. xix, 70 Pac. 81.

Colorado. — Witcher *v.* Gibson, 15 Colo. App. 163, 61 Pac. 192.

Georgia. — Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787.

Iowa. — Holsten *v.* Wheeler, 78 N. W. 845; McCormick Harv. Mach. Co. *v.* Lambert, 120 Iowa 181, 94 N. W. 497.

Kentucky. — Limestone Min. & Mfg. Co. *v.* Lehman, 25 Ky. L. Rep. 703, 76 S. W. 328; Baldwin & Co. *v.* Tucker, 25 Ky. L. Rep. 222, 75 S. W. 196.

Maryland. — Hogg *v.* Jackson & Sharp Co. (Md.), 26 Atl. 869.

Massachusetts. — Kelley *v.* Lindsey, 7 Gray 287; Ayer *v.* Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754 (in answer to letter defendant sent its agent to plaintiff); Allen *v.* Fuller, 182 Mass. 202, 65 N. E. 31; Carberry *v.* Farnsworth, 177 Mass. 398, 59 N. E. 61.

Michigan. — Booth *v.* Majestic Mfg. Co., 105 Mich. 562, 63 N. W. 524; Ryerson *v.* Tourcotte, 121 Mich. 78, 79 N. W. 933.

Minnesota. — Winter & Ames Co. *v.* Atlantic Elev. Co., 88 Minn. 196, 92 N. W. 955; Dowagiac Mfg. Co. *v.* Watson, 90 Minn. 100, 95 N. W. 884; Wheeler *v.* Benton, 67 Minn. 293, 69 N. W. 927.

Missouri. — Hoppe *v.* Saylor, 53 Mo. App. 4; Weber *v.* Collins, 139 Mo. 501; 41 S. W. 249.

Montana. — Starr *v.* Gregory Con. Min. Co., 6 Mont. 485, 13 Pac. 195.

Nebraska. — Creighton *v.* Finlayson, 46 Neb. 457, 64 N. W. 1103; Day & Frees Lumb. Co. *v.* Bixby, 93 N. W. 688.

New Jersey. — Strauss *v.* American Talcum Co., 63 N. J. L. 613, 44 Atl. 631.

New York. — Dows *v.* Greene, 16 Barb. 72; Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17; Warburton *v.* Camp, 112 N. Y. 683, 20 N. E. 592; Mikles *v.* Hawkins, 59 App. Div. 253, 69 N. Y. Supp. 557; Wallace *v.* Arkell, 28 Misc. 502, 59 N. Y. Supp. 597, *affirming* 57 N. Y. Supp. 655; Goldsmith *v.* Schroeder, 93 App. Div. 206, 87 N. Y. Supp. 558; Mullin *v.* Sire, 37 Misc. 807, 76 N. Y. Supp. 926; Grannis *v.* Hobby, 137 N. Y. 559, 33 N. E. 486, *affirming* 17 N. Y. Supp. 618.

Pennsylvania. — Appeal of Hayes, 195 Pa. St. 177, 45 Atl. 1007.

Tennessee. — Whiteside *v.* Watkins (Tenn. Ch. App.), 58 S. W. 1107.

Texas. — Harris *v.* Nations, 79 Tex. 409, 15 S. W. 262; Gulf, C. & S. F. R. Co. *v.* Jones, 82 Tex. 156, 17 S. W. 534; Osborne & Co. *v.* Gatewood (Tex. Civ. App.), 74 S. W. 72.

Vermont. — Guyette *v.* Town of Bolton, 46 Vt. 228.

Washington. — Lough *v.* John Davis & Co., 35 Wash. 449, 77 Pac. 732.

Wisconsin. — Cameron *v.* White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493; Roche *v.* Pennington, 90 Wis. 107, 62 N. W. 946.

Evidence Insufficient.

Arkansas. — Kelley & Lysle Mill. Co. *v.* Adams, 72 Ark. 657, 78 S. W. 49.

Colorado. — Brown *v.* Salomon, 9 Colo. App. 323, 48 Pac. 278.

Georgia. — Walton Guano Co. *v.*

c. *Testimony of Agent.* — The testimony of the agent may, of itself, be sufficient to show his authority.[91]

d. *Of Particular Facts.* — **(1.) General Powers.** — Evidence showing an agent's general powers is sufficient to establish his implied powers.[92]

(2.) Evidence That One Is Acting for Another Not Sufficient. — Evidence that one is acting for another is not sufficient to prove authority so to act.[93]

(3.) Similar Transactions. — Evidence that the agent has openly conducted similar transactions for the principal under circumstances implying knowledge and consent of the principal may be sufficient.[94]

McCall, 111 Ga. 114, 36 S. E. 469; Smith *v.* Georgia & A. R. Co., 113 Ga. 625, 38 S. E. 956.

Kansas. — Wilcox *v.* Eadie, 65 Kan. 459, 70 Pac. 338.

Massachusetts. — Shaw *v.* Hall, 134 Mass. 103.

Minnesota. — Hornsby *v.* Hause, 35 Minn. 369, 29 N. W. 119.

Missouri. — Cockrell *v.* McIntyre, 161 Mo. 59, 61 S. W. 648; First Nat. Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 686.

Nebraska. — Gilbert *v.* Garber, 62 Neb. 464, 87 N. W. 179; Hare *v.* Winterer, 96 N. W. 179.

New York. — Tarpy *v.* Bernheimer, 16 N. Y. Supp. 870; Brown *v.* Reiman, 48 App. Div. 295, 62 N. Y. Supp. 663; National Park Bank *v.* American Exch. Nat. Bank, 40 Misc. 672, 83 N. Y. Supp. 249; Burgess *v.* Willis, 43 Misc. 672, 88 N. Y. Supp. 149.

North Carolina. — Parker *v.* Brown, 131 N. C. 264, 42 S. E. 605; Smith *v.* Browne, 132 N. C. 365, 43 S. E. 915.

Oregon. — Durkee *v.* Carr, 38 Or. 189, 63 Pac. 117.

Washington. — Corbet *v.* Waller, 27 Wash. 242, 67 Pac. 567; Sherlock *v.* Van Asselt, 34 Wash. 141, 75 Pac. 639.

Evidence of Authority To Employ. — Suffiient. — Stahlberger *v.* New Hartford Leather Co., 92 Hun 245, 36 N. Y. Supp. 708.

Insuffiient. — St. Louis, A. & T. R. Co. *v.* Hoover, 53 Ark. 377, 13 S. W. 1092.

Acting as Agent Under Circumstances Implying Knowledge. — Evidence that a party has acted as agent under such circumstances that the principal must have known thereof makes a *prima facie* case. Indiana, B. & W. R. Co. *v.* Adamson, 114 Ind. 282, 15 N. E. 5.

Acting as Agent for a Considerable Time. — "From the natural improbability that one should voluntarily, without authority, assume to act for another, settling his obligations for a considerable period of time, and from the fact that such conduct would naturally come to be known by the assumed principal, the fact of agency may be presumed." Neibles *v.* Minneapolis & St. L. R. Co., 37 Minn. 151, 33 N. W. 332.

91. McCall *v.* Henderson, 11 La. Ann. 209.

Where a power of attorney authorizes an agent to do such acts as are necessary, his testimony that certain acts were necessary is not sufficient. He must give the facts. Bruce *v.* Duke, 2 Litt. (Ky.) 244.

In the following cases the testimony of the agent was not sufficient. State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141; Price *v.* Moore, 158 Mass. 524, 33 N. E. 927; Blair *v.* Sheridan, 86 Va. 527, 10 S. E. 414.

In Meredith's Lessee *v.* Macoss, 1 Yeates (Pa.) 200, it was held that power to rent lands must be shown by other evidence.

92. Dows *v.* Greene, 32 Barb. (N. Y.) 490.

93. Walsh *v.* St. Paul Trust Co., 39 Minn. 23, 38 N. W. 631.

94. St. Louis, I. M. & S. R. Co. *v.* Bennett, 53 Ark. 208, 13 S. W. 742, 22 Am. St. Rep. 187; First Nat. Bank *v.* Ridpath, 47 Neb. 96, 66 N. W. 37.

But evidence of isolated transactions is not sufficient. Tadner *v.* Hibler, 26 Ill. App. 639; Holbrook *v.* Oberne, 56 Iowa 324, 9 N. W. 291.

(4.) Recognition of Authority. — Evidence showing recognition of the agent's authority is sufficient to establish it.[95]

(5.) Admissions of Principal. — Admissions of principal may be sufficient to prove authority.[96]

(6.) Letter in Response to One Addressed to Principal. — Evidence that a letter signed by an agent was sent in response to a letter addressed to the principal may be sufficient to establish the authority of the agent.[97]

(7.) Limited Authority. — Evidence that an agent was authorized to do a certain act is not sufficient to show authority to do any further or other act, unless authority for the latter is necessarily implied from the former.[98]

e. *For Particular Purposes.* — **(1.) Authority To Sell Property.** Possession of property by an agent is not evidence of authority to sell;[99] nor is evidence of the offering of the property for sale by the agent sufficient to show authority.[1]

(2.) Authority To Make or Indorse Bills or Notes may be shown by circumstantial or direct evidence, the sufficiency of which will usually be for the jury.[2]

Nor is evidence of circumstances not justifying the inference of knowledge sufficient. Eagle Bank *v.* Smith, 5 Conn. 71, 13 Am. Dec. 37.

Evidence that an agent had acted for a principal in a transaction does not prove that he was subsequently authorized to make false and fraudulent representations for the purpose of evading its terms and conditions. Hayes *v.* Burkam, 94 Ind. 311.

95. Arthur *v.* Gard, 3 Colo. App. 133, 32 Pac. 343 (communications between the principal and agent in which the authority of the latter is expressly or impliedly admitted); Odiorne *v.* Maxcy, 15 Mass. 39 (recognition by one partner sufficient); Ely *v.* James, 123 Mass. 36; Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912; Thomas Roberts Stevenson Co. *v.* Tucker, 14 Misc. 297, 35 N. Y. Supp. 682.

Where the principal receives the purchase price without affirming or denying a claimed warranty, the authority of the agent may be inferred. Smilie *v.* Hobbs, 64 N. H. 75, 5 Atl. 711.

96. Holden *v.* Terhune, 33 Ill. App. 269 (sufficient in connection with other evidence).

But they are not evidence of any greater authority than they purport. Camden Fire Ins. Ass'n *v.* Jones, 53 N. J. L. 189, 21 Atl. 458, 23 Atl. 166 (admission of authority to sell land does not show authority to sell shares of stock); Fullerton *v.* McLaughlin 70 Hun 568, 24 N. Y. Supp. 280 (admission by owner of lots during negotiations for sale that agent did all his business not evidence of authority for other purposes).

97. Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911.

98. Evidence establishing that the principal had agreed to sign a contract which the agent was instrumental in negotiating does not tend to show that the agent was authorized to bind the principal by a parol contract. Hayes *v.* Burkam, 94 Ind. 311.

Evidence that the principal continued to consign to factors after knowledge of their financial condition is not evidence of authority in the factors to treat the property as their own. Wootiers *v.* Kaufman & Ruge, 73 Tex. 395, 11 S. W. 390.

99. Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260.

1. Mortimer *v.* Cornwell, 1 Hoff. Ch. (N. Y.) 351.

Evidence Insufficient or Inconclusive. — Stadleman *v.* Fitzgerald, 14 Neb. 290, 15 N. W. 234; Fisher *v.* Moyer (Pa.), 4 Atl. 64.

2. Evidence Sufficient. — Valentine *v.* Packer, 5 Pa. 333.

(3.) Authority To Receive Payment.—Evidence that the agent has received other similar payments for the principal, with his knowledge and consent, is sufficient to establish authority to receive payment.[3]

2. Evidence of Ratification. — A. Burden of Proof. — a. *In General.* — The burden of proving the facts constituting a ratification is upon the party claiming it.[4]

B. Presumptions. — a. *From Silence.* — Ratification of an unauthorized act of an agent may be presumed from long continued silence in a principal who has knowledge of the facts.[5]

b. *From Nature of Acts.* — Knowledge of the acts of an agent may be presumed when they are of such a nature that the principal must have known of them.[6]

C. Essential Evidence. — a. *Knowledge of Facts.* — Evidence of knowledge of the facts is essential to ratification.[7]

b. *Injury.* — When the ratification of an unauthorized act of an agent is sought to be inferred from the silence or conduct of his principal, in favor of a third person, it must clearly appear that the latter might have been thereby misled, and induced to forego some advantage he would otherwise have enjoyed.[8]

D. Mode of Proof. — a. *Conduct of Principal.* — Evidence of any conduct on the part of the principal recognizing the validity of the act of the agent is admissible.[9]

Evidence Insufficient. — Williams *v.* Robbins, 16 Gray (Mass.) 77, 77 Am. Dec. 396; Lerch *v.* Bard, 153 Pa. St. 573, 26 Atl. 236.

In Consolidated Nat. Bank *v.* Pacific Coast S. S. Co., 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85, the evidence was sufficient to disprove ostensible authority.

By Statute in Louisiana authority was required to be express and special. Nortrebe *v.* McKinney, 6 Rob. (La.) 13.

3. Quinn *v.* Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138. For other cases holding evidence sufficient to establish such authority, see Bronson *v.* Chappell, 12 Wall. (U. S.) 681; Wilson *v.* LaTour, 108 Mich. 547, 66 N. W. 474.

4. Moore *v.* Ensley, 112 Ala. 228, 20 So. 744; Guimbillot *v.* Abat, 6 Rob. (La.) 284; Allis *v.* Goldsmith, 22 Minn. 123; Minter *v.* Cupp, 98 Mo. 26, 10 S. W. 862; Dean *v.* Hipp, 16 Colo. App. 537, 66 Pac. 804.

Of Knowledge of Principal. — The burden of proving knowledge on the part of a principal of an unauthorized act of the agent is upon the party claiming it. Moore *v.* Ensley, 112 Ala. 228, 20 So. 744.

5. Long *v.* Thayer, 150 U. S. 520; Southern Oil Wks. *v.* Jefferson, 2 Lea (Tenn.) 581.

And a presumption so arising cannot be overcome by an offer at the trial to return the property received. Southern Oil Wks. *v.* Jefferson, 2 Lea (Tenn.) 581.

6. James *v.* Lewis, 26 La. Ann. 664 (principal presumed to be informed of what her agent did in regard to the settlements with the servants in her employ).

7. Oxford Lake Line *v.* First Nat. Bank, 40 Fla. 349, 24 So. 480; Leonardson *v.* School District, 125 Mich. 209, 84 N. W. 63; Bohanon *v.* Boston & M. R., 70 N. H. 526, 49 Atl. 103 (acts not sufficient when no knowledge); Keefe *v.* Sholl, 181 Pa. St. 90, 37 Atl. 116.

8. Guimbillot *v.* Abat, 6 Rob. (La.) 284; Brown *v.* Henry, 172 Mass. 559, 52 N. E. 1073.

9. *Kentucky.* — Bates' Ex'rs *v.* Best's Ex'rs, 13 B. Mon. 215.

Louisiana. — Sentell *v.* Kennedy, 29 La. Ann. 679.

b. *Declarations of Principal.* — Evidence of what the principal said when the matter was first called to his attention is admissible to show or to rebut ratification.[10]

c. *Amount of Evidence Required.* — **(1.) In General.** — The fact of ratification should be as clearly made out as that of original authority.[11]

Massachusetts. — Pratt *v.* Putnam, 13 Mass. 361.

Michigan. — Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490; Dousman *v.* Peters, 85 Mich. 488, 48 N. W. 697.

New Hampshire. — Hatch *v.* Taylor, 10 N. H. 538.

Pennsylvania. — Hall *v.* Vanness, 49 Pa. St. 457; Duncan *v.* Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570, *s. c.*, 149 Pa. St. 114, 24 Atl. 190 (receipt of rents and of agent's account).

Texas. — Grande *v.* Chaves, 15 Tex. 550.

Virginia. — Downer *v.* Morrison, 2 Gratt. 237.

Evidence of conduct may be admitted and be sufficient to establish ratification, notwithstanding the principal expressly declared he would not sanction the contract. Hatch *v.* Taylor, 10 N. H. 538.

Deed Executed After Suit. — A deed of confirmation executed after the commencement of suit is admissible. McCulloch County Land & Cattle Co. *v.* Whitefort (Tex. Civ. App.), 50 S. W. 1042.

10. Reid *v.* Alaska Packing Ass'n, 43 Or. 429, 73 Pac. 337; Burns *v.* Campbell, 71 Ala. 271.

11. Wisconsin Bank *v.* Morley, 19 Wis. 62.

Specific performance will not be decreed when the evidence of ratification is conflicting. De Sollar *v.* Hanscome, 158 U. S. 216.

Where a surgeon has been employed by an agent of a railroad company to attend an injured employe, slight acts of ratification are sufficient. Cairo & St. L. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

Evidence Sufficient.

United States. — Clark *v.* Van-Riemsdyk, 9 Cranch 153; Continental Ins. Co. *v.* Insurance Co. of State of Pennsylvania, 51 Fed. 884, 2 C. C. A. 535, 1 U. S. App. 201.

California. — Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243 (question was as to authority to execute note; evidence that principal authorized agent subsequently to negotiate for an extension is sufficient to show ratification).

Illinois. — Erie & P. Despatch *v.* Cecil, 112 Ill. 180; Burns *v.* Lane, 23 Ill. App. 504.

Indiana. — Terre Haute & I. R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650.

Iowa. — Hannum *v.* Benton, 54 Iowa 396, 6 N. W. 549.

Kansas. — Pacific R. Co. *v.* Thomas, 19 Kan. 256.

Louisiana. — Delabigarre *v.* Second Municipality, 3 La. Ann. 230.

Maryland. — Reynolds *v.* Davison, 34 Md. 662 (receiving rent according to terms of agreement); Hartlove *v.* William Fait Co., 89 Md. 254, 43 Atl. 62.

Massachusetts. — Harrod *v.* McDaniels, 126 Mass. 413; Fogg *v.* Boston & L. R. Corp., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583.

Michigan. — Jennison *v.* Parker, 7 Mich. 355; Hutchinson *v.* Smith, 86 Mich. 145, 48 N. W. 1090.

Mississippi. — Exum *v.* Brister, 35 Miss. 391.

New York. — Hawley *v.* Keeler, 53 N. Y. 114, *affirming* 62 Barb. 231; Thomas Roberts Stevenson Co. *v.* Tucker, 14 Misc. 297, 35 N. Y. Supp. 682; Meyers *v.* Brown-Cochran Co., 91 N. Y. Supp. 72; Fischer *v.* Jordan, 54 App. Div. 621, 66 N. Y. Supp. 286, *affirmed* 169 N. Y. 615, 62 N. E. 1095; Brown *v.* Reiman, 48 App. Div. 295, 62 N. Y. Supp. 663.

Pennsylvania. — Lindsley *v.* Malone, 23 Pa. St. 24; Philadelphia, W. & B. R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Wright *v.* Burbank, 64 Pa. St. 247; Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

South Dakota. — Schull *v.* New Birdsall Co., 17 S. D. 39, 95 N. W. 276.

Texas. — Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Tinsley *v.*

(2.) Where Acts Have Been Notorious. — When the use of the principal's name has been frequent and notorious, slight evidence of injury to the moving party is sufficient.[12]

(3.) Silence. — Evidence of the silence of the principal after acquiring knowledge of the unauthorized acts of his agent is to be considered, but it is not necessarily conclusive.[13]

3. Undisclosed Principal. — A. Burden of Proof. — a. *In General* — In an action by an undisclosed principal he has the burden of showing the agency and that in making the contract the agent was acting for him.[14]

b. *Where Principal Entrusts Agent With Indicia of Title.* Where a principal entrusts his agent with the indicia of title, and the latter disposes of the property to a third person, the principal has the burden of showing notice of his rights in the third party.[15]

B. Mode of Proof. — a. *Parol Evidence.* — Parol evidence is admissible on behalf of an undisclosed principal to prove that a person signing a written contract was his agent and was acting for him in a transaction.[16]

Dowell (Tex. Civ. App.), 24 S. W. 928; Bexar B. & L. Ass'n *v.* Newman (Tex. Civ. App.), 25 S. W. 461.

Wisconsin. — Platt *v.* Schmitt, 117 Wis. 489, 94 N. W. 345.

Evidence Insufficient.

Alabama. — Simon *v.* Johnson, 105 Ala. 344, 16 So. 884, 53 Am. St. Rep. 125; Simon *v.* Johnson, 108 Ala. 241, 19 So. 244.

Arkansas. — Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049.

Illinois. — Miller *v.* Drexel, 37 Ill. App. 462.

Iowa. — Robinson *v.* Chapline, 9 Iowa 91.

Louisiana. —Mayor, etc. *v.* Hunter, 12 Mart. (O. S.) 3 (express refusal to ratify sufficient to overcome circumstances tending to show ratification).

Massachusetts — Price *v.* Moore, 158 Mass. 524, 33 N. E. 927.

Michigan. — Wells *v.* Martin, 32 Mich. 478; Somerville *v.* Wabash R. Co., 109 Mich. 294, 67 N. W. 320; Holmes *v.* McAllister, 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396; Rapid Hook & Eye Co. *v.* De Ruyter, 117 Mich. 547, 76 N. W. 76.

Minnesota. — Stillman *v.* Fitzgerald, 37 Minn. 186, 33 N. W. 564.

New York. — Estevez *v.* Purdy, 66 N. Y. 446; Beyers *v.* Hodge, 1 Misc. 76, 19 N. Y. Supp. 830; Piper *v.* Herrick, 26 Misc. 649, 56 N. Y. Supp. 386.

North Dakota. — Morris *v.* Ewing, 8 N. D. 99, 76 N. W. 1047.

Receipts From Principal to Agent. Uncontradicted receipts in full from principal to agent are sufficient to prove ratification of all collections, disbursements and appropriations which had taken place when the receipts were given. City Bank *v.* Kent, 57 Ga. 283.

12. Forsyth *v.* Day, 41 Me. 382.

13. "Mere silence or nonaction, after knowledge, is evidence of ratification, but is not conclusive, except when the protection of the assumed agent or of third parties requires it; that is, where the facts are such that the law will presume that the agent or a third party would be prejudiced by the delay to speak or act, if the principal should thereafter be permitted to assert that he had not authorized or ratified the act." Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800. See also Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634, *reversing* 7 Colo. App. 383, 43 Pac. 670.

14. Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618.

15. Calais Steamboat Co. *v.* Van Pelt, 2 Black (U. S.) 372.

16. *United States.* — Ford *v.* Williams, 21 How. 287; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504;

b. *Conduct of Principal.* — A defendant, sued by a principal, may show that the agent was the real party in interest; and for that purpose he may show the conduct of the principal in regard to the matter.[17]

c. *Direct Testimony.* — A plaintiff may testify that he relied upon the defendants when he signed a contract and acted under it.[18]

Darrow *v.* Horne Produce Co., 57 Fed. 463; Nash *v.* Towne, 5 Wall. 689.

Alabama. — Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915.

Maine. — Putnam *v.* White, 76 Me. 551; Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

Maryland. — Oelrichs *v.* Ford, 21 Md. 489.

Massachusetts. — Huntington *v.* Knox, 7 Cush. 371.

Missouri. — State *v.* O'Neill, 74 Mo. App. 134.

Oregon. — Barbre *v.* Goodale, 28 Or. 465, 38 Pac. 67, 43 Pac. 378.

South Carolina. — Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645.

Vermont. — Edwards *v.* Golding, 20 Vt. 30.

West Virginia. — Deitz *v.* Providence Wash. Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909.

Such proof does not contradict the writing; it only explains the transaction. Ford *v.* Williams, 21 How. (U. S.) 287; Powell *v.* Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915.

Testimony of Agent. — The testimony of the agent is competent to prove that he was acting for his principal. Oelrichs *v.* Ford, 21 Md. 489; Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720; Edwards *v.* Golding, 20 Vt. 30.

Communications Between Principal and Agent. — Such facts may also be proved by communications which have passed between the principal and agent. Oelrichs *v.* Ford, 21 Md. 489. See also Rice & B. Malting Co. *v.* International Bank, 185 Ill. 422, 56 N. E. 1062.

One may be asked whether he acted for himself or for his principal in a transaction. Swinnerton *v.* Argonaut Land & Dev. Co., 112 Cal. 375, 44 Pac. 719.

As Showing Acceptance. — It is competent for plaintiffs to prove that their agent informed them of what he had done, and that they thereupon accepted the contract and undertook to execute it. Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974.

Evidence of Mental State Not Admissible. — A question to a witness as to whether he approved or disapproved of an agent's act is irrelevant as calling for evidence of a mere mental state. Burns *v.* Campbell, 71 Ala. 271.

17. Bronson *v.* Herbert, 95 Mich. 478, 55 N. W. 359 (proper to ask plaintiffs whether they charged defendant upon their books, and whether the defendant ever promised to pay).

Evidence that a suit against the agent had been prosecuted to judgment is admissible to show that the agent was regarded as the principal debtor. Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

But this may be overcome by evidence that the suit was prosecuted by mistake. Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238.

Evidence of Secret Motives Not Admissible. — Evidence of the secret motives which may have operated upon the mind of a party dealing with an agent is inadmissible. Fobes *v.* Branson, 81 N. C. 256 (improper to ask, "were you induced to order the goods by the representations of plaintiffs' agent").

18. Crawford *v.* Moran, 168 Mass. 446, 47 N. E. 132.

To the effect that a plaintiff may show that a contract, made apparently by the agent for himself, was really made for defendant, see Jones *v.* Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 61 Am. St. Rep. 436, 37 L. R. A. 682; Borcherling *v.* Katz, 37 N. J. Eq. 150; Lauer *v.* Bandow, 43 Wis. 556, 28 Am. Rep. 571; Weston *v.* McMillan, 42 Wis. 567. It is a well established proposition of substantive law that a third party may hold either the agent or the undisclosed principal.

d. *Amount of Proof Required.* — A principal may show that he is the real party in interest by a mere preponderance of evidence; clear evidence is not required.[19]

II. ACTIONS BETWEEN PRINCIPAL AND AGENT.

1. Actions for Accounting. — A. Burden of Proof. — a. *Of Receipt of Money.* — In an action for accounting the principal has the burden of showing the amount received and not accounted for.[20]

b. *Of Accounting for Amount Received.* — It is not necessary for the principal to prove that the agent has not accounted for money he is shown to have received.[21] The burden is upon the agent to show that he has accounted.[22]

c. *That Disbursements Were Authorized.* — Likewise, the agent has the burden of showing that disbursements made by him were for the account of the principal and were authorized by him.[23]

d. *That Agent Has Received Nothing for Goods Consigned.* The burden is upon the agent to prove that he has received nothing for goods consigned to him by the principal.[24]

B. Admissibility. — a. *Conduct of Agent.* — To show that the agent has received money, the principal may introduce evidence of the agent's acts from which payment to him may be inferred.[25]

19. Barbre *v.* Goodale, 28 Or. 465, 43 Pac. 378 ("requires no higher or superior proof than to establish any other fact in the case").

20. Anderson *v.* First Nat. Bank, 4 N. D. 182, 59 N. W. 1029.

He must show that the sum collected was more than sufficient to offset the agent's just claims. Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93, 2 U. S. App. 40.

In general, see article, "Accounts, Accounting and Accounts Stated," Vol. I.

21. Merchants Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394.

22. Pratt *v.* Grimes, 48 Ill. 376; Young *v.* Powell, 87 Mo. 128; Carder *v.* Primm, 52 Mo. App. 102; Anderson *v.* First Nat. Bank, 4 N. D. 182, 59 N. W. 1029. See also Marvin *v.* Brooks, 94 N. Y. 71. But see Beattie, 83 Hun 295, 31 N. Y. Supp. 936 (agent who collects is presumed to have paid the principal).

"Such a decree proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money or property of the other party; intrusted in a confidential relation with an interest which makes him a *quasi* trustee, and by reason of that relation knowing what the other party cannot know, and bound to reveal to him the entire truth. The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and the duty of explanation, and hence the burden of such explanation and the proof of its truth fell, in such cases, upon the defendant whose conduct was questioned, whenever an accounting was decreed, and required of him the extreme of good faith." Marvin *v.* Brooks, 94 N. Y. 71.

23. Western Assur. Co. *v.* Uhlhorn, 41 La. Ann. 385, 6 So. 485.

24. Delpeuch *v.* Dufart, 7 La. 533. See also Robson *v.* Sanders, 25 S. C. 116.

25. Helm's Ex'rs *v.* Jones' Adm'x, 3 Dana (Ky.) 86 (deeds executed by an agent admissible).

Agent's Testimony. — An agent may testify generally that he has accounted for all moneys received. "The defendant had an undoubted right to show the gross amount of deductions actually made, and was not, therefore, bound to introduce

b. *Account Books.* — The account books of a principal are not admissible to show delivery of goods to an agent as such;[26] but the books of the agent may be admitted to show payments to the principal, especially where the principal has examined the books and made no objection.[27]

2. Actions Based on Agent's Neglect or Misconduct. — A. BURDEN OF PROOF. — a. *Of the Wrong.* — The burden of proving that the agent has been guilty of wrongdoing or negligence is upon the principal.[28]

b. *Of Facts in Excuse.* — Where a *prima facie* case of wrong or neglect is established, the agent has the burden of proving facts releasing him from liability.[29]

c. *That Principal Has Not Been Damaged.* — Where neglect of an agent or violation of instructions is shown, the burden is on

evidence which would establish the same thing by another and a more extended and elaborate course of examination, when the answer to the question put would prove the same fact in a more direct and positive manner." France *v.* McElhone, 1 Lans. (N. Y.) 7.

Receipt of Debtor. — The agent, in order to prove a payment to a third person for the principal, may introduce the receipt. Given *v.* Gould, 39 Me. 410.

26. Dunn *v.* Whitney, 10 Me. 9.

27. Lever *v.* Lever, 2 Hill Eq. (S. C.) 158. In general, see article, "BOOKS OF ACCOUNT," Vol. II.

28. Schoelkopf *v.* Leonard, 8 Colo. 159, 6 Pac. 209; Heinemann *v.* Heard, 62 N. Y. 448; Rand *v.* C. R. Johns & Sons (Tex. App.), 15 S. W. 200.

A distinction is made between actions for money had and received and actions for embezzlement. In the former, where it is shown that the agent has received money, the burden is upon him to show that he has accounted. (See *ante,* note 23.) In the latter, "it is necessary not only to show that he has received the money, but also that he has refused to pay the same upon demand, or that he has misapplied the same; and the burden of establishing these propositions rests upon the plaintiffs, notwithstanding the admission of the defendant that he received the moneys claimed to have been embezzled." Panama R. Co. *v.* Johnson, 58 Hun 557, 12 N. Y. Supp. 499.

A party claiming that another was his agent in the purchase of land has the burden of proof. Spratt *v.* Wilson, 94 Ala. 608, 10 So. 209.

29. Collins *v.* Andrews, 6 Mart. N. S. (La.) 190 (failure to collect debts placed in his hands for collection); Bartlett *v.* Hamilton, 46 Me. 435 (agent wrongfully commingled funds which were stolen; he has burden of showing that the identical money was stolen); Fahy *v.* Fargo, 63 Hun 625, 17 N. Y. Supp. 344; Brumble *v.* Brown, 71 N. C. 513; Lamb *v.* Fairbanks, 48 Vt. 519 (an agent who claims that the principal authorized him to apply funds to his own use has the burden of proving the permission).

Thus, where he claims that money intrusted to him has been lost, he has the burden of showing that the loss was not occasioned by a want of care on his part which men of ordinary prudence observe when clothed with such a trust. Darling *v.* Younker, 37 Ohio St. 487, 41 Am. Rep. 532. It is presumed that an agent has done his duty. Bangs *v.* Hornick, 30 Fed. 97; Ford *v.* Danks, 16 La. Ann. 119; Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316; Merchants' Bank *v.* Griswold, 72 N. Y. 472, 28 Am. Rep. 159; Murdock *v.* Leath, 10 Heisk. (Tenn.) 166.

Thus, the law presumes that money collected by an agent in his lifetime has been paid over to the principal. Breed *v.* Breed, 55 App. Div. 121, 67 N. Y. Supp. 162.

him to show that the principal has not been damaged thereby.[30]

B. Mode of Proof. — a. *Evidence of Circumstances.* — Evidence of the circumstances surrounding the transaction is admissible.[31]

b. *Admissions.* — Admissions of an alleged agent are admissible to prove the relation as against him.[32]

c. *Custom.* — Evidence of custom is admissible to aid in the construction of a general authority;[33] evidence of a custom is not,

30. Crawford *v.* Louisiana State Bank. 1 Mart. N. S. (La.) 214 (neglect to give notice of dishonor of negotiable instrument); Miranda *v.* City Bank. 6 La. 740, 26 Am. Dec. 493 (same); Wilson *v.* Wilson, 26 Pa. St. 393.

Every doubt is resolved against the agent who violates his instructions. Adams *v.* Robinson, 65 Ala. 586. See also Harvey *v.* Turner, 4 Rawle (Pa.) 223.

31. To show that defendant was plaintiff's agent in a transaction, evidence of his election to the office of general manager, and of verbal notification of such election is competent. Farnsworth *v.* Nevada Co., 102 Fed. 578, 42 C. C. A. 509.

In an action for fraud in concealing the price received for stock, evidence of the agent's declarations to other stockholders similarly situated is admissible; and the principal is not estopped to show by parol evidence that the true consideration was not expressed in a written contract made by the agent with a third person. Barber *v.* Martin, 67 Neb. 445, 93 N. W. 722.

The agent, sued for loss of money intrusted to him, cannot show that other principals provided safes for their agents, where it does not appear that he ever asked for one. Wright *v.* Central R. & B. Co., 16 Ga. 38.

Evidence That Another Would Have Pursued a Different Course. Evidence of a witness that he would have pursued a different course is not admissible to prove negligence of an agent. "Negligence is a question of fact to be determined by the jury from all the facts and circumstances surrounding the transaction; and to admit the testimony of a witness — that he would have pursued a different course stated — would be, in effect, substituting the opinion of a witness for a conclusion which is required by law to be reached by the jury." Norwood *v.* Alamo Fire Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

In general, see article "Negligence," Vol. VIII.

General Reputation of Third Party. Evidence that the general reputation of a party trusted by an agent is bad is not admissible to show the agent's neglect. Rand *v.* C. R. Johns & Sons (Tex. App.), 15 S. W. 200.

Intent. — Evidence of the intent of the agent is in general immaterial. Boykin *v.* Maddrey, 114 N. C. 89, 19 S. E. 106 (not competent to show other similar breaches, because intent immaterial).

32. Oliver *v.* Piatt, 3 How. (U. S.) 333, *affirming* Piatt *v.* Oliver, 2 McLean 267, 19 Fed. Cas. No. 11,115; New Home S. M. Co. *v.* Seago, 128 N. C. 158, 38 S. E. 805.

In an action against an agent, it is error to refuse to permit the plaintiff to prove what the agent said when certain money was paid to him. Spor *v.* Grau, 89 App. Div. 365, 85 N. Y. Supp. 876.

33. *Connecticut.* — Leach *v.* Beardslee, 22 Conn. 404.

Illinois. — Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

Indiana. — Rapp *v.* Grayson, 2 Blackf. 130.

Kentucky. — Wallace *v.* Bradshaw, 6 Dana 382.

Maryland. — Jackson *v.* Union Bank, 6 Har. & J. 146.

Massachusetts. — Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22; Dwight *v.* Whitney, 15 Pick. 179.

Missouri. — Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369.

New York. — McMorris *v.* Simpson, 21 Wend. 610.

Custom of Agents. — Evidence of the custom of agents is admissible upon the question of whether an agent has violated general instructions. Tyler *v.* O'Reilly, 59 Hun 618, 13 N. Y. Supp. 201.

however, admissible to excuse a violation of positive instructions.[34]

3. Actions for Compensation. — A. BURDEN OF PROOF. — In an action for compensation the agent has the burden of showing that he has performed services and that he had authority to do so;[35] but the principal has the burden of proving any matter of defense.[36]

B. MODE OF PROOF. — a. *Evidence of Employment.* — The same evidence is admissible to show agreement and employment as is admissible in cases of contracts generally.[37]

b. *Evidence of Value.* — **(1.) Where Express Contract.** — Where there is an express contract, evidence of the reasonableness of a commission is not admissible.[38]

(2.) Compensation of Similar Agents. — Where there is a conflict of testimony as to the agreement, evidence of what other agents engaged in the same business at the time received is competent.[39] And where there is no agreement as to amount, such evidence is admissible to show what would be a reasonable compensation.[40]

34. Hatcher *v.* Comer, 73 Ga. 418; Parsons *v.* Martin, 11 Gray (Mass.) 111; Porter *v.* Patterson, 15 Pa. 229; Barksdale *v.* Brown, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; Hall *v.* Storrs, 7 Wis. 253.

35. Monnett *v.* Heller, 25 Jones & S. 576, 5 N. Y. Supp. 913, judgment *modified* in Monnet *v.* Merz, 127 N. Y. 151, 27 N. E. 827.

Similar Transactions. — To show employment, the agent may present evidence of other similar transactions in which he has acted for the principal. Phillips *v.* Roberts, 90 Ill. 492.

Acts of Agent. — To show what the agent has done, evidence of what he stated to prospective purchasers is admissible. Welsh *v.* Lemert, 92 Iowa 116, 60 N. W. 230 (witness allowed to testify that agent claimed to have defendant's farm for sale).

Consummation of Transaction. To show that a deal for which commissions are claimed has been consummated, a written agreement between the principal and the buyer is admissible. Boland *v.* Kistle, 92 Iowa 369, 60 N. W. 632.

36. Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. 381 (burden of proving negligence).

37. Foste *v.* Standard Ins. Co., 34 Or. 125, 54 Pac. 811.

Parol Evidence. — Parol evidence is admissible to show the actual agreement when only part is in writing. Magill *v.* Stoddard, 70 Wis. 75, 35 N. W. 346.

In the case cited, secondary evidence of the contents of an agreement was not admitted because the loss of the original was not proved. In general, as to this, see articles "BEST AND SECONDARY EVIDENCE," and "PAROL EVIDENCE." See also article "CONTRACTS."

38. McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74. See also Ludlow *v.* Dole, 1 Hun (N. Y.) 715, 4 Thomp. & C. 655.

39. "It does not necessarily follow that because other agents received two and one-half per cent. commissions, that the defendant did not make the contract, as stated by the plaintiffs; but as the evidence is in conflict upon that point, what other agents received for the same service, at that time, may be considered by the jury as a circumstance that he would not as probably have made a contract for less commissions than the customary rate, though he may have done so." Glenn *v.* Salter, 50 Ga. 170. See also Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. 1103.

40. Hollis *v.* Weston, 156 Mass. 357, 31 N. E. 483; Ruckman *v.* Bergholz, 38 N. J. L. 531.

The jury is to determine from the evidence what would be a reasonable compensation. Best *v.* Sinz, 73 Wis. 243, 41 N. W. 169.

In a suit for compensation for finding a purchaser for real estate, a broker may testify as to what he would charge for the same services.

(3.) Expert Testimony. — The value of an agent's services may be determined by expert evidence.[41]

(4.) Unskilfulness of Agent. — The principal may show that the agent's mode of carrying out his contract was not skilful.[42]

c. *Self-Serving Declarations.* — A plaintiff cannot prove his own agency by evidence of his declarations to others made in the course of his business.[43]

d. *Evidence That Agent Was Acting for Other Party.* — Evidence that the agent was acting for the other party alone is admissible;[44] and in this connection evidence of his subsequent conduct is admissible.[45]

III. OTHER ACTIONS.

1. Between Agent and Third Persons. — A. Burden of Proof. a. *Contract Made Apparently as Principal.* — Where a defendant sets up that a contract, made by him, apparently as principal, was in reality made as the agent for another, he has the burden of proving the fact by a preponderance of evidence.[46]

b. *Contract Made Apparently as Agent.* — But where he acted ostensibly as an agent, a party seeking to hold him personally liable has the burden of proving his want of authority.[47]

c. *Where Credit Given to Agent of Known Principal.* — A party claiming that exclusive credit was given to the agent of a known principal has the burden of proving the fact by clear evidence.[48]

B. Presumptions. — a. *Where Acts Are Within Authority.* If the usual business of an agent is his agency, an act done by him

Elting *v.* Sturtevant, 41 Conn. 176.

Such evidence is admissible when the contract is denied. Kelly *v.* Phelps, 57 Wis. 425, 15 N. W. 385.

It is not conclusive. Kennerly *v.* Sommerville, 64 Mo. App. 75.

As to compensation of attorneys at law, see article "Attorney and Client," Vol. II.

41. Levitt *v.* Miller, 64 Mo. App. 147.

In general, see article "Expert and Opinion Evidence," Vol. V.

42. Perry *v.* Jensen, 142 Pa. 125, 21 Atl. 866, 12 L. R. A. 393 (agreed to use "best reasonable endeavors to introduce" medicine; evidence that he did not use the best methods of distributing samples is admissible).

43. Ehrenworth *v.* Putnam (Tex. Civ. App.), 55 S. W. 190 (action by broker for commissions).

44. Morehouse *v.* Remson, 59 Conn. 392, 22 Atl. 427.

45. Miller *v.* Irish, 67 Barb. (N. Y.) 256, *affirmed* 63 N. Y. 652.

46. Tiger *v.* Lincoln, 1 Colo. 394; Vawter *v.* Baker, 23 Ind. 63; Curts *v.* Scoles, 1 Iowa 471; Pratt *v.* Beaupre, 13 Minn. 187; McCall *v.* Elliott, 3 Or. 138; Miller *v.* Stock, 2 Bailey (S. C.) 163.

And the burden of proving agency is not affected by the fact that the plaintiff has charged the alleged principal upon his books. Miller *v.* Stock, 2 Bailey (S. C.) 163.

Of Private, Verbal Authority. Thus, where an authority may be private, or verbal, and not of record, the person who claims to exercise it has the burden of proof when it is afterward put in issue. Jackson's Ex'rs *v.* Holliday's Adm'rs, 3 T. B. Mon. (Ky.) 363.

47. Rhone *v.* Powell, 20 Colo. 41, 36 Pac. 899; Plumb *v.* Milk, 19 Barb. (N. Y.) 74.

48. Meeker *v.* Claghorn, 44 N. Y. 349; Ferris *v.* Kilmer, 48 N. Y. 300.

within the scope of such agency is presumed to have been done for the principal.[49]

b. *That Known Principal Was Given Credit.* — Where one sells goods to an agent of a known principal, for the use of the principal, the presumption is that he gives credit to the principal and not to the agent.[50]

c. *Contract Signed "B, Agent."* — A writing signed by a party with the word "Agent" after his name is presumed to be the individual contract of the party signing it;[51] but parol evidence is admissible to show that it was in fact the contract of the principal.[52]

d. *No Presumption That Agent Has Paid Money to Principal.* In an action against an agent to recover money paid to him, there is no presumption that he has turned it over to his principal.[53]

C. MODE OF PROOF. — a. *Parol Evidence.* — **(1.) Not Admissible to Exonerate Agent Who Has Not Disclosed His Principal.** — Parol evidence is not admissible to exonerate an agent who has entered into a written contract in which he appears as principal,[54] although he

49. Brett *v.* Bassett, 63 Iowa 340, 19 N. W. 210; Hamilton *v.* Eimer, 20 La. Ann. 391; McCarthy *v.* Missouri R. Co., 15 Mo. App. 385 ("where the superintendent of a corporation requests a physician to go on and treat an employe of the company, who has been injured, the natural implication would be that he makes the request for the company, and not with the intention of charging himself personally").

It seems that where an agent is also habitually acting for himself in the same sort of matters as to which it is claimed that he acted as agent; or if in his agency he acts only occasionally and irregularly, the presumption is that he acts for himself. Curts *v.* Scoles 1 Iowa 471; Vawter *v.* Baker, 23 Ind. 63; Soulter *v.* Stoeckle, 6 Ohio Dec. 1054.

50. Meeker *v.* Claghorn, 44 N. Y. 349; Ferris *v.* Kilmer, 48 N. Y. 300.

51. Rhone *v.* Powell, 20 Colo. 41, 36 Pac. 899. In this case the court said: "The writing by its terms neither purported to be the contract of Smith, Powell & Lamb, nor was it executed in their name, but was by its terms and mode of execution *prima facie* the individual contract of Powell. The addition of the word 'agent' was *prima facie descriptio personae,* and while the fact that the word was not so intended, but was understood by the contracting parties as indicating that the contract was signed in a representative capacity, may be shown by parol testimony, the contract is to be construed as *prima facie* the individual act of the party executing it." See also Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350; Braun *v.* S. F. Hess & Co., 187 Ill. 283, 58 N. E. 371, 79 Am. St. Rep. 221, *affirming* 86 Ill. App. 544. *Compare* Bradley *v.* McKee, 5 Cranch C. C. 298, 3 Fed. Cas. No. 1,784.

52. Rhone *v.* Powell, 20 Colo. 41, 36 Pac. 899; Deering *v.* Thom, 29 Minn. 120, 12 N. W. 350; Schaefer *v.* Bidwell, 9 Nev. 209. See also Rutland & B. R. Co. *v.* Cole, 24 Vt. 33 (note payable to treasurer of corporation; latter may show that it was intended for the corporation).

53. "Had the omission of the agents to pay over the money to their principal been a criminal offense, there might have been a presumption in favor of innocence, that they had paid it over. Not paying over the money was only a breach of an implied contract, and we are not aware of any presumption of the performance of a contract. The money was proved to be in the hands of the agents, and where the existence of a particular subject matter or relation has once been proved, its continuance is presumed until proof be given to the contrary, or till a different presumption be afforded by the very nature of the subject matter." Shipherd *v.* Underwood, 55 Ill. 475.

54. *United States.* — Nash *v.*

proposes to show that he fully disclosed his agency at the time of the transaction.[55]

(2.) Admissible To Show Authority. — An agent who executes an instrument purporting to be made under a written authority, may show authority by other evidence than a writing.[56]

b. *Evidence of Intent.* — Entries in books of a plaintiff are not conclusive against him as to whom he intended to charge.[57]

D. Sufficiency. — To hold an agent personally liable, the evidence must show that he contracted personally, or that he assumed to act without sufficient authority.[58]

2. Between Third Parties. — An admission of agency by a principal who is not a party to the suit is hearsay and incompetent.[59]

3. Criminal Actions. — In a prosecution for forgery, the burden of proving want of authority is on the state.[60]

Evidence of apparent authority of an agent is not sufficient to hold a defendant criminally responsible.[61]

Towne, 5 Wall. 689; Prichard *v.* Budd, 76 Fed. 710, 22 C. C. A. 504.

Illinois. — Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71.

Maryland. — McClernan *v.* Hall, 33 Md. 293.

New Jersey. — Kean *v.* Davis, 20 N. J. L. 425.

South Carolina. — Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645.

Texas. — Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

Washington. — Shuey *v.* Adair, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879, 39 L. R. A. 473.

Wisconsin. — Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135; Weston *v.* McMillan, 42 Wis. 567.

Reasons. — Parol evidence is admissible to give the benefit of the contract to or to charge the principal, because "it does not deny that it is binding on those whom, on the face of it, purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal." But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. Higgins *v.* Senior, 8 M. & W. (Eng.) 834.

55. Nash *v.* Towne, 5 Wall. (U. S.) 689; Miller *v.* Early, 22 Ky. L. Rep. 825, 58 S. W. 789; Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645; Cream City Glass Co. *v.* Friedlander, 84 Wis. 53, 54 N. W. 28, 36 Am. St. Rep. 895, 21 L. R. A. 135.

56. Page & Bacon *v.* Lathrop, 20 Mo. 589.

57. McKeen *v* Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49.

58. Trastour *v.* Fallon, 12 La. Ann. 25.

Assumption of Agency. — As against one who assumes to be the agent of another, that fact is sufficient *prima facie* to justify the inference that he was duly authorized to do what he claimed the authority to do. Montgomery *v.* Pacific Coast Land Bureau, 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122.

59. Clark *v.* Peabody, 22 Me. 500 (written admission by payee of note that party who indorsed note for him was his agent, is not admissible in a suit by indorsee against the maker).

60. Romans *v.* State, 51 Ohio St. 528, 37 N. E. 1040.

61. "The accused, in such case, has the right to rebut the presumption of *prima facie* agency, which the evidence makes against him, by showing, if he can, that the criminal act was, in fact, committed without his authority and against his instructions." Anderson *v.* State, 22 Ohio St. 305.

PRINCIPAL AND SURETY.

CROSS-REFERENCES:

Admissions;
Bills and Notes; Bonds;
Guaranty;
Judgments;
Officers;
Parol Evidence;
Statute of Frauds.

I. BURDEN OF PROOF.

1. On Creditor. — A. To Show Surety's Liability. — The creditor has the burden of proving the liability of the surety by clear evidence.[1]

B. To Show Consent to Extension. — The burden of proving consent to an extension of time or other act which would otherwise release the surety is upon the creditor.[2]

C. To Show Surety Has Not Been Injured by Release of Other Securities. — The creditor has the burden of showing that the surety has not been injured by the release of other securities.[3]

D. To Show Lack of Knowledge of Fraud. — A creditor who seeks to enforce payment against the surety whose signature to the contract was obtained by the fraud of the principal debtor has the burden of showing that when he accepted the obligation of suretyship he had no knowledge of the fraud.[4]

1. Hazard *v.* Lambeth, 3 Rob. (La.) 378; Erwin *v.* Greene, 5 Rob. (La.) 70.

In Koppitz-Melchers Brewing Co. *v.* Schultz, 68 Ohio St. 407, 67 N. E. 719, plaintiff sued on a bond conditioned for the faithful performance of a contract. It was held that he had the burden of showing performance of conditions on his part.

In Pirkle *v.* Chamblee, 109 Ga. 32, 34 S. E. 276, a party signed as surety a note which had previously been signed by two others. It was held that he had the burden of showing that one of the others was a cosurety.

But unless the execution of the bond is denied by a plea of *non est factum* he is not obliged to prove that fact. State *v.* Duvall, 83 Md. 123, 34 Atl. 831.

2. Tuohy *v.* Woods, 122 Cal. 665, 55 Pac. 683; Hanks *v.* Gerbracht, 75 Hun 181, 26 N. Y. Supp. 1097.

"The surety could not ordinarily be able to prove, that he did not assent to it, when made without his knowledge. The proof should come from the party who would be relieved from the consequences of his own wrongful act." Stowell *v.* Goodenow, 31 Me. 538.

The creditor has the burden of showing that the surety consented to a stay of execution beyond the statutory time. Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911.

Where the defense is an alteration, and the plaintiff sets out the alteration in his claim, and makes it part of his case, the defendant does not have the burden of showing that he did not consent. Mundy *v.* Stevens, 17 U. S. App. 463, 61 Fed. 77, 9 C. C. A. 366.

An averment in the surety's answer of want of consent is unnecessary, and, if made, need not be proved. Tuohy *v.* Woods, 122 Cal. 665, 55 Pac. 683.

Contra. — To the effect that the surety has the burden of showing that he did not consent, see Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285; Guderian *v.* Leland, 61 Minn. 67, 63 N. W. 175. See also McNulty *v.* Hurd, 86 N. Y. 547, where the court said: "The plaintiff, however, set this litigation in motion and was only entitled to recover upon proof that her intestate had not consented to this new contract. It is true that this involved a negative, but without it she had no cause of action. The burden or *onus probandi* would, however, be shifted by slight evidence and thrown upon the party who was to profit by the consent, if given, and who, therefore, might be supposed to have cognizance of it."

3. Allen *v.* O'Donald, 23 Fed. 573; Rawson *v.* Gregory, 59 Ga. 733.

4. Bank of Monroe *v.* Anderson Bros. Min. & R. Co., 65 Iowa 692, 22 N. W. 929. See also Lane *v.* Krekle, 22 Iowa 399; Union Nat.

E. To Show Consent of All Partners to Suretyship. Where a partnership name is signed with the word "surety" after it, or where it otherwise appears that the name is signed as surety, the holder has the burden of proving the consent of all the partners, or the authority of the person signing.[5]

2. On Surety. — A. To Show Facts Discharging Him From Liability. — A surety has the burden of proving facts discharging him from liability.[6] Thus he must prove an extension of time to the debtor set up by him as a defense;[7] or an alteration of the instrument.[8] It has been said, however, that this burden is only that of going forward with the evidence.[9]

Bank *v.* Barber, 56 Iowa 559, 9 N. W. 890.

5. Boyd *v.* Plumb, 7 Wend. (N. Y.) 309. See also Hendrie *v.* Berkowitz, 37 Cal. 113, 99 Am. Dec. 251; Bank of Rochester *v.* Bowen, 7 Wend. (N. Y.) 159.

"It is settled law that the party who takes a promissory note bearing the endorsement of a firm, either as guarantors or sureties, takes it burdened with the presumption that the firm name was not signed in the usual course of partnership business, and no recovery can be had by simply showing the endorsement. The holder is required to show special authority to make the endorsement on the part of the partner by whom the firm name was signed, or an authority to be implied from the common course of business of the firm, or previous course of dealing between parties, or that the endorsement was subsequently adopted and acted upon by the firm." Clarke *v.* Wallace, 1 N. D. 404, 48 N. W. 339.

6. Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28; Robinson *v.* Snyder, 97 Ind. 56; Bayley *v.* Jeneven, 24 La. Ann. 288; Bramble *v.* Ward, 40 Ohio St. 267; Gass *v.* Citizens' Bldg. & Loan Ass'n., 95 Pa. St. 101.

A surety upon an indemnity bond must prove his contention that the alleged breach of duty by the principal had been changed into an indebtedness by the action of the creditor. Socialistic Coop. Pub. Ass'n *v.* Hoffman, 12 Misc. 440, 33 N. Y. Supp. 695. See, however, Stendal *v.* Ackerman, 86 N. Y. Supp. 468, where it was held that the creditor has the burden of showing that he has not been guilty of anything that might be said to change or alter the defendant's position.

A surety must prove his contention that an employer has retained an employe after knowledge of his embezzlement, without notifying the surety (Foster *v.* Franklin Life Ins. Co., [Tex. Civ. App.], 72 S. W. 91), and that funds presumably in the hands of the principal had been misappropriated before he became liable on the bond. McMullen *v.* Winfield Bldg. & Loan Ass'n, 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924.

7. Truesdell *v.* Hunter, 28 Ill. App. 292; Barclay *v.* Miers, 70 Ind. 346; Bramble *v.* Ward, 40 Ohio St. 267.

He must prove all the essentials of the defense. Thus, he must show that an extension was founded on a valid consideration. Eaton *v.* Waite, 66 Me. 221.

8. Truesdell *v.* Hunter, 28 Ill. App. 292.

9. In Tenney *v.* Knowlton, 60 N. H. 572, where the defense set up was an unauthorized extension of time, the court said: "For the purpose of maintaining the issue on her part, she [plaintiff] produced and proved the note, and thus made out a *prima facie* case, which would have entitled her to a verdict had the defendants offered no evidence. To avoid the effect of the *prima facie* case so made, it was, therefore, incumbent on the defendants to offer some evidence in rebuttal; but it does not follow that the burden of proof was thereby shifted. On the contrary, we think it remained on the plaintiff throughout the trial. In every aspect of the cause, the substantive fact to be

B. To Show Notice to Sue. — In order to be released on account of failure to sue the principal after notice, the surety must show clearly the nature and terms of the notice, given at a time when the creditor has it in his power to proceed to collect the debt.[10]

C. To Show Relation When It Does Not Appear. — Where a party to an instrument does not appear on its face to be a surety but claims that in fact he is so, he has the burden of proving his claim.[11]

D. To Show That Creditor Had Notice of Relation. Where the fact of suretyship does not appear upon the face of the instrument, a surety claiming rights as such must prove that the creditor had notice of the relation; such notice will not be presumed.[12]

proved by her remained the same. She affirmed the validity of the contract; the defendants denied it. That was the vital fact in issue at all stages of the trial, and to it the evidence on both sides was directed, affirmatively or negatively; and as the plaintiff affirmed that the contract was a legal and subsisting liability when the alleged breach occurred, and as he who affirms must prove, she was bound to sustain her affirmation by proof satisfactory to the jury. No form of pleading could effect an actual change of the issue thus made up, nor shift the burden of proof upon it, unless by force of a legal presumption. And so, while the proof of the extension of the time of payment alleged in the brief statement necessarily commenced on the part of the defendants after the production and proof of the note, it was not because the burden of proof had shifted, but because the plaintiff had offered proof sufficient to establish the validity of the contract and its breach, unless it was rebutted by proof of equal or greater weight. This was what the defendants did; but in so doing they did not assume the burden of proof in any just sense, for, to rebut and overcome the *prima facie* case made by the plaintiff, it was not required of them to produce a preponderating weight of evidence, but only enough to balance the scales, because in that event the case would then stand as if no evidence had been given on either side, and consequently the burden resting on the plaintiff at the outset would remain unchanged."

10. King *v.* Haynes, 35 Ark. 463; Conrad *v.* Foy, 68 Pa. St. 381.

If the creditor does not sue as requested, he has the burden of showing that the money could not have been collected thereby. Strickler *v.* Burkholder, 47 Pa. St. 476.

11. *Georgia.* — Love *v.* Lamar, 78 Ga. 323, 3 S. E. 90.

Indiana. — Williams *v.* Scott, 83 Ind. 405.

Kansas. — Payne *v.* First Nat. Bank, 16 Kan. 147.

Kentucky. — Columbia Finance & Trust Co. *v.* Mitchell's Adm'r., 24 Ky. L. Rep. 1844, 72 S. W. 350.

New York. — Brink *v.* Stratton, 72 N. Y. Supp. 87, 64 App. Div. 331.

Tennessee — Coleman *v.* Norman, 10 Heisk. 590.

West Virginia. — Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

12. Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032; Mullendore *v.* Wertz, 75 Ind. 431, 39 Am. Rep. 155; Williams *v.* Scott, 83 Ind. 405; Wilson *v.* Foot, 11 Metc. (Mass.) 285; Agnew *v.* Merritt, 10 Minn. 308.

In some jurisdictions, however, knowledge of the relation will be presumed as against the original payee of a note, or, as the rule has been stated, "where the note remains with the original payee, he is presumed to know the relation the parties to the note sustain to each other." Ward *v.* Stout, 32 Ill. 399. See also Champion *v.* Robertson, 4 Bush (Ky.) 17; Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282. But this presumption is not conclusive. Hall *v.* Rogers, 114 Ga. 357, 40 S. E. 250.

E. To Show Incapacity. — A surety defending upon the ground of mental incapacity has the burden of proving the fact.[13]

3. On Cosurety. — Where one party to a contract claims contribution from another party as cosurety he has the burden of establishing this relationship unless it appears from the face of the instrument.[14]

II. PRESUMPTIONS.

1. All Signers Presumed To Be Joint Obligors. — All the signers of a bond or note are presumed to be joint obligors and makers if there is nothing on the face of the instrument to show any different understanding or agreement.[15]

2. Effect of Addition of Word "Surety." — The addition of the word "surety" after a party's name raises a presumption that he is in fact a surety; but this is not conclusive.[16]

3. Consent to Alteration. — It is presumed that sureties consented to an alteration of a bond made before delivery and consisting merely in the affixing of seals to the instrument.[17]

4. Presumption as to Time of Defalcation. — Where an officer holds for two terms, it will be presumed against him and his sureties that he had in his possession at the commencement of his second term all moneys for which he was accountable.[18]

13. Gaar, Scott & Co. *v.* Hulse, 90 Ill. App. 548.

14. Thus the burden of proving a party, apparently an indorser, to be a cosurety, is upon the party alleging it. Nurre *v.* Chittenden, 56 Ind. 462; Sweet *v.* McAllister, 4 Allen (Mass.) 353.

15. Chandler *v.* Ruddick, 1 Ind. 391; Derry Bank *v.* Baldwin, 41 N. H. 434; Flanagan *v.* Post, 45 Vt. 246; Harper *v.* McVeigh, 82 Va. 751, 1 S. E. 193.

Order of Signature. — Evidence of the order in which names were signed to a note does not raise any presumption of suretyship. Summerhill *v.* Tapp, 52 Ala. 227.

16. Lathrop *v.* Wilson, 30 Vt. 604. See also Harper's Adm'r. *v.* McVeigh, 82 Va. 751, 1 S. E. 193.

17. In Moses *v.* United States, 166 U. S. 571, the government refused to receive a bond because seals were not attached. The bond was again presented with seals attached, and was accepted. The sureties claimed that they had not consented to the affixing of the seals. The court said: "The sureties were not in a position of having secured what they wanted by the execution of the instrument in the manner originally shown; nor was the government in the attitude of asking something more of these sureties after they had secured the benefit for which the paper had been executed. As the matter stood, when the bond was returned to Howgate, he was under the same obligation to furnish a proper instrument that he had ever been, and for all that appears, precisely the same reason for signing the instrument originally still existed with the sureties at the time when the seals were placed upon the bond." And it was held that a presumption of consent arose. To the same effect, see Howgate *v.* United States, 3 App. D. C. 277. See also article "Alteration of Instruments," Vol. I, p. 809.

18. In an action on a bond given for the second term, this presumption will be indulged, and it devolves upon the surety to show that a defalcation occurred during the first term. Bernhard *v.* City of Wyandotte, 33 Kan. 465, 6 Pac. 617.

It is presumed that money not ac-

5. Presumption as to Amount of Payment. — It will be presumed that a surety who pays a note or judgment pays the amount due at the time of payment.[19]

6. Presumption as to Extension of Time. — A. Taking Note. The mere taking of a promissory note by the creditor from the debtor does not of itself create a presumption of an extension of time, so as to release sureties.[20]

B. Payment of Interest in Advance. — The acceptance of interest in advance beyond the date of the maturity of the obligation may give rise to an inference of an agreement for an extension, but it raises no such presumption of law.[21]

7. Presumption of Cosuretyship. — Where parties appear to be sureties, they will be presumed to be cosureties for purposes of contribution.[22]

III. MODE OF PROOF.

1. Statute of Frauds. — A. In General. — Contracts of suretyship, being within the statute of frauds, cannot be proved by parol.[23]

B. Does Not Apply to Agreement for Contribution. — The statute of frauds does not apply to an agreement for contribution between the sureties themselves.[24]

2. Parol Evidence. — A. To Vary or Contradict Writing. a. *Generally Not Admissible.* — Parol evidence is not admissible to

counted for by a principal is still in his possession. Fidelity & Deposit Co. *v.* Mobile Co., 124 Ala. 144, 27 So. 386.

See article "Officers." Vol. IX.

19. Searing *v.* Berry, 58 Iowa, 20, 11 N. W. 708.

The fact that a note is indorsed by the payee to the surety "for value received," together with its possession by the surety, will give rise to the presumption that the full amount due was paid by him. Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226.

20. Hutchinson *v.* Woodwell, 107 Pa. St. 509.

21. "The presumption arising from interest being accepted in advance is a presumption of fact, not of law, and no reference whatever ought to be made to it in the charge where there is other evidence to consider on the issue. Its mention in such a situation is apt to confuse and mislead, and, besides, it is to some extent on the weight of evidence." Gerguin *v.* Boone (Tex. Civ. App.), 77 S. W. 630.

22. Houck *v.* Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Warner *v.* Price, 3 Wend. (N. Y.) 397; Knopf *v.* Morel, 111 Ind. 570, 13 N. E. 51.

23. 29 Car. II, ch. 3, § 4. Similar statutes are in force in all of the states.

See articles "Guaranty," Vol. VI, "Parol Evidence," Vol. IX, and "Statute of Frauds."

24. Reasons. — "The statute of frauds does not apply, because the parol agreement related to the obligations of the indorsers *inter sese*, and not to a promise to pay the debt of another; also, so far as there was any promise it was one implied by law * * * from the mutual relation of the parties when it was established that they were co-sureties." Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. 157.

vary or contradict a written contract of suretyship.[25] Such evidence is not admissible to contradict or vary a written agreement by the creditor for an extension of time.[26]

b. *But Strangers May Show the Real Facts.* — This rule is confined in its operation to the parties to the contract, their representatives, and those claiming under them.[27]

B. To Explain or Interpret Instrument. — a. *Generally Admissible.* — Parol evidence of surrounding facts is admissible to explain or interpret a written contract of suretyship.[28] But a party cannot testify directly as to his undisclosed intent.[29]

b. *That Act Was Included in Contract.* — Parol evidence is admissible to show that a certain act was one of those included in the contract of suretyship where the terms of the instrument are general or ambiguous.[30]

C. To Show Instrument To Be Void. — a. *Fraud or Mistake.* Parol evidence is of course admissible to show that a bond was forged, or was altered after signature;[31] and where it will not work injury to a third party, it is admissible to show mistake.[32]

25. *United States.* — Boffinger *v.* Tuyes, 120 U. S. 198.

Arizona. — Albuquerque Nat. Bank *v.* Stewart, 3 Ariz. 293, 30 Pac. 303.

Indiana. — Trentman *v.* Fletcher, 100 Ind. 105.

Kansas. — Brenner *v.* Luth, 28 Kan. 581.

Louisiana. — Ferguson *v.* Glaze, 12 La. Ann. 667.

Maryland. — Criss *v.* Withers, 26 Md. 553.

Missouri. — State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440.

Pennsylvania. — Arnold *v.* Cessna, 25 Pa. St. 34.

Parol evidence is not admissible to show that a surety's liability was to be measured by another contemporaneous agreement. Domestic Sew. Mach. Co. *v.* Webster, 47 Iowa, 357. Thus parol evidence is not admissible to show that one surety signed as such after the instrument had been executed by the principal and his other surety, on condition that plaintiff would extend time of payment, and would bring no suit thereon within that period. Schroer *v.* Wessell, 89 Ill. 113.

For a discussion of the rule, its limits and exceptions, see article "Parol Evidence," Vol. IX.

26. Fellows *v.* Prentiss, 3 Denio (N. Y.) 512, 45 Am. Dec. 484; Halliday *v.* Hart, 30 N. Y. 474. In the latter case the surety was not allowed to show the real consideration for a writing which he contended was an extension of time.

27. "Unless both parties are bound, either is at liberty to show, by parol, a different set of facts from that set out in the writing." Bank of California *v.* White, 14 Nev. 373.

28. Slater *v.* Demorest Spoke & Handle Co., 94 Ga. 687, 21 S. E. 715; Thomas *v.* Truscott, 53 Barb. (N. Y.) 200.

In Wussou *v.* Hase, 108 Wis. 382, 84 N. W. 433, the court said: "It was the duty of the court to place itself in the situation of the parties to the instrument, by means of extrinsic evidence, in order that the true meaning of the language used might be ascertained."

29. Slater *v.* Demorest Spoke & Handle Co., 94 Ga. 687, 21 S. E. 715. See article "Intent," Vol. VII.

30. For instance, where a bond indemnifies against partnership liabilities, parol evidence is admissible to show that a certain liability was that of the partnership. Warriner *v.* Mitchell, 128 Pa. St. 153, 18 Atl. 337.

31. In town of Barnet *v.* Abbott, 53 Vt. 120, this was assumed. See articles "Fraud," Vol. VI, p. 16, and "Parol Evidence," Vol. IX.

32. In United States Fid. & Guar. Co. *v.* Siegmann, 87 Minn. 175, 91 N.

b. *Usury.* — Parol evidence is admissible to show a contemporaneous agreement to pay usurious interest, although the instrument is valid on its face.[33]

D. To Show Real Character of Parties. — a. *Admissible When Facts Do Not Appear on Face of Instrument.* — When a bond or note does not show on its face who are principals and who are sureties, parol evidence is admissible to establish the character of the parties.[34] The fact of suretyship may be established, as

W. 473, a party was allowed to show by parol that by mistake he signed in the place for sureties instead of in the place for witnesses.

33. Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288 (applied to surety).

See also Levy *v.* Brown, 11 Ark. 16; Lear *v.* Yarnel, 3 A. K. Marsh. (Ky.) 420; Allen *v.* Hawks, 13 Pick. (Mass.) 79; Hammond *v.* Hopping, 13 Wend. (N. Y.) 505.

The rule is based upon the ground that the evidence renders the note void. The parol evidence rule assumes that the instrument has a legal existence, and is valid. See articles "Bills and Notes," Vol. II, "Parol Evidence," Vol. IX, and "Usury."

34. *United States.* — American & General Mort. & Inv. Corp. *v.* Marquam, 62 Fed. 960.

Connecticut. — Case *v.* Spaulding, 24 Conn. 578.

Georgia. — Higdon *v.* Bailey, 26 Ga. 426.

Illinois. — Kennedy *v.* Evans, 31 Ill. 258.

Indiana. — Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Harris *v.* Pierce, 6 Ind. 162; Nurre *v.* Chittenden, 56 Ind. 462.

Maryland. — Owings *v.* Baker, 54 Md. 82.

Massachusetts. — Carpenter *v.* King, 9 Metc. 511, 43 Am. Dec. 405; M'Gee *v.* Prouty, 9 Metc. 547; Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. 157.

Minnesota. — Metzner *v.* Baldwin, 11 Minn. 92.

Missouri. — Foster *v.* Wallace, 2 Mo. 231; Garrett *v.* Ferguson's Adm'rs., 9 Mo. 125; Mechanics' Bank *v.* Wright, 53 Mo. 153; Scott *v.* Bailey, 23 Mo. 140.

New Hampshire. — Davis *v.* Barrington, 30 N. H. 517; Derry Bank *v.* Baldwin, 41 N. H. 434.

New Jersey. — Paulin *v.* Kaighn, 27 N. J. L. 503.

New York. — Neimcewicz *v.* Gahn, 3 Paige, 614; Artcher *v.* Douglass, 5 Denio, 509; La Farge *v.* Herter, 11 Barb. 159; Hubbard *v.* Gurney, 64 N. Y. 457; Knowles *v.* Cuddeback, 19 Hun 590.

North Carolina. — Welfare *v.* Thompson, 83 N. C. 276; Cole *v.* Fox, 83 N. C. 463.

Ohio. — Champion *v.* Griffith, 13 Ohio, 228.

Oklahoma. — Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282.

Rhode Island. — Otis *v.* Von Storch, 15 R. I. 41, 23 Atl. 39.

South Carolina. — Smith *v.* Tunno, 1 McCord, Eq., 443, 16 Am. Dec. 102; Anderson *v.* Peareson, 2 Bailey 107.

Tennessee. — White *v.* Brown, 4 Humph. 292.

Texas. — Burke *v.* Cruger, 8 Tex. 66, 58 Am. Dec. 102.

Virginia. — Williams *v.* Macatee's Trustee, 86 Va. 681, 10 S. E. 1061.

Washington. — Harmon *v.* Hale, 1 Wash. T. 422, 34 Am. Rep. 816.

West Virginia. — Creigh *v.* Hedrick, 5 W. Va. 140. But see Kritzer *v.* Mills, 9 Cal. 21; Aud *v.* Magruder, 10 Cal. 282.

In Emmons *v.* Overton, 18 B. Mon. (Ky.) 643, it was urged that such evidence contradicted the writing, but the court said: "This argument is however founded on a misconception of the legal effect of the writing upon which the action was brought. It does not state the character or relative position of the obligors, nor does the law, in the absence of such statement, conclusively fix the character they occupy. No statement or recital in the writing is contradicted by showing that one of the obligors is surety and the other is principal. In the absence of all testimony on the subject the law regards them as

between the makers of an instrument, by evidence of the acts and transactions between the parties.[35]

b. *As Between Obligors.* — This rule clearly applies as between the obligors themselves.[36] And a collateral contract between themselves may be shown by parol.[37]

c. *To Show An Indorser To Be a Surety.* — It is competent to show that a party apparently liable only as an indorser is in reality a surety.[38]

d. *When Writing Expressly States Character of Parties.* — But where the writing expressly states who are principals and who are sureties, parol evidence of their true character is not admissible against the creditor.[39]

equally liable, inasmuch as the writing itself does not furnish any grounds for discrimination. But if this legal construction of the writing should be permitted to have the effect contended for, the statute in favor of sureties would become, in a great measure, a dead letter, except in those cases where the note stated on its face who was principal and who was surety."

The rule applies in law as well as in equity. Brown *v.* Stewart, 4 Md. Ch. 87; Davis *v.* Mikell, 1 Freem. Ch. (Miss.) 548.

35. Strong *v.* Baker, 25 Minn. 442. One claiming to be a surety may show that his co-obligor was indebted to him, in corroboration of his testimony that the note was given in order to enable the other to pay him. Harvey *v.* Osborn, 55 Ind. 535.

36. Summerhill *v.* Tapp, 52 Ala. 227; Hunt *v.* Chambliss, 7 Smed. & M., (Miss.) 532; Nims *v.* Bigelow, 44 N. H. 376; Robison *v.* Lyle, 10 Barb. (N. Y.) 512; Oldham *v.* Broom, 28 Ohio St. 41.

"Such evidence is not offered to contradict or vary the contract contained in the writing, but simply to show the actual relations subsisting between the joint makers of the note and the real nature of the contract between them. Such facts are not a part of the contract and do not affect its terms, but are wholly collateral to it." Bulkeley *v.* House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247.

37. Vary *v.* Norton, 6 Fed. 808; Mansfield *v.* Edwards, 136 Mass. 15, 49 Am. Rep. 1; Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416; Montgomery *v.* Page, 29 Or. 320, 44 Pac. 689.

As, where there is a parol agreement to divide the loss (Phillips *v.* Preston, 5 How. [U. S.] 278; Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394), or as to method of enforcement (Wright *v.* Latham, 7 N. C. 298).

"Evidence is always admissible between principal and surety to show what their equitable rights toward each other are." *In re* May, 16 Fed. Cas. No. 9,327.

As between sureties, parol evidence is admissible to show limitation of liability. Myers *v.* Fry, 18 Ill. App. 74.

38. *Indiana.* — Nurre *v.* Chittenden, 56 Ind. 462; Browning *v.* Merritt, 61 Ind. 425; Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101.

Maine. — Smith *v.* Morrill, 54 Me. 48; Coolidge *v.* Wiggin, 62 Me. 568.

Massachusetts. — Weston *v.* Chamberlin, 7 Cush. 404; Clapp *v.* Rice, 13 Gray 403, 74 Am. Dec. 639; Sweet *v.* McAllister, 4 Allen 353.

Michigan. — Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734.

New Hampshire. — Paul *v.* Rider, 58 N. H. 119.

New York. — Easterly *v.* Barber, 66 N. Y. 433.

North Carolina. — Love *v.* Wall, 8 N. C. 313.

Vermont. — Barrows *v.* Lane, 5 Vt. 161, 26 Am. Dec. 293.

Wisconsin. — Kiel *v.* Choate, 92 Wis. 517, 67 N. W. 431, 53 Am. St. Rep. 936.

39. Sprigg *v.* Bank of Mt. Pleasant, 10 Pet. (U. S.) 257; *s. c.*, 14 Pet. (U. S.) 201, *affirming* 1 McLean, 384, 22 Fed. Cas. No. 13,257; McMillan *v.*

e. *Obligee's Knowledge of Relation of Parties.* — As against the creditor, it must be shown that he had knowledge of the fact that certain obligors were in reality sureties; and of course knowledge may be shown by parol.[40]

Parkell, 64 Mo. 286; McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; Pintard *v.* Davis, 21 N. J. L. 632, 47 Am. Dec. 172; Wingate *v.* Blalock, 15 Wash. 44, 45 Pac. 663.

In Exeter Bank *v.* Stowell, 16 N. H. 61, 41 Am. Dec. 716, the defendants said, in a note signed by all of them, "We jointly and severally all as principals promise;" parol evidence to contradict this statement was held inadmissible.

"The temptations to and the probabilities of perjury would be largely increased in litigation, and no good or useful purpose would be served to offset the difficulties and the wrongs that would arise under a rule allowing the imperfect memory of biased witnesses to overturn the solemn contract, in writing and under seal, of the parties at the time the obligation was entered into. There can never be any necessity for the real principal to sign as surety, or the real surety as principal; and the safer and better method, in the matter of bonds, where the recital of the obligation of each signer is contained in the body of the instrument, is to hold the obligors, and each of them, to the full measure of the liability each has therein solemnly assumed, and to allow no change in such liability upon the faith of oral testimony, subject as it is to all the imperfections and the faults that human nature is heir to. The rule that parol proof cannot be given to contradict or vary the terms of a written instrument should be rigidly enforced in the case of bonds, if at all." Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534.

In Louisiana, under a statute forbidding a wife from being a surety for her husband, it is held that the wife, sued as principal, may show by parol evidence that she was only a surety, although it would expressly contradict her declarations in an authentic act. "When certain persons, such as married women, are incapacitated from contracting engagements of a particular kind, any stipulations obtained from them contrary thereto, are *in fraudem legis*; and if it were not open to them to show the real nature of the transaction, the laws made for their protection would have no effect." Macarty *v.* Roach, 7 Rob. (La.) 357. See also Pilie *v.* Patin, 8 Mart. N. S. (La.) 692. Waggaman *v.* Zacharie, 8 Rob. (La.) 181.

40. *United States.* — American & General Mortg. & Inv. Corp. *v.* Marquam, 62 Fed. 960.

Alabama. — Summerhill *v.* Tapp, 52 Ala. 227.

Georgia. — Howell *v.* Lawrenceville Mfg. Co., 31 Ga. 663; Stewart *v.* Parker, 55 Ga. 656.

Indiana. — Davenport *v.* King, 63 Ind. 64; Arms *v.* Beitman, 73 Ind. 85; Mullendore *v.* Wertz, 75 Ind. 431, 39 Am. Rep. 155; Albright *v.* Griffin, 78 Ind. 182; Lamson *v.* First Nat. Bank, 82 Ind. 21; Tharp *v.* Parker, 86 Ind. 102.

Iowa. — Murray *v.* Graham, 29 Iowa, 520; Morgan *v.* Thompson, 60 Iowa, 280, 14 N. W. 306.

Kentucky. — Neel *v.* Harding, 2 Metc. 247.

Massachusetts. — Wilson *v.* Foot, 11 Metc. 285.

Minnesota. — Agnew *v.* Merritt, 10 Minn. 308.

Missouri. — Patterson *v.* Brock, 14 Mo. 473.

New Jersey. — Kaighn *v.* Fuller, 14 N. J. Eq. 419.

New York. — Neimcewicz *v.* Gahn, 3 Paige 614; Elwood *v.* Deifendorf, 5 Barb. 398.

Oklahoma. — Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282.

Texas. — Roberts *v.* Bane, 32 Tex. 385; Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 32 S. W. 855.

Vermont. — Sanford *v.* Norton, 17 Vt. 285.

Washington. — Harmon *v.* Hale, 1 Wash. T. 422, 34 Am. Rep. 816; Culbertson *v.* Wilcox, 11 Wash. 522, 39 Pac. 954.

E. Obligee's Knowledge of Conditional Signing. — To defeat his liability a surety may show by parol the obligee's knowledge of an agreement by the principal to secure other sureties before delivering the instrument.[41]

3. Admissions. — A. Of Principal. — a. *In General.* — **(1.) Admissible When Part of Res Gestae.** — The admissions of the principal made in connection with and relating to the matter of suretyship, are competent to establish his liability, and incidentally the liability of the surety.[42] But such admissions to be competent against the

As to the requisite of knowledge in the payee of a bill or note, see article Bills and Notes, Vol. II, p. 468.

A cashier of the plaintiff bank, appointed after a note was given, may be asked what his information was as to the relation of the parties. Young *v.* New Farmers Bank, 19 Ky. 1309, 43 S. W. 473.

41. Caudle *v.* Ford, 24 Ky. L. Rep. 1764, 72 S. W. 270.

42. *England.* — Middleton *v.* Melton, 10 Barn. & C. 317, 21 Eng. C. L. 84.

United States. — Ingle *v.* Collard, 1 Cranch C. C. 152, 13 Fed. Cas. No. 7,042.

Alabama. — Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433; Bondurant *v.* State Bank, 7 Ala. 830; Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Casky *v.* Haviland, 13 Ala. 314; Dumas *v.* Patterson, 9 Ala. 484.

Arkansas. — State *v.* Newton, 33 Ark. 276.

California. — Placer Co. *v.* Dickerson, 45 Cal. 12.

Connecticut. — Davis *v.* Kingsley, 13 Conn. 285.

Georgia. — Dobbs *v.* Justices, 17 Ga. 624; Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680.

Illinois. — Guarantee Co. of North America *v.* Mutual Bldg. & Loan Ass'n., 57 Ill. App. 254; Schureman *v.* People, 55 Ill. App. 629; Magner *v.* Knowles, 67 Ill. 325.

Indiana. — Parker *v.* State, 8 Blackf. 292.

Kentucky. — Pendleton *v.* Bank of Kentucky, 1 T. B. Mon. 171.

Louisiana. — Reynes *v.* Zacharie, 10 La. 127.

Maryland. — State *v.* McKee, 11 Gill & J. 378; McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552.

Massachusetts. — Amherst Bank *v.* Root, 2 Metc. 522; Bank of Brighton *v.* Smith, 12 Allen 243, 90 Am. Dec. 144; Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 39; McKim *v.* Blake, 139 Mass. 593, 2 N. E. 157; Sigourney *v.* Drury, 14 Pick. 387; Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417.

Minnesota. — Whitaker *v.* Rice, 9 Minn. 1.

Mississippi. — Montgomery *v.* Dillingham, 3 Smed. & M. 647; State *v.* Stewart, 36 Miss. 652.

Missouri. — Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; State *v.* Grupe, 36 Mo. 365; Union Sav. Ass'n. *v.* Edwards, 47 Mo. 445; Cheltenham Co. *v.* Cook, 44 Mo. 29.

New Hampshire. — Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457.

New York. — Eichhold *v.* Tiffany, 20 Misc. 681, 46 N. Y. Supp. 534.

Pennsylvania. — Deardorf *v.* Hildebrand, 2 Rawle 226; Com. *v.* Kendig, 2 Pa. St. 448; Bachman *v.* Killinger, 55 Pa. St. 414; Respublica *v.* Davis, 3 Yeates, 128, 2 Am. Dec. 366.

Rhode Island. — Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231.

South Carolina. — State *v.* Teague, 9 Rich. 149.

Texas. — Barry *v.* Screwman's Ass'n., 67 Tex. 250, 3 S. W. 261; Lasater *v.* Purcell Mill & Elevator Co., 22 Tex. Civ. App. 33, 54 S. W. 425.

Vermont. — Wilson *v.* Green, 25 Vt. 450, 60 Am. Dec. 279, Richardson *v.* Hitchcock, 28 Vt. 757.

Virginia. — Walker *v.* Pierce, 21 Gratt. 722; Smith *v.* Governor, 2 Rob. 229.

Reasons. — "The legal presumption is that no one will falsely charge himself. Against him it would be the highest and best evidence; and

surety must have been made during the transaction.[43] Admissions made after the act complained of are not competent;[44] nor are those

against his sureties it must be, at least, *prima facie* evidence. For they are his privies in law; and whatever will in law charge him, will charge them." Treasurers *v.* Bates, 2 Bailey (S. C.) 362.

Illustrations. — Where part of the principal's duty is to account, admissions made by him during the course of an accounting are competent against the surety. Hall *v.* United States Fidelity & Guaranty Co., 77 Minn. 24, 79 N. W. 590; Thompson *v.* Commercial Union Assur. Co. (Colo. App.), 78 Pac. 1073. Likewise, admissions made during the examination of the principal's books, while the employment still existed, are competent. Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475. An admission of a trustee of an unexecuted trust to the effect that the fund had been received is competent against his sureties. Yates *v.* Thomas, 35 Misc. 552, 71 N. Y. Supp. 1113.

Upon the last day of his employment, but before the employment had ceased, the principal admitted an embezzlement. It was held competent against his surety. Guarantee Co. of No. Am. *v.* Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

An admission of a principal in a sworn answer filed by him in a proceeding against him is competent against his sureties. Gilmer *v.* Baker, 24 W. Va. 724.

43. *United States.* — United States *v.* Cutter, 2 Curt. 617, 25 Fed. Cas. No. 14,911.

Alabama. — Walker *v.* Forbes, 25 Ala. 139, 60 Am. Dec. 498; Bondurant *v.* State Bank, 7 Ala. 830; Lewis *v.* Lee Co., 73 Ala. 148; Dumas *v.* Patterson, 9 Ala. 484.

Arkansas. — State *v.* Newton, 33 Ark. 276.

Colorado. — Jenness *v.* City of Black Hawk, 2 Colo. 578.

Georgia. — Dobbs *v.* Justices, 17 Ga. 624.

Illinois. — Kirkpatrick *v.* Howk, 80 Ill. 122; Guarantee Co. of N. Am. *v.* Mutual B. & L. Ass'n, 57 Ill. App. 254.

Indiana. — Lane *v.* State, 27 Ind. 108; Hotchkiss *v.* Lyon, 2 Blackf. 222; Shelby *v.* Governor, 2 Blackf. 289.

Kansas. — Lee *v.* Brown, 21 Kan. 458.

Kentucky. — Pollard *v.* Louisville C. & L. R. Co., 7 Bush. 597; Com. *v.* Brassfield, 7 B. Mon. 447; Lucas *v.* Chamberlain, 8 B. Mon. 276.

Maine. — Foxcroft *v.* Nevens, 4 Greenl. 72.

Minnesota. — Hall *v.* United States Fidelity & Guar. Co., 77 Minn. 24, 79 N. W. 590.

Missouri. — Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Union Sav. Ass'n *v.* Edwards, 47 Mo. 445.

New York. — Ayer *v.* Getty, 46 Hun 287; Eichhold *v.* Tiffany, 20 Misc. 681, 46 N. Y. Supp. 534; Hatch *v.* Elkins, 65 N. Y. 489; Tenth Nat. Bank *v.* Darragh, 1 Hun 111; Horn *v.* Perry, 14 Hun 409.

North Carolina. — State *v.* Fullenwider, 26 N. C. 364. (But a different rule applies as to public officers in this state as a result of statute. State *v.* Woodside, 30 N. C. 104.)

Ohio. — Stetson *v.* City Bank, 2 Ohio St. 167.

Pennsylvania. — Nikols *v.* Jones, 166 Pa. St. 599, 31 Atl. 329.

Tennessee. — Snell *v.* Allen, 1 Swan, 208; Wheeler *v.* State, 9 Heisk. 393; White *v.* German Nat. Bank, 9 Heisk. 475; Trousdale *v.* Philips, 2 Swan 384.

Virginia. — Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217. See also cases cited in following note.

Accordingly, a statement made before the transaction is not admissible. Dexter *v.* Clemans, 17 Pick. (Mass.) 175. Cheltenham Co. *v.* Cook, 44 Mo. 29.

44. Bocard *v.* State, 79 Ind. 270; Lee *v.* Brown, 21 Kan. 458; Cassitys *v.* Robinson, 8 B. Mon. (Ky.) 279; Hatch *v.* Elkins, 65 N. Y. 489; Stetson *v.* City Bank, 2 Ohio St. 167; Wheeler *v.* State, 9 Heisk. (Tenn.) 393; Trousdale *v.* Philips, 2 Swan (Tenn.) 384.

In Knott *v.* Peterson, 125 Iowa, 404, 101 N. W. 173, a surety on a

made after the expiration of the term for which the surety is bound.[45]

(2.) Receipts. — Receipts given by the principal for money paid to him are admissible against his sureties.[46]

(3.) Guardian's Inventory. — An inventory filed by a guardian in the course of his official duties is admissible against the sureties on his bond.[47]

(4.) Administrator's Settlement. — A settlement by an administrator is admissible against his sureties.[48]

(5.) Account Books. — Account books of the principal debtor are admissible against the surety.[49] In some cases, however, only such entries as were made in the course of official duty are admissible against sureties.[50]

b. *Officers.* — **(1.) When Admissible.** — Admissions of officers, to be admissible against their sureties, must be made in the performance of some official act or duty connected with the transaction

liquor dealer's bond agreed to pay all damages resulting from the unlawful sale of liquors by the principal. The principal illegally sold liquor to the plaintiff's husband and caused his death. It was held that declarations made by the principal the day after the death were not competent against the surety.

Declarations of an employe, made after an embezzlement and relating thereto, are not competent against a surety. Wieder *v.* Union Surety & Guar. Co., 42 Misc. 499, 86 N. Y. Supp. 105.

In Ayer *v.* Getty, 46 Hun (N. Y.) 287, admissions of a lessee principal made as a witness in the course of a trial of an action for the rent, more than six months after the termination of the lease, were held incompetent.

45. Hotchkiss *v.* Lyon, 2 Blackf. (Ind.) 222; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

Confession of a defaulting agent of a railroad company made after his discharge are not admissible against his surety. Pollard *v.* Louisville, C. & L. R. Co., 7 Bush (Ky.) 597.

To the same affect, that admissions after termination of service are not generally competent, see Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1; Tenth Nat. Bank *v.* Darragh, 1 Hun 111, 3 Thomp. & C. 138; McFarlane *v.* Howell (Tex. Civ. App.), 43 S. W. 315.

Admissions of an administrator made after his discharge are not competent against his sureties. Lacoste *v.* Bexar County, 28 Tex. 420.

As to admissions of public officers made after the expiration of their terms of office, see *post,* notes 52, 53.

46. People *v.* Huson, 78 Cal. 154, 20 Pac. 369; Magner *v.* Knowles, 67 Ill. 325. Sooy *v.* State, 41 N. J. L. 394. See also Singer Mfg. Co. *v.* Coon, 9 Misc. 465, 30 N. Y. Supp. 232.

As to the admissibility and effect of receipts in general, see article "PAYMENT," Vol. IX.

47. State *v.* Stewart, 36 Miss. 652.

48. Wycough *v.* State, 50 Ark. 102, 6 S. W. 598. See also article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 457, nn. 58, 59.

49. McKim *v.* Blake, 139 Mass. 593, 2 N. E. 157; Strong *v.* Baker, 25 Minn. 442; Metropolitan Life Ins. Co. *v.* Callen, 4 N. Y. Supp. 833; State *v.* Teague, 9 Rich (S. C.) 149 (cash book).

Such books are admissible although the entries therein were made by clerks. Williamsburg City Fire Ins. Co. *v.* Frothingham, 122 Mass. 391.

As to the admissibility of account books in general, see article "BOOKS OF ACCOUNT," Vol. II.

50. Middleton *v.* Melton, 10 B. & C. 317, 21 Eng. C. Law 84. Entries were admitted in Goss *v.* Watlington, 3 Brod. & Bing. (Eng.) 132; Whitnash *v.* George, 8 B. & C. (Eng.) 556; Town of Union *v.* Bermes, 44 N. J. L. 269, 43 Am. Rep. 369.

out of which the breach of the condition is alleged to have arisen.[51] It follows, of course, that admissions made after the term of office has expired are not generally competent;[52] although they may be so when the bond secures the performance of a subsequent act.[53]

(2.) Official Reports. — In an action against sureties on an official bond, the official entries and reports made by the principal are a part of the *res gestae,* and competent evidence, not only of the facts affirmatively appearing therein, but also of such other facts and circumstances bearing upon the liability of the sureties as are legit-

51. Evans *v.* State Bank, 13 Ala. 787; Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186 (using the language of the text); Lewis *v.* Lee County, 73 Ala. 148; Dobbs *v.* Justices, 17 Ga. 624; State *v.* Bird, 22 Mo. 470. See article "Officers," Vol. IX.

In Shelby *v.* Governor, 2 Blackf. (Ind.) 289, it was held that the acknowledgment of the sheriff that he had collected the money on an order of sale could not be proved to sustain an action for the money against the surety, unless his acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money, the court saying: "If Weathers, while officially acting in relation to the receipt of this money, stated that he had received it, such statement would form a part of the *res gestae,* and would be evidence to prove the act of receiving; and would therefore be admissible against his sureties. But declarations made by him at any subsequent period, would have no connection with the act, and could not be introduced as evidence of the act, so as to bind his sureties; for it is his acts, and not his admissions or declarations, for which his sureties are bound. As the statement of Weathers, that he had collected this money, is not connected by the testimony, with any act of his relative to this order of sale, or any money collected by him on this order, it was inadmissible as evidence against the defendant in this case."

In North Carolina a different rule prevails, as a result of statute. It is provided: "That in actions brought upon the official bonds of sheriffs, and other public officers, etc. when it may be necessary to prove any official default of any of the said officers, any receipt or acknowledgment of such officer, or any other matter or thing which, by law would be admissible, and competent, for, or toward proving the same, against such officer himself, shall, in like manner, be admissible and competent, against his sureties." See State *v.* Woodside, 30 N. C. 104.

52. Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186; Com. *v.* Brassfield, 7 B. Mon. (Ky.) 447; Pollard *v.* Louisville C. L. R. Co., 7 Bush (Ky.) 597; Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 1; City of St. Louis *v.* Foster, 24 Mo. 141; Tompkins County Sup'rs. *v.* Bristol, 15 Hun (N. Y.) 116.

53. In Jenness *v.* City of Black Hawk, 2 Colo. 578, "the undertaking of the sureties was that their principal should duly account for and pay over all moneys which should come to his hands by virtue of his office. The nature of the official duty, and the character and purpose of the suretyship, imply, if the words of the condition do not, indeed, import, that a full and formal statement of all moneys received should be rendered in writing. But in the nature of things, it cannot have been intended by the parties that such account should necessarily, and at all events, be rendered before the qualification of the officer's successor." Accordingly, admissions made during the performance of this subsequent act were held competent. See also Lewis *v.* Lee County, 73 Ala. 148; Wyche *v.* Myrick, 14 Ga. 584. The same rule applies as to treasurers of private corporations. Father Matthew Soc. *v.* Fitzwilliams, 12 Mo. App. 445; *s. c.,* 84 Mo. 406.

In Placer County *v.* Dickerson, 45 Cal. 12, receipts given by an officer after his legal term had expired but while he was still a *de facto* officer were admitted.

imately inferable therefrom.[54] And their public books are admissible although they have been kept by a clerk.[55]

(3.) Transcript of Accounts. — A transcript of accounts of a department of the United States government with a contractor is admissible against his sureties.[56]

(4.) Conclusiveness. — There has been a wide difference of opinion as to the conclusiveness of official reports, or entries made by public officials in the ordinary course of official duty. There is a respectable line of authority holding that such entries and reports are conclusive both upon the official making them and upon the sureties upon his official bond.[57] But the weight of authority is that they are only *prima facie* evidence against the surety.[58]

54. State *v.* Newton, 33 Ark. 276; Stern *v.* People, 102 Ill. 540; Nolley *v.* Callaway County, 11 Mo. 447; Northumberland *v.* Cobleigh, 59 N. H. 250; Tompkins County *v.* Bristol, 99 N. Y. 316, 1 N. E. 878; Lewiston *v.* Hoffman, 8 Misc. 583, 29 N. Y. Supp. 1119; Barry *v.* Screwmen's Ass'n., 67 Tex. 250, 3 S. W. 261. See also cases cited in succeeding notes.

An account required by law to be filed by a public official, is *prima facie* evidence of the amounts received by him, both against himself and against the sureties on his bond; but the sureties may show the account to be erroneous. Rodes *v.* Com., 6 B. Mon. (Ky.) 359. In the case cited it was admitted as a part of the *res gestae*.

Accounts rendered to the government by a revenue officer are admissible against his sureties. United States *v.* Gaussen, 19 Wall. (U. S.) 198.

55. "Public officers are always presumed regularly and duly to perform the duties imposed on them by law; therefore when books which the law requires them to keep are offered in evidence, all intendments are in their favor; it is presumed the entries were regularly made at the proper time and in accordance with the facts; consequently, if any irregularity, mistake or fraud is claimed to have been committed, the burden of establishing it is on the party relying upon it." State *v.* Rhoades, 6 Nev. 352. See Cassady *v.* Trustees of Schools, 105 Ill. 560, and article "Officers," Vol. IX.

56. Rev. Stat. § 886; Moses *v.* United States, 166 U. S. 571.

57. *Illinois.* — Morley *v.* Town of Metamora, 78 Ill. 394, 20 Am. Rep. 266; City of Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Cawley *v.* People, 95 Ill. 249; Longan *v.* Taylor, 130 Ill. 412, 22 N. E. 745; Doll *v.* People, 48 Ill. App. 418.

Indiana. — State *v.* Grammer, 29 Ind. 530; Modisett *v.* Governor, 2 Blackf. 135 (but see note 58).

Iowa. — Boone Co. *v.* Jones, 54 Iowa, 699, 2 N. W. 987, 7 N. W. 155, 37 Am. St. Rep. 229.

A sheriff's return on an execution was held conclusive on his sureties in Bagot *v.* State, 33 Ind. 262.

In Virginia it has been held that a settlement of a public officer is conclusive upon his sureties if they had notice of it, but otherwise only *prima facie* evidence. Supervisors of Washington Co. *v.* Dunn, 27 Gratt. (Va.) 608.

The argument advanced by the leading case of Baker *v.* Preston, Gilmer (Va.) 235, is, that as a judgment against the principal would conclude his sureties, so ought also the evidence on which the judgment is rendered conclude them. But see Munford *v.* Overseers, 2 Rand. (Va.) 313; Craddock *v.* Turner's Adm'r, 6 Leigh (Va.) 116.

Individual Books. — But the individual books of the officer are not conclusive. Schureman *v.* People, 55 Ill. App. 629.

58. *United States.* — United States *v.* Eckford, 1 How. 250; United States *v.* Boyd, 15 Pet. 187; *s. c.*, 5 How. 29; Supreme Coun. Cath. Knights of Am. *v.* Fid. & Cas. Co., 63 Fed. 48, 11 C. C. A. 96, 22 U. S. App. 439.

(5.) Entries Themselves a Breach of Bond. — Such entries, however, may in themselves constitute such fraud as would make the sureties liable under a bond for the faithful discharge of the duties of the office.[59]

(6.) Corporation Officers. — Reports of an officer of a corporation are merely *prima facie* evidence against his sureties.[60]

c. *In Action Against Principal and Surety Jointly.* — In some jurisdictions, when principal and surety are jointly sued on a joint, or a joint and several obligation, any admission or declaration made by the principal, which is competent evidence against him, is also competent against the surety.[61]

Arkansas. — Arkansas *v.* Newton, 33 Ark. 277.

Indiana. — Ohning *v.* City of Evansville, 66 Ind. 59; State *v.* Mock, 21 Ind. App. 629, 52 N. E. 998 (*dictum*); Nichols' Adm'r *v.* State, 65 Ind. 512.

Mississippi. — Mann *v.* Yazoo City, 31 Miss. 574.

Missouri. — Nolley *v.* Callaway County, 11 Mo. 447.

Nebraska. — Van Sickle *v.* Buffalo Co., 13 Neb. 103, 13 N. W. 19, 42 Am. Rep. 753; Albertson *v.* State, 9 Neb. 429, 2 N. W. 742, 892; State *v.* Paxton, 65 Neb. 110, 90 N. W. 983.

New York. — Bissell *v.* Saxton, 66 N. Y. 55.

Texas. — Broad *v.* City of Paris, 66 Tex. 119, 18 S. W. 342.

59. United States *v.* Girault, 11 How. (U. S.) 22.

"Under bonds obligating the surety for the faithful discharge of official duty by his principal, the evidence offered to show fabricated entries or false reports may show such official dereliction or fraud as in itself would constitute a breach of the obligation of the bond." Supreme Coun. Cath. Knights of Am. *v.* Fid. & Cas. Co., 22 U. S. App. 439, 63 Fed. 48, 11 C. C. A. 96.

60. Lewison *v.* Hoffman, 8 Misc. 583, 29 N. Y. Supp. 1119.

61. *Indiana.* — Parker *v.* State, 8 Blackf. 292; Chapel *v.* Washburn, 11 Ind. 393. But see Pierce *v.* Goldsberry, 35 Ind. 317.

Massachusetts. — Amherst Bank *v.* Root, 2 Metc. 541.

Mississippi. — Montgomery *v.* Dillingham, 3 Smed. & M. 647.

Missouri. — Union Sav. Ass'n. *v.* Edwards, 47 Mo. 445.

Texas. — Lasater *v.* Purcell Mill & El. Co., 22 Tex. Civ. App. 33, 54 S. W. 425.

Vermont. — Brown *v.* Munger, 16 Vt. 12.

Declarations of the principal as to alleged admissions of the surety are incompetent. Root Music Co. *v.* Caldwell, 54 Iowa 432, 6 N. W. 695.

The changes in the law allowing parties to testify, and allowing several judgments against joint defendants has not changed this rule. Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417.

Reasons. — "As the suit is against several joint contractors or joint obligors a recovery to the san. extent must be had against all or none, unless one or more of the defendants interposes a personal defense, such as infancy, coverture, or bankruptcy." Lewis *v.* Lee County, 73 Ala. 148.

"Where a surety was sued separately, there would be no difficulty in applying the rule (if it was a rule) against the admissibility, as against sureties, of admissions of the principal subsequently made; but where the suit is against the principal and sureties jointly, the difficulty becomes obvious. The admission of the principal is admissible against himself; how can it be rejected as against the surety; the plaintiff must recover against all or none. And the fact of severing in pleading makes no difference as to this." Atlas Bank *v.* Brownell, 9 R. I. 168, 11 Am. Rep. 231.

Cases Contra. — This exception is not law in Alabama. Lewis *v.* Lee County, 73 Ala. 148. See also Daniel *v.* Ballard, 2 Dana (Ky.) 296.

d. *Admission of Deceased Principal.* — Admissions of a principal, since deceased, are competent against his sureties, although not made at the time of the transaction:[62] but admissions of an administrator of the principal are incompetent.[63]

e. *Declarations As To Character of Other Parties.* — A declaration of one party to the contract that others are principals is not admissible against them.[64]

f. *Declarations of Hearsay.* — Declarations of the principal as to declarations and admissions of the surety are clearly hearsay and inadmissible.[65]

g. *Effect of Admissions.* — Admissions of a principal, when competent, are *prima facie* evidence against his sureties.[66] The surety is not confined to the impeachment of the admissions, but may show any facts which tend to a contrary conclusion.[67]

B. Of Surety. — Admissions and declarations of one surety are not competent to charge a cosurety:[68] nor are such admissions competent to charge the principal.[69]

C. Of Creditor. — An admission of non-indebtedness by the creditor is *prima facie* but not conclusive evidence in favor of the sure-

62. Middleton *v.* Melton, 10 Barn. & C. (Eng.) 317, 21 Eng. C. L. 84; Drabek *v.* Grand Lodge, 24 Ill. App. 82; Hinkley *v.* Davis, 6 N. H. 210, 25 Am. Dec. 457; Peck *v.* Gilmer, 20 N. C. 249; State *v.* Taegue, 9 Rich. (S. C.) 149.

Of course, when the admissions would be competent if the principal were living they are equally competent after his death. Walker *v.* Pierce, 21 Gratt. (Va.) 722.

63. This is because there is no privity between the administrator and the surety. Harrison *v.* Heflin, 54 Ala. 552.

64. Barkley *v.* Bradford, 18 Ky. L. Rep. 725, 38 S. W. 432. And it has been held that an admission of a fact which is immaterial as to the party making it is not competent as to others; as where the declarations relate to the time of a defalcation for which he was clearly liable Lane *v.* State, 27 Ind. 108.

65. Root Music Co. *v.* Caldwell, 54 Iowa, 432, 6 N. W. 695.

66. Stephens *v.* Crawford, 1 Ga. 574, 44 Am. Dec. 680; State *v.* McKee, 11 Gill & J. (Md.) 378; State *v.* Stewart, 36 Miss. 652; Treasurers *v.* Bates, 2 Bailey, (S. C.) 362. See also to the effect that admissions of the principal are not conclusive upon the surety. McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552; Labaree *v.* Klosterman, 33 Neb. 150, 49 N. W. 1102.

67. Books and records kept by a state treasurer, and statements made by him and filed in the office of the auditor are *prima facie* evidence against his sureties. "They are not conclusive, however, nor are the sureties confined to the impeachment of such books, records and statements, but they may show the facts as to when such defalcation occurred, and the amount thereof, in any way and by any testimony by which any other fact would be established." State *v.* Paxton, 65 Neb. 110, 90 N. W. 983.

"They may show that they were made by mistake, or by fraud and collusion between an insolvent sheriff and his creditors." Treasurers *v.* Bates, 2 Bailey (S. C.) 362.

68. Very *v.* Watkins, 23 How. (U. S.) 469.

69. Thurman *v.* Blankenship-Blake Co., 79 Tex. 171, 15 S. W. 387. But see Chapel *v.* Washburn, 11 Ind. 393.

ty.[70] The account books of the obligee are competent against him when relevant.[71]

4. Judgments. — A. AGAINST PRINCIPAL. — a. *Under Bonds of General Indemnity.* — **(1.) Generally Not Admissible.** — In most jurisdictions a judgment against a principal is evidence against a surety only of the fact of its recovery, and not of the facts it assumes to decide.[72] An exception is made when the surety has undertaken to be responsible for the result of a suit.[73]

(2.) Record of Bankruptcy Proceedings. — The record of bankruptcy proceedings against the maker of a note is not admissible against a surety on the note.[74]

(3.) View That Judgments Are Prima Facie Evidence. — In some jurisdictions, however, the recovery of a judgment or decree against the principal on a bond, although the sureties were not parties to the suit, is *prima facie* binding upon the sureties.[75]

70. In Moses *v.* United States, 166 U. S. 571, this was held as to a certificate of non-indebtedness given by the government to an army officer. See also Soule *v.* United States, 100 U. S. 8. To the effect that an admission of the obligee is competent in favor of the surety, see Mennet *v.* Grisard, 79 Ind. 222.

71. Citizens Nat. Bank *v.* Wilson, 121 Iowa 156, 96 N. W. 727. In this case entries in the obligee's books were admitted to show that a new note was accepted as payment, thereby extending time.

72. *California.* — Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647.

Minnesota. — American Bldg. & Loan Ass'n. *v.* Stoneman, 53 Minn. 212, 54 N. W. 1115.

New Jersey. — DeGreiff *v.* Wilson, 30 N. J. Eq. 435.

New York. — Thomas *v.* Hubbell, 15 N. Y. 405, 69 Am. Dec. 619, *reversing* 18 Barb. 9; Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874; Jackson *v.* Griswold, 4 Hill 522; Douglass *v.* Howland, 24 Wend. 35.

Texas. — Glasscock *v.* Hamilton, 62 Tex. 143.

Vermont. — Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98.

Wisconsin. — Grafton *v.* Hinckley, 111 Wis. 46, 86 N. W. 859.

Reasons. — "It is a fundamental principle in jurisprudence that every man shall have his day in court, and shall be heard in his own defense, and of this right he may not, under the constitution and laws of this state, be deprived. For this reason, judgment against the principal may never foreclose investigation of the surety's liability, unless, by virtue of the latter's undertaking, he has obligated himself directly or by implication to be bound thereby." McConnell *v.* Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312.

"A surety may give notice to his principal who owes him this duty to defend him, but it would be a novelty if the principal could call in his surety who owes no such duty, to defend him. * * * A surety in a separate and independent instrument is no party who could appear and control the separate action against his principal or appeal from the judgment. Nor is there a legal privity. *Privity*, says Mr. Greenleaf, § 189, denotes mutual or successive relationship to the same right of property. In none of the classes enumerated, as in estate, in blood, and in law, does the case of a surety fall in reference to a creditor's *action*. It is the right to represent, which creates privity in law as between ancestor and heir, decedent and administrator, &c., but clearly the principal, in an action against himself alone, cannot represent the surety." Giltinan *v.* Strong, 64 Pa. St. 242.

73. McConnell *v.* Poor, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312.

74. Kennedy *v.* Moore, 17 S. C. 464.

75. *Georgia.* — Bradwell *v.* Spencer, 16 Ga. 578; Bennett *v.* Graham,

A judgment against an insurance company is *prima facie* evidence in a suit on a bond executed by the company to indemnify policy holders.[76]

It must first be shown that the judgment relates to the subject-matter of the suretyship.[77]

b. *Under Bonds To Abide the Judgment.* — **(1.) In General.** There is a line of cases in which the judgment is held conclusive, and this independently of the general holding in other cases. These cases are those in which the court interprets the contract as stipulating to abide by the judgment.[78]

(2.) Obligation To Satisfy Judgment. — Where a surety's obligation

71 Ga. 211; Weaver *v.* Thornton, 63 Ga. 655.

Iowa. — Charles *v.* Haskins, 14 Iowa 471, 83 Am. Dec. 378.

Kentucky. — Com. *v.* Bracken, 17 Ky. L. Rep. 785, 32 S. W. 609.

Louisiana. — Ferguson *v.* Glaze, 12 La. Ann. 667; Macready *v.* Schenck, 41 La. Ann. 456, 6 So. 517; Whitehead *v.* Woolfolk, 3 La. Ann. 42.

Maryland. — Parr *v.* State, 71 Md. 220, 17 Atl. 1020; Jenkins *v.* State, 76 Md. 255, 23 Atl. 608, 790.

Michigan. — People *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

Missouri. — State *v.* Thornton, 8 Mo. App. 27.

New York. — Pierpoint *v.* McGuire, 13 Misc. 70, 34 N. Y. Supp. 150.

Ohio. — O'Conner *v.* State, 18 Ohio 225.

Tennessee. — Barksdale *v.* Butler, 6 Lea 450. See also Gambill *v.* Campbell, 12 Heisk. 737.

"To avoid its effect, the surety may show collusion and fraud, that the demand has been paid, or that there is a clerical mistake in entering up the judgment." Berger *v.* Williams, 4 McLean 577, 3 Fed. Cas. No. 1,341; Charles *v.* Haskins, 14 Iowa, 471, 83 Am. Dec. 378.

In a suit on a bail-bond, a return of *non est* is *prima facie* evidence of an avoidance. Hall *v.* White, 27 Conn. 488.

76. Union Guaranty & Trust Co. *v.* Robinson, 79 Fed. 420, 24 C. C. A. 650, 49 U. S. App. 148. This was supported upon the authority of City of Lowell *v.* Parker, 10 Metc. (Mass.) 309, where Shaw, C. J., said: "When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence, in a suit against the party so responsible for that other."

77. New Haven *v.* Chidsey, 68 Conn. 397, 36 Atl. 800; Roberts *v.* Woven Wire Mattress Co., 46 Md. 374. See also Bradford *v.* Frederick, 101 Pa. 445.

The judgment should disclose with certainty that it was founded upon the negligent or other improper conduct of the principal. Lake Drummond C. & W. Co. *v.* West End Trust & S. D. Co., 131 Fed. 147.

78. "There can be no doubt, that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. . . . It is upon this ground that the liability of bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647. See also Riddle *v.* Baker, 13 Cal. 295; Conner *v.* Reeves, 103 N. Y. 527.

is to satisfy a judgment, the record of the judgment is conclusive evidence of his liability.[79] Instances of such obligations are bonds for the release of attachments,[80] bonds to stay executions, and injunction bonds.[81]

(3.) Official Bonds. — (A.) In General. — In some jurisdictions sureties on official bonds are held impliedly to undertake to pay judgments rendered against their principal, and accordingly such judgments are held admissible and are at least *prima facie* evidence.[82] On the other hand, it is held elsewhere that there is no such agreement, and accordingly such judgments are not admissible.[83]

(B.) Effect of Notice. — In some jurisdictions it is said that judgments in such cases are conclusive when the surety had notice of the proceeding, but only *prima facie* when he did not have notice.[84]

79. *California.*— Riddle *v.* Baker, 13 Cal. 295.

Georgia.— Mitchell *v.* Toole, 63 Ga. 93.

Louisiana.— Fusz *v.* Trager, 39 La. Ann. 292, 1 So. 535; Jones *v.* Doles, 3 La. Ann. 588.

Michigan.— People *v.* Laning, 73 Mich. 284, 41 N. W. 424.

Mississippi. — Higdon *v.* Vaughn, 58 Miss. 572.

New York.— Barber *v.* Rutherford, 12 Misc. 33, 33 N. Y. Supp. 89, *affirming* 10 Misc. 784, 30 N. Y. Supp. 1129; Lee *v.* Clark, 1 Hill 56.

Ohio.— Jaynes *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810.

Thus a judgment rendered on a bond given by a defendant in a distress warrant or trover proceeding is conclusive on a surety. Price *v.* Carlton, 121 Ga. 12, 48 S. E. 721, 68 L. R. A. 736; Waldrop *v.* Wolff, 114 Ga. 610, 40 S. E. 830.

80. Fusz *v.* Trager, 39 La. Ann. 292, 1 So. 535; Jaynes *v.* Platt, 47 Ohio St. 262, 24 N. E. 262, 21 Am. St. Rep. 810. See, however, Lartigue *v.* Baldwin, 5 Mart. O. S. (La.) 193.

81. A surety on an injunction bond is concluded by the judgment dismissing the action. Shenandoah Nat. Bank *v.* Read, 86 Iowa 136, 53 N. W. 96. See also McAllister *v.* Clark, 86 Ill. 236; Lothrop *v.* Southworth, 5 Mich. 436; Towle *v.* Towle, 46 N. H. 431.

82. "The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud or misconduct of the officer. The bond is made with the full knowledge and understanding that in many cases such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable; and the fair construction of the contract of the sureties is, that they will pay all damages so ascertained and liquidated in an action against their principal." Stephens *v.* Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793; McConnell *v.* Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312. See also Moses *v.* United States, 166 U. S. 571; Com. *v.* Gould, 118 Mass. 300.

83. "The surety on the sheriff's official bond has not agreed that his principal shall pay any specific judgment, or that his principal shall pay any judgment whatever. And hence the production of the judgment shows no liability. He has agreed that the principal shall faithfully perform his office. But the judgment against the plaintiff does not, as against the surety, show that the sheriff did not so perform." People *v.* Russell, 25 Hun (N. Y.) 524. See also Loewer's Gambrinus Brew. Co. *v.* Lithaner, 43 Misc. 683, 88 N. Y. Supp. 372. See article "Officers," Vol. IX.

84. Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275; People *v.* White, 28 Hun (N. Y.) 289; State *v.* Colerick, 3 Ohio 487; Westerhaven *v.* Clive, 5 Ohio 136; State *v.* Jennings, 14 Ohio St. 73.

Elsewhere it is held that the judgment is conclusive whether notice is given or not.[85]

(C.) Sheriffs and Constables. — This conflict extends to bonds of sheriffs and constables. In some jurisdictions a judgment against a sheriff or constable is admissible against his sureties and is *prima facie* evidence;[86] in others it is conclusive;[87] and in still others it is not admissible at all.[88]

(4.) Bonds of Executors, Administrators and Guardians. — (A.) In General. — Bonds of executors, administrators and guardians are of the same class, and judgments against them are conclusive evidence against their sureties.[89]

(B.) Obligation To Account. — Where the duty guaranteed by the sureties is that an executor or guardian will account before any court of competent jurisdiction, a decree of such a court in relation thereto is conclusive upon the surety;[90] but only such decrees

85. Rice *v.* Wilson, 129 Mich. 520, 89 N. W. 336.

86. City of Lowell *v.* Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436 (but see Tracy *v.* Goodwin, 5 Allen (Mass.) 409, where the evidence is said to be conclusive); Treasurers *v.* Temples, 2 Spears Law (S. C.) 48; State *v.* Cason, 11 S. C. 392; Stephens *v.* Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793.

Even a judgment by confession has been admitted. Atkins *v.* Baily, 9 Yerg. (Tenn.) 111.

Judgments of amercement were held *prima facie* evidence against But the surety may take advantage sureties in Fay *v.* Edmiston, 25 Kan. 439; Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249.

87. Tracy *v.* Goodwin, 5 Allen (Mass.) 409, *holding* the case of City of Lowell *v.* Parker, 10 Metc. (Mass.) 309, to be a mere *dictum* on the point of conclusiveness. See also Dennie *v.* Smith, 129 Mass. 143; Evans *v.* Com., 8 Watts. (Pa.) 398; Eagles *v.* Kern, 5 Whart. (Pa.) 144. of any defense personal to himself. Masser *v.* Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668.

88. Pico *v.* Webster, 14 Cal. 202, 73 Am. Dec. 647; Governor *v.* Shelby, 2 Blackf. (Ind.) 26.

A judgment on an indemnity bond given to a sheriff is not admissible against sureties. Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679.

89. "The duty they have assumed is, that their principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as administrator, if the estate be solvent." Heard *v.* Lodge, 20 Pick. (Mass.) 53, 58.

"The law has placed the sureties of executors and administrators on a different footing from other sureties and co-obligors in general. They are not liable on the administration-bond, until a devastavit is judicially established; and, as the question of a devastavit is all that is controverted in the suit against the executor or administrator, the decision is conclusive not only against the executor or administrator, but against the sureties also." Governor *v.* Shelby, 2 Blackf. (Ind.) 26.

90. *Illinois.* — Nevitt *v.* Woodburn, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315.

Maine. — Judge of Probate *v.* Quimby, 89 Me. 574, 36 Atl. 1049.

New York. — Douglass *v.* Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Gerould *v.* Wilson, 16 Hun 530, *affirmed* 81 N. Y. 573.

Ohio. — Braiden *v.* Mercer, 44 Ohio St. 339. 7 N. E. 155.

Pennsylvania. — Garber *v.* Com., 7 Pa. St. 265; Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21.

Wisconsin. — Meyer *v.* Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124.

are admissible as are made against the guardian personally.[91]

(C.) Decree Settling Account. — A decree of distribution and an order settling an account are conclusive upon an executor and his sureties.[92] Likewise, a decree settling a guardian's account is conclusive upon his sureties.[93] But such a decree is not conclusive as to defenses personal to the surety.[94]

(D.) Judgments in Favor of Third Parties. — A judgment against an administrator is conclusive upon the sureties on his official bond.[95] Likewise, a judgment against a guardian for an amount due his ward is conclusive upon his sureties.[96]

(E.) Decree Removing Guardian. — A decree removing a guardian is conclusive as against his sureties.[97]

(F.) Prima Facie Evidence in Some Jurisdictions. — In some jurisdictions, however, judgments and decrees against executors, administrators and guardians are only *prima facie* evidence against sureties.[98]

(5.) Bonds of Assignees for Creditors. — Upon the same principle which governs in cases of administrator's bonds, it has been held

91. McDonald *v.* People, 12 Colo. App. 98, 54 Pac. 863.

The sureties on an administrator's bond are not bound by a decree settling accounts of his successor. Reither *v.* Murdock, 135 Cal. 197, 67 Pac. 784.

92. Martin *v.* Tally, 72 Ala. 23; Jones *v.* Ritter's Adm'r., 56 Ala. 270; Treweek *v.* Howard, 105 Cal. 434, 39 Pac. 20; Irwin *v.* Backus, 25 Cal. 214, 85 Am. Dec. 125; State *v.* Donegan, 83 Mo. 374, *affirming* 12 Mo. App. 190; Dix *v.* Morris, 66 Mo. 514. See also Crook *v.* Newborg, 124 Ala. 479, 27 So. 432, 82 Am. St. Rep. 190.

An order of payment, made upon settlement of accounts, is conclusive on the sureties. State *v.* Creusbauer, 68 Mo. 254. See also Ralston *v.* Wood, 15 Ill. 159, 58 Am. Dec. 604.

An order directing the payment of an allowance is conclusive. State *v.* James, 82 Mo. 509.

93. Ryan *v.* People, 165 Ill. 143, 46 N. E. 206; State *v.* Hoshaw, 86 Mo. 193.

The sureties are concluded by a decree finding the amount due. Com. *v.* Julius, 173 Pa. St. 322, 34 Atl. 21; Shepard *v.* Pebbles, 38 Wis. 373.

94. Martin *v.* Tally, 72 Ala. 23.

95. McCalla *v.* Patterson, 18 B. Mon. (Ky.) 201; Hobbs *v.* Middleton, 1 J. J. Marsh. (Ky.) 176. See also Brown *v.* Pike, 74 N. C. 531.

96. Brooks *v.* People, 15 Ill. App. 570; Badger *v.* Daniel, 79 N. C. 372.

97. Deegan *v.* Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742. See Gravett *v.* Malone, 54 Ala. 19.

98. *Florida.* — May *v.* May, 19 Fla. 373.

Georgia. — Bennett *v.* Graham, 71 Ga. 211; Bradwell *v.* Spencer, 16 Ga. 578.

Louisiana. — Verret *v.* Belanger, 6 La. Ann. 109; Canal & Banking Co. *v.* Brown, 4 La. Ann. 545.

Missouri. — State *v.* Rosswaag, 3 Mo. App. 11, State *v.* Engelke, 6 Mo. App. 356.

South Carolina. — Ordinary *v.* Carlile, 1 McMull. Law, 100; Ordinary *v.* Wallace, 1 Rich. L., 507; but in a later report of this case, found in 2 Rich. L., 460, the court said: "It certainly was, in the beginning, stretching legal principles as far as they would bear, to hold that it was only *prima facie* evidence."

A confession of judgment by an administrator has been held to be *prima facie* against his sureties. Iglehart *v.* State, 2 Gill. & J. (Md.) 235.

In Annett *v.* Terry, 35 N. Y. 256, it is said that "the sureties are so far concluded, by its terms, that they

that a judgment against an assignee for creditors is conclusive on his sureties.[99]

(6.) Bonds To Protect Against Mechanics' Liens. — An undertaking to protect against mechanics' liens has been held to be subject to the same rule;[1] but the contrary result has been reached in some jurisdictions.[2]

(7.) Collusive Judgments. — Judgments suffered collusively[3] or negligently[4] by the principal are not conclusive upon the surety. Thus, where the principal fails to take advantage of the statute of limitations, the surety will not be concluded.[5] It has been held, however, that the surety should seek his relief in equity.[6]

c. *Where Surety Has Been Called Upon To Defend.* — Where the surety has been called in to defend the action by the principal,

cannot impeach it for error or irregularity by an appeal, on their own motion, nor collaterally"; and yet the judgment was said to be only *prima facie* evidence.

99. "The duties imposed by law upon these two classes of fiduciaries are almost exactly similar. Each administers the estate committed to his charge, pays the debts, and pays over to those entitled the surplus found to be due upon his settlement." National Surety Co. *v.* Arteburn, 23 Ky. L. Rep. 281, 62 S. W. 862. See also Walsh *v.* Miller, 51 Ohio St. 462, 38 N. E. 381; Moulding *v.* Wilhartz, 169 Ill. 422, 48 N. E. 189.

1. "This contract or obligation necessarily contemplated that litigation might arise or grow out of the enforcement of such claims or mechanics' liens connected with the building of the house. It was not possible for Nolan and McLaughlin to become parties to any such litigation, or to, in any way, control the same. In this respect their position was, in no way, different from that occupied by a surety in a bail-bond in a criminal case or a surety in an appeal bond in a civil case. Therefore, a fair construction of the undertaking leads us to the conclusion that Nolan and McLaughlin assumed the responsibility and results of a contestation of such suit by their principals, and, so far as the force or effect of the judgments is concerned, Nolan and McLaughlin must occupy the shoes of the Dempsey Bros." McFall *v.* Dempsey, 43 Mo. App. 369. See also Oberbeck *v.* Mayer, 59 Mo. App. 289; Comstock *v.* Cameron, 41 Neb. 814, 60 N. W. 105.

Such a judgment was held *prima facie* evidence in Ihrig *v.* Scott, 13 Wash. 559, 43 Pac. 633; LaFayette Bldg. Ass'n. *v.* Kleinhoffer, 40 Mo. App. 388.

A default judgment is not conclusive. Aeschlimann *v.* Presbyterian Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723.

2. State *v.* Tiedermann, 10 Fed. 20.

3. *United States.* — Berger *v.* Williams, 4 McLean 577, 3 Fed. Cas. No. 1,341.

Iowa. — Charles *v.* Haskins, 14 Iowa, 471, 83 Am. Dec. 378.

Maine. — Dane *v.* Gilmore, 51 Me. 544.

New Hampshire. — Great Falls Mfg. Co. *v.* Worster, 45 N. H. 110.

North Carolina. — Parker *v.* Woodside, 29 N. C. 296.

South Carolina. — Treasurers *v.* Bates, 2 Bailey 362.

Vermont. — Parkhurst *v.* Sumner, 23 Vt. 538, 56 Am. Dec. 94.

4. Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80.

5. Dawes *v.* Shed, 15 Mass. 6, 8 Am. Dec. 80.

6. "If he apprehends any fraudulent collusion between the parties to the decree, his remedy is in chancery for relief against the bond. If this were not the case—as the action is against principal and surety jointly—the result would be that Southworth would be permitted, under color of Cleveland's claim of injury, to relitigate the matters settled by the de-

the judgment is conclusive against him.[7] It must be shown, however, that clear notice has been given to the surety;[8] but such notice need not be in writing, and it may therefore be proved by parol evidence.[9] Where the surety actually assumes the defense the judgment is clearly conclusive.[10]

d. *Where Surety Has Been a Party.* — Where the surety has been a party to the action, and has filed an answer, a judgment therein against the principal is conclusive against him.[11]

e. *Judgments By Confession.* — In some jurisdictions judgments by confession or default are not admissible against the surety.[12] Such a judgment has but the value of a private agreement between the principal and his creditors.[13] In some cases, however, such judgments have been admitted,[14] and held to be *prima facie* evidence.[15]

cree." Lothrop *v.* Southworth, 5 Mich. 436.

7. "The case presents one of the exceptions to the general rule that no one is bound by a judgment unless he be a party to it, or in privity with a party." Hersey *v.* Long, 30 Minn. 114, 14 N. W. 508. See also:

United States. — Lake Drummond Canal & W. Co. *v.* West End Trust & S. D. Co., 131 Fed. 147.

California. — Showers *v.* Wadsworth, 81 Cal. 270, 22 Pac. 663.

Connecticut. — Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3.

Massachusetts. — Train *v.* Gold, 5 Pick. 379.

Missouri. — Stewart *v.* Thomas, 45 Mo. 42.

New York. — Mayor, etc. of New York *v.* Brady, 70 Hun 250, 24 N. Y. Supp. 296.

Washington. — Henry *v.* Aetna Indemnity Co., 36 Wash. 553, 79 Pac. 42; Friend *v.* Ralston, 35 Wash. 422, 77 Pac. 794.

Of course if the surety, in pursuance of such notice, takes charge of the case, the evidence is clearly admissible. Great Northern R. Co. *v.* Akeley, 88 Minn. 237, 92 N. W. 959. See cases cited *post,* note 10.

8. Hersey *v.* Long, 30 Minn. 114, 14 N. W. 508.

9. Hersey *v.* Long, 30 Minn. 114, 14 N. W. 508; Crawford *v.* Turk, 24 Gratt. (Va.) 176.

10. Jennings *v.* Sheldon, 44 Mich. 92, 6 N. W. 96; Reed *v.* McGregor, 62 Minn. 94, 64 N. W. 88; Great Northern R. Co. *v.* Akeley, 88 Minn. 237, 92 N. W. 959.

11. Stoops *v.* Wittler, 1 Mo. App. 420.

12. Herrick *v.* Conant, 4 La. Ann. 276; Allison *v.* Thomas, 29 La. Ann. 732; Foxcroft *v.* Stevens, 4 Greenl. (Me.) 72; Aeschlimann *v.* Pres. Hospital, 165 N. Y. 296, 59 N. E. 148, 80 Am. St. Rep. 723.

13. Allison *v.* Thomas, 29 La. Ann. 732.

14. Iglehart *v.* State, 2 Gill. & J. (Md.) 235; Picot *v.* Signiago, 27 Mo. 125; Nimocks *v.* Pope, 117 N. C. 315, 23 S. E. 269 (surety on replevin bond bound by compromise judgment); Atkins *v.* Baily, 9 Yerg. (Tenn.) 111.

15. "Can it be affirmed, as a matter of law, that the conditions of the bond only covered judgments obtained upon hostile and adverse litigation, and that no discretion was left in the sheriff to consent to a judgment, although he believed that by so doing money would be saved to the parties ultimately liable? This we think would be a too strict interpretation of the contract. But at the same time to hold that a judgment entered by consent of the parties, and without notice to or approval by the sureties, is, in the absence of proof of fraud or collusion, conclusive against them, would open the door to the perpetration of secret frauds and subject sureties to a most hazardous responsibility, and to the discretion and judgment of a third person, which might seriously imperil

B. In Favor of Principal. — A judgment in favor of the principal is admissible in favor of the surety, and is conclusive.[16]

C. Against Surety. — a. *Admissible Against Principal.* — A judgment against a surety is *prima facie* evidence against the principal. It is conclusive where the principal had notice of the action.[17]

b. *Admissibility Against Cosurety.* — A judgment against one surety is not admissible in his favor in a suit for contribution against another surety, unless the latter had notice of the proceeding, and an opportunity to defend.[18]

5. Awards. — Awards of arbitrators chosen by the principal and the debtor are not admissible against the surety,[19] unless he has agreed to be bound by such a submission.[20]

6. Statements rendered by Creditor to Debtor. — Statements of account rendered by the creditor to the debtor and consented to by the latter are admissible to show application of payments as against the surety.[21]

7. Evidence of What Was Said and Done at Time of Contract. Evidence of what was said and done at the time of the execution of a bond is competent.[22] Such testimony may be used to show that a

them. * * * We think the reasonable rule is that a judgment so obtained is presumptive evidence only against the sureties." Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439. See also Iglehart *v.* State, 2 Gill & J. (Md.) 235.

16. "The issue is precisely the same in this suit as it was in the former one; and the judgment of the court of competent jurisdiction is conclusive in a second suit between the same parties, or their privies, on the same question, although the subject-matter may be different." State *v.* Coste, 36 Mo. 437, 88 Am. Dec. 148.

17. Dexter Horton & Co. *v.* Sayward, 66 Fed. 265. See also Thomas *v.* Beckman, 1 B. Mon. (Ky.) 29. Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54; Chipman *v.* Fambro, 16 Ark. 291; Bone *v.* Torry, 16 Ark. 83.

18. Breckinridge *v.* Taylor, 5 Dana (Ky.) 110. In this case the court said, "Although there was no such privity between Taylor and Breckinridge as would make the record of the suit against the one, evidence, *per se*, against the other—still we are of the opinion that, Breckinridge being liable over to Taylor for a portion of whatever he was compelled to pay, there was that kind of relation between them which would have given to Breckinridge the right to defend the suit against Taylor, and therefore, such as to make the record of that suit evidence against him, if he had such actual notice of the pendency of the suit as might have enabled him to make a full and proper defense on the trial of its merits." See also Kramph's Exrx. *v.* Hatz's Exrs., 52 Pa. St. 525.

A somewhat broader rule seems to be laid down in Cobb *v.* Haynes, 8 B. Mon. (Ky.) 137.

Such evidence was permitted in Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241, and held to be *prima facie*.

19. Simonton *v.* Boucher, 2 Wash. C. C. 473, 22 Fed. Cas. No. 12,877; Beall *v.* Beck, 3 Har. & McH. (Md.) 242.

20. Binsse *v.* Wood, 37 N. Y. 526. Where the terms of the contract provide for submission and the surety takes an active part in the proceedings, he is bound by the award. Hostetter *v.* City of Pittsburgh, 107 Pa. St. 419.

21. White Sewing Mach. Co. *v.* Fargo, 51 Hun 636, 3 N. Y. Supp. 494.

22. Sureties may testify as to conversations at the time a bond was signed, to the effect that the bond was not to be used unless another signed it, when the creditor had con-

bond was delivered conditionally. But it has been held that such evidence is not admissible against the obligee when not brought home to him.[23]

8. Habits of Alleged Surety. — Evidence of the habits of business of an alleged surety, as to becoming surety, is not admissible.[24]

9. Financial Condition of Parties. — Evidence of the pecuniary embarrassment of the principal is generally incompetent to show his default; but under special circumstances, as where he is shown to have commingled money promiscuously, it may be admitted.[25] Evidence of the financial condition of a surety is incompetent upon an issue as to consideration.[26]

10. Recitals. — A recital in a mortgage that one of the parties

structive notice by the insertion of the name of the other surety. Such evidence is competent not only as part of the *res gestae*, but as defining the obligation which by the delivery of the incomplete instrument the sureties were willing to undertake. People *v.* Sharp, 10 Detroit Leg. N. 217, 94 N. W. 1074. To the same effect see Benton County Sav. Bank *v.* Boddicker, 117 Iowa 407, 90 N. W. 822. See also in support of the text State *v.* Gregory, 132 Ind. 387, 31 N. E. 952; Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561; Wilson *v.* Powers, 131 Mass. 539 (where prior conversations were admitted as well).

23. Johnston *v.* Patterson, 114 Pa. St. 398, 6 Atl. 746; Hardwick Sav. Bank & Trust Co. *v.* Drenan, 71 Vt. 289, 44 Atl. 347.

Evidence of what the principal told the surety at the time the surety signed a note is hearsay, and incompetent. Ricketts *v.* Harvey, 78 Ind. 152.

"Conversations between a principal and his sureties on an official bond are not competent evidence. The obligee of such a bond is not bound by what occurs between the principal and sureties, unless brought to the knowledge of the officers whose duty it is to accept such a bond prior to its delivery." Harvey *v.* State, 94 Ind. 159.

24. Triplett *v.* Goff's Adm'r, 83 Va. 784, 3 S. E. 525. The reason given is that, in general, evidence of habit is inadmissible to show that a person did or did not do a particular thing. Such evidence is admissible only when the nature of the action involves or directly affects the general character of the party.

25. "A public officer would not be presumed to apply public moneys to meet personal liabilities. His embarrassed condition as an individual, would therefore generally have no tendency to prove his misapplication of the public funds. There is no necessary connection between the facts. But when the public officer is shown to have mingled promiscuously his own money with the money of the public, and to have been in the constant practice of meeting demands against the public funds in his hands with his individual effects, and *vice versa* to have paid off private debts with the public moneys, the presumption with which the officer is ordinarily favored is destroyed. These facts being established, his pecuniary embarrassments form a link in the same chain of testimony, and should have been admitted." Nolley *v.* Callaway County, 11 Mo. 447.

26. In Deposit Bank *v.* Peak, 23 Ky. L. Rep. 19, 62 S. W. 268, the father of the principal debtor signed as surety before the delivery of the bond. The defendant signed as surety after delivery, and offered evidence that the father was a man of means while he was not, to show acceptance before his signature was given, and a consequent want of consideration. The evidence was excluded, the court saying: "The most natural effect of this evidence was to lead the attention of the jury to the consideration of the ethical relation of these parties, as among themselves."

was a surety is evidence of the fact against all holders of the mortgage.[27]

11. Certificates of Postmaster-General. — A certificate of the postmaster-general as to a shortage of a postmaster is not competent against his sureties,[28] although it has been intimated that an order disallowing commissions is *prima facie* evidence.[29]

12. Evidence of Fraud. — A. Not Admissible Unless Creditor Is Connected Therewith. — Evidence tending to show fraud of the principal is not admissible in behalf of the surety when the creditor is not connected therewith.[30]

B. Surety's Statement As To Effect of Fraud. — Where the surety claims that he entered into the obligation as a result of fraud, he cannot be asked whether he would have signed as surety if he had known the true facts;[31] but it has been held that he may so testify when the creditor misrepresents the facts.[32]

13. Indemnity. — Evidence that a surety had been fully indemnified by the principal is admissible to show that he had become a principal and was not released by any indulgence granted to the original principal,[33] though it is held to the contrary.[34]

27. Krutsinger *v.* Brown, 72 Ind. 466.

28. United States *v.* Case, 49 Fed. 270.

29. Jaedicke *v.* United States, 85 Fed. 372, 29 C. C. A. 199, 56 U. S. App. 409.

30. Bank of Monroe *v.* Gifford, 72 Iowa 750, 32 N. W. 669. See also Milliken *v.* Callahan County, 69 Tex. 205, 6 S. W. 681.

31. "The question in this case is not one of intent. It was whether the witness had been defrauded. On this point, all the testimony had been admitted, and it was not proper to ask the witness what he would have done under other circumstances." Learned *v.* Ryder, 61 Barb. (N. Y.) 552, 5 Lans. 539. But see Blaney *v.* Rogers, 174 Mass. 277, 54 N. E. 561, where it was held competent for a surety to testify that he would not have executed a bond if he had not believed the recitals contained therein. Both the surety and the creditor were deceived.

32. Remington Sew. Mach. Co. *v.* Kezertee, 49 Wis. 409, 5 N. W. 809.

33. As to the admissibility and effect of such evidence, see Crim *v.* Fleming, 101 Ind. 154; Louisiana Soc. for Prev. of Cruelty to Children *v.* Moody, 52 La. Ann. 1815, 28 So. 224; Moore *v.* Paine, 12 Wend. (N. Y.) 123. The theory upon which such evidence is admitted is that the surety is not injured by any act of the obligee indulging the principal when he had full indemnity.

34. In Rounsavell *v.* Wolf, 47 Wis. 353, 2 N. W. 545, sureties claimed that they signed without knowledge of the real character of the bond. Evidence that the principal subsequently gave security to the sureties was held incompetent. "The appellants had a right to take indemnity against the liability which they admit they had assumed, and indeed, against their possible liability on the bond as written, and the evidence was not only incompetent, but was well calculated to pass with the jury, as it was probably intended, for an affirmance by the appellants of the bond in suit, and a recognition of their liability upon it."

To Rebut Surety's Claim That He Signed Conditionally. — "Ordinarily, testimony that indemnity was given to the surety is immaterial in an action against him on a forfeited recognizance. In this case, however, it was not improper. In his testimony Madden stated that he signed the recognizance only upon the condition that Duncan or his wife should join

14. Testimony of Witness, Since Deceased. — Testimony of a witness, since deceased, given in a proceeding in which the principal, but not the surety, was a party, is not admissible against the surety.[35]

15. Evidence To Prove Particular Facts. — A. CREDITOR'S KNOWLEDGE OF PRINCIPAL'S PREVIOUS DEFAULT. — Evidence tending to show that the creditor might have ascertained, by investigation, that the principal was already a defaulter is, standing alone, not admissible to show knowledge of the fact.[36]

B. THAT AN EXTENSION HAD BEEN GIVEN TO PRINCIPAL. — A valid agreement extending time may be inferred from evidence of an offer upon the part of the principal and a failure to proceed upon the part of the creditor.[37]

C. THAT A VALUABLE CONSIDERATION WAS GIVEN FOR AN EXTENSION. — A promissory note made by the principal to the creditor on the day an extension of time was given is admissible to show a valuable consideration for the extension.[38]

D. THAT SURETY CONSENTED TO AN EXTENSION. — Evidence that the surety was in no danger of losing by an act of the creditor is admissible as tending to show his consent thereto.[39]

him as a co-surety. The testimony objected to tended to contradict this statement, and to show that no such conditions were mentioned, but, rather that the inducement which led to the signing of the recognizance was the transfer and delivery by the prisoner to him of forty-one head of cattle," etc., as the indemnity. Madden *v.* State, 35 Kan. 146, 10 Pac. 469.

35. In Fellers *v.* Davis, 22 S. C. 425, a witness testified in a proceeding for an account against an administrator, and then died. It was held that his testimony was not admissible in a subsequent action against the surety. The court said, "This case, and that before the Probate Court, cannot be regarded as 'between the same parties.' The sureties were not parties to that proceeding, and the administrator, who must be taken to have been a party there, is not before this court. . . . But it is urged that, although the parties personally are not the same, the subject-matter is the same; that the judgment of the Probate Court against the administrator is *prima facie* evidence against the sureties, and therefore they must be privies. It is true that the liability of the sureties arises under the same bond as that which binds the administrator, and they all might, and indeed ought to be, sued together; but it does not seem to us that they are privies in the sense of the rule which makes evidence against one necessarily evidence against the other. The rule admitting the evidence is exceptional, and proceeds upon the view that the parties have had an opportunity to cross-examine the witness, but here the sureties never had such opportunity, and the fact that the administrator had such opportunity should not bind them."

36. Reports made by a bank cashier to the comptroller of the currency are not admissible to show that the officers of the bank might have obtained knowledge. Bowne *v.* Mt. Holly Nat. Bank, 45 N. J. L. 360.

37. A letter from the principal to the payee, enclosing a check and making a proposition for an extension, is admissible, and is not hearsay. Lawrence *v.* Thom, 9 Wyo. 414, 64 Pac. 339.

38. Hutchinson *v.* Moody, 18 Me. 393.

39. Thus, evidence that the principal had secured the surety is admissible. "If the surety is in no danger, there is no reason why he should require the creditor to sue the principal; and if there is no rea-

E. That Surety Has Been Released By Change In Contract. Parol evidence is admissible to show a change in a contract, whereby the surety has been released;[40] and also to show that the sureties did not consent thereto.[41]

F. That Surety Demanded That Creditor Sue. — The surety may testify to a demand on the creditor that he sue.[42]

G. That Surety Was Injured By Creditor's Neglect. — Evidence that a cosurety was solvent and able to pay at the time demand was made for suit, and that he subsequently became insolvent, is admissible.[43]

H. Extent of Obligation. — The terms of the principal's employment may be shown, by written evidence, when it exists,[44] and when it does not, by parol evidence.[45]

16. Competency of Party When Other Party Is Dead. — By statute in some states a surety is not a competent witness against the representative of a deceased obligee, whether he is a party to the suit or not.[46] But one apparently a principal may testify that he was in reality a surety, although another surety is dead;[47] and an obligee may testify against the surety, although the principal is dead.[48]

son why he should require the creditor to sue him, that is a circumstance tending, more or less, to show, that an allegation of his that he did require the creditor to sue him, is not true; or, to show, that he has waived the requisition, if he ever made it." Bailey *v.* New, 29 Ga. 214.

40. In Norwegian Evan. L. B. Congregation *v.* United States Fid. & Guar. Co., 81 Minn. 32, 83 N. W. 487, the bond provided that changes in a building contract costing more than three hundred dollars should not be made without the consent of the surety. It was held competent to show such changes by parol. Of course such evidence is not admissible when the contract and bond expressly provide for and allow changes. Ovington *v.* Aetna Ind. Co., 36 Wash. 473, 78 Pac. 1021.

41. The sureties may testify directly that they never knew of, nor were asked about, certain changes. Forst *v.* Leonard, 116 Ala. 82, 22 So. 481.

42. In Vancil *v.* Hagler, 27 Kan. 407, the surety testified to having mailed a postal card to the plaintiff demanding that he forthwith sue, which was held sufficient *prima facie* evidence that the plaintiff received the card and that it was a sufficient demand under the Illinois statute.

43. Vancil *v.* Hagler, 27 Kan. 407.

44. Articles of incorporation of an obligee are admissible to show the term and duties of a secretary who is the principal. Danvers Farmers El. Co. *v.* Johnson, 93 Minn. 323, 101 N. W. 492.

45. Where sureties sign an employe's bond without knowledge of the terms of employment, parol evidence of the terms is admissible in order to show extent of default. Southern Cotton-Oil Co. *v.* Bass, 113 Ala. 603, 21 So. 227.

46. Thus, in Georgia, under a statute disqualifying a witness not a party but interested in the result, a surety cannot testify against the representative of a deceased obligee. Crawford *v.* Parker, 96 Ga. 156, 23 S. E. 196. See also Howle *v.* Edwards, 113 Ala. 187, 20 So. 956, where the principal was applied as between the other parties.

47. "The statute does not render a witness incompetent simply because the other party is dead. It includes only direct transactions or communications between the witness and the deceased party, and as to all other matters the living party is a competent witness." Chamblee *v.* Pirkle, 101 Ga. 790, 29 S. E. 20.

48. Lee *v.* Wisner, 38 Mich. 82.

17. Evidence in Suit by Surety. — In an action by a surety for money paid, he must prove the original agreement by proof of the bond or other contract, and if the fact of suretyship does not appear on the face of the instrument, it must be proved by other means. If he was compelled to pay by execution, a copy of the judgment and writ should be produced.[49]

IV. WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. Effect of Agreement. — When it is agreed that certain proof shall be *prima facie* sufficient, the courts will give effect to the agreement.[50]

2. Amount Realized at Sheriff's Sale. — The amount realized by a sheriff's sale is conclusive as to the value of the property, although it be bought by the creditor.[51]

3. Proof Necessary To Avoid Official Bond. — The proof necessary to avoid an official bond must be as clear, satisfactory and demonstrative as that required to set aside a decree or judgment of a court of record upon the ground of fraud.[52]

See article, "TRANSACTIONS WITH DECEASED PERSONS."

49. Edge *v.* Keith, 13 Smed. & M. (Miss.) 295.

A note paid by the surety is admissible. Cameron *v.* Warbritton, 9 Ind. 351; Hill *v.* Voorhies, 22 Pa. St. 68.

50. Thus, in American Surety Co. *v.* Pauly, 38 U. S. App. 280, 72 Fed. 484, 18 C. C. A. 657, the following provision in the bond was enforced: "It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be *prima facie* evidence thereof." See also John A. Tollman Co. *v.* Bowerman, 5 S. D. 197, 58 N. W. 568.

51. Moorman *v.* Hudson, 125 Ind. 504, 25 N. E. 593.

52. "If this can be done at all upon the unsupported testimony of the party who is sought to be charged, that testimony must be clear, explicit and demonstrative, to a positive certainty." Amis *v.* Marks, 3 Lea (Tenn.) 568.

PRIVATE CORPORATIONS.—See Corporations.

PRIVATE ROADS.—See Highways.

PRIVATE WRITINGS.—See Documentary Evidence; Written Instruments.

PRIVIES.—See Admissions; Judgments; Principal and Agent; Principal and Surety; Title.

PRIVILEGED COMMUNICATIONS.

By Willoughby Rodman.

I. PHYSICIAN AND PATIENT.

1. General Rule. — A physician[1] may not, without the consent of his patient, give in evidence any information acquired from or in regard to his patient in the course of professional employment, which was confidential and necessary to enable him to perform his duty;[2] and a patient cannot be compelled to testify concerning the advise or treatment of his physician.[3]

1. The word "physician," as used in this article, includes surgeon. Statutes creating the privilege use the words "physician or surgeon."

2. Physicians may not testify as to knowledge acquired from patient in the course of professional employment.

California. — Keast *v.* Santa Ysabel G. M. Co., 136 Cal. 256, 68 Pac. 771.

Colorado. — Colorado Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875.

Illinois. — Reeves *v.* Herr, 59 Ill. 81.

Indiana. — Masonic M. B. Assn. *v.* Beck, 77 Ind. 203, 40 Am. Rep. 295; Excelsior Mut. Aid Assn. *v.* Riddle, 91 Ind. 84; Penn. Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409; Williams *v.* Johnson, 112 Ind. 273, 13 N. E. 872; Morris *v.* Morris, 119 Ind. 341, 21 N. E. 918; Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159; Harris *v.* Rupel, 14 Ind. 209; Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279.

Iowa. — Raymond *v.* Burlington, C. R. & N. R. Co., 65 Iowa 152; 21 N. W. 495; Prader *v.* Accident Assn. 95 Iowa 149, 63 N. W. 601; Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907; Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543.

Michigan. — Briggs *v.* Briggs, 20 Mich. 34; Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176; Jones *v.* Life Assur. Co., 120 Mich. 211, 220, 79 N. W. 204; Storrs *v.* Scougale, 48 Mich. 387, 12 N. W. 502; Perry *v.* John Hancock Mut. L. Ins. Co., 106 N. W. 860; Krapp *v.* Metropolitan L. Ins. Co., 106 N. W. 1107.

Missouri. — Harriman *v.* Stowe, 57 Mo. 93; Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358; *s. c.* to same effect in 12 Mo. App. 585; Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; Norton *v.* City of Moberly, 18 Mo. App. 457; Kling *v.* City of Kansas, 27 Mo. App. 231, 241; Webb *v.* Metropolitan St. R. Co., 89 Mo. App. 604; Haworth *v.* Kansas C. So. R. Co., 94 Mo. App. 215, 68 S. W. 111.

New York. — Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185, 194, *reversing s. c.* 5 Hun 1; Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182; Matter of Coleman, 111 N. Y. 220, 19 N. E. 71; Nelson *v.* Oneida, 156 N. Y. 219, 50 N. E. 802, 66 Am. St. Rep. 556; Hanford *v.* Hanford, 3 Edw. Ch. 468; Hunn *v.* Hunn, 1 Thomp. & C. 499; Redmond *v.* Industrial Ben. Assn., 28 N. Y. Supp. 1075; McGillicuddy *v.* Farmers' L. & T. Co., 55 N. Y. Supp. 242; *In re* Myer's Will, 184 N. Y. 54, 76 N. E. 920.

Rhode Island. — Not privileged in Rhode Island. Banigan *v.* Banigan, 26 R. I. 454, 59 Atl. 313.

Texas. — Such communications are not privileged in Texas. See Steagald *v.* State, 22 Tex. Crim. 464, 3 S. W. 771.

Wisconsin. — Boyle *v.* N. W. M. R. A., 95 Wis. 312, 70 N. W. 351; Kenyon *v.* City of Mondovi, 98 Wis. 50, 73 N. W. 314; Shafer *v.* City of Eau Claire, 105 Wis. 239, 81 N. W. 409; Green *v.* Town of Nebagamain, 113 Wis. 508, 89 N. W. 520.

A case in which communications to a physician were held privileged, although not confidential, as that term is used in this article, and not made for the purpose of receiving medical advice or treatment is found in Doran *v.* Cedar R. & M. C. R. Co., 117 Iowa 442, 90 N. W. 815. See statement and quotation under I, 5, E, d, *post.*

3. See 1, 5, A, b, *post.*

2. Not Privileged at Common Law. — Communications to physicians were not privileged at common law.[4]

Statutes. — Statutes making such communications privileged have been enacted in almost all of the United States. Federal courts apply the statute of the state in which the trial court sits.[5]

3. Founded Upon Public Policy. — It has been held that the rule declaring incompetent the testimony of physicians as to knowledge acquired from patients while engaged in professional employment is founded upon public policy.[6] But the contrary has been held.[7]

4. Object of Rule. — Protection of Patient. — The object of the rule is the protection of the patient.[8]

4. *England.* — Wheeler *v.* Le Marchant, 17 Ch. Div. 675, 50 L. J. Ch. 793, 44 L. T. 632; Rex *v.* Gibbons, 1 Car. & P. 97, 11 E. C. L. 327; Broad *v.* Pitt, 3 Car. & P. 518, 14 E. C. L. 423; Doe, d. Peter *v.* Watkins, 6 L. J. N. S. C. P. 107; Russell *v.* Jackson, 9 Hare 387, 68 Eng. Reprint 558.

Indiana. — Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 163, 23 L. R. A. 244.

Iowa. — Prader *v.* Accident Assn. 95 Iowa 149, 63 N. W. 601; Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428.

Michigan. — Campau *v.* North, 39 Mich. 606, 33 Am. Rep. 433.

Montana. — Territory *v.* Corbett, 3 Mont. 50.

New York. — Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564, Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524; Buffalo, L. T. & S. Co. *v.* Knight T. & M. M. A. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839; Allen *v.* Public Admr., 1 Bradf. 221; People *v.* Stout, 3 Park. Crim. 670; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887, 893.

North Carolina. — Fuller *v.* Knights of Pythias, 129 N. C. 318, 40 S. E. 65.

Rhode Island. — Banigan *v.* Banigan, 26 R. I. 454, 59 Atl. 313.

Utah. — Munz *v.* Salt Lake City R. Co., 25 Utah 220, 70 Pac. 852.

Wisconsin. — Boyle *v.* Northwestern Mut. R. Assn. 95 Wis. 312, 320, 70 N. W. 351.

5. Connecticut Life Ins. Co. *v.* Union Trust Co., 112 U. S. 250, applying New York Statute. Statute of Missouri applied in Adreveno *v.* Mutual R. F. L. Assn., 34 Fed. 870; statute of New York applied in Pennsylvania R. Co. *v.* Durkee, 147 Fed. 99, and in Metropolitan St. R. Co. *v.* Jacobi, 112 Fed. 924, 50 C. C. A. 619; Mutual Ben. Life Ins. Co. *v.* Robins, 58 Fed. 723, 731, 19 U. S. App. 266, 22 L. R. A. 331, applying Iowa statute.

6. Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1; Davis *v.* Supreme Lodge, K. of H., 165 N. Y. 159, 58 N. E. 891; Butler *v.* Manhattan R. Co., 30 Abb. N. C. 78, 23 N. Y. St. 163; *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169; *In re* Myer's Will, 184 N. Y. 54, 76 N. E. 920.

7. Adreveno *v.* Mutual R. F. L. Assn., 34 Fed. 870; Grand Rapids I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

As to public policy, and question of waiver contained in application for life insurance as being contrary to public policy, see Dougherty *v.* Metropolitan L. Ins. Co., 33 N. Y. Supp. 873.

8. *Indiana.* — Hauk *v.* State, 148 Ind. 238, 260, 46 N. E. 127, 47 N. E. 465.

Michigan. — Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173; Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216.

Missouri. — Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. St. Rep. 108.

New York. — Buffalo L. F. & Co. *v.* Knights T. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, People *v.* Stout, 3 Park. Crim. 670.

Wisconsin. — Boyle *v.* Northwestern Mut. R. Assn., 95 Wis. 312, 322, 70 N. W. 351. *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169.

5. Nature of Privilege. — The rule confers a right upon the patient.[9]

To Whom Belongs. — The privilege belongs to the patient,[10] or to his personal representative.[11]

In Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173, the court says: "The objection that a physician cannot reveal with his patient's consent what he has learned during his treatment, is one which if valid would render it impossible in either civil or criminal cases to use the only testimony which would show the nature and extent of disease. The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. It is only a question of privilege, and such communications are on the same footing with any other privileged communications which the public has no concern in suppressing when there is no desire for suppression on the part of the persons concerned."

In an action to recover value of physician's services, the Supreme Court of New York says: "The statute was not passed for the pecuniary benefit of the medical fraternity, but to silence its voice, and in this manner protect those seeking medical assistance, by excluding all inquiry which may offend the sensitiveness of the living, or reflect in the slightest on the memory of the dead. It was to throw the mantle of charity over the sick and unfortunate, and at the same time elevate the medical practitioner to the high plane with the clergy and good Samaritan, leaving him to protect his fees according to professional ethics, so long as he does not infringe the humanitarian sentiment embraced in the statutory prohibition. It is a beneficent statue, clearly indicating the policy of the state. It should not be impaired, but preserved in its integrity, according to its manifest spirit and purpose." McGillicuddy *v.* Farmers' L. & T. Co., 55 N. Y. Supp. 242.

"The object of the statute is plainly this, that persons may feel sure that whatever they disclose to a physician, in his professional capacity, in regard to their bodily condition, whether it be by word or by allowing a physical examination, shall be held sacred." Grattan *v.* Metropolitan L. Ins. Co., 24 Hun (N. Y.) 43.

9. The privilege is a legal right. McConnell *v.* Osage, 80 Iowa 293, 303, 45 N. W. 550, 8 L. R. A. 778.

It is a personal privilege. Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977; Allen *v.* Public Admr., 1 Bradf. (N. Y.) 221.

10. *Indiana.* — Penn. Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; Hauk *v.* State, 148 Ind. 238, 260, 46 N. E. 127, 47 N. E. 465.

Michigan. — Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Storrs *v.* Scougale, 48 Mich. 387, 395, 12 N. W. 502; Lincoln *v.* City of Detroit, 101 Mich. 245, 59 N. W. 617.

New York. — Johnson *v.* Johnson, 14 Wend. 637.

Wisconsin. — Boyle *v.* Northwestern Mut. L. Assn., 95 Wis. 312, 70 N. W. 351; Kenyon *v.* City of Mondovi, 98 Wis. 50, 73 N. W. 314.

11. Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

"The right to exclude the testimony prohibited survives to the representatives . . . of a deceased person." Staunton *v.* Parker, 19 Hun (N. Y.) 55. This case involved a will contest, in which the issue was the testator's sanity. Pending probate of will, it was held that the heirs at law represented testator so far as related to privilege.

It was held that, pending proceedings for probate, and while executor's status was undetermined, the heirs-at-law represented decedent so far as related to the exercise of this privilege.

For cases in which physician was allowed to raise question of privilege, see Mott *v.* Consumers' Ice Co., 52 How. Pr. (N. Y.) 148, *s. c.* on appeal, *Ib.* 244; Lowenthal *v.* Leonard, 46 N. Y. Supp. 818.

Prohibition Relates to Physician Alone. — The prohibition of the law operates upon the physician alone. It is his mouth that is closed.[12]

A. RIGHT OF PATIENT. — a. *To Exclude Physician's Testimony.* The rule confers upon the patient a right to exclude his physician's testimony. Consequently a physician shall not testify as to any knowledge acquired from his patient in the course of professional employment and necessary to enable him to perform his duties.[13]

12. Buffalo L. T. & S. D. Co. *v.* Knights T. & M. M. A. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887.

13. *United States.* — Adreveno *v.* Mutual R. F. Assn., 34 Fed. 870.

Indiana. — Penn. Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

Iowa. — Raymond *v.* Burlington C. R. & N. Co. (Iowa), 17 N. W. 923, same ruling on rehearing, 65 Iowa 152, 21 N. W. 495; Keist *v.* Chicago, G. W. R. Co., 110 Iowa 32, 81 N. W. 181.

Michigan. — Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

New York. — Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 298, 36 Am. Rep. 617; Davis *v.* Supreme Lodge K. of H., 165 N. Y. 159, 58 N. E. 891; Matter of Hoyt, 20 Abb. N. C. 162; Buffalo L. T. & S. O. Co. *v.* Knights Templar & M. M. A. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839; Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564; Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1; Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300; Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; Redmond *v.* Industrial B. Assn., 28 N. Y. Supp. 1075; *s. c. affirmed* 150 N. Y. 167, 44 N. E. 769.

The rule gives the patient the "privilege of suppressing information" acquired confidentially by a physician. Referring to statute making a physician incompetent to testify to professional communications, the supreme court of Missouri says: "This statute, as frequently construed by this court, merely gives the patient the privilege of suppressing information thus acquired and was not intended to operate in its absolute suppression." Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122.

"A rule is prescribed which he is not to be 'allowed' to violate; a privilege is guarded which does not belong to him but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself." Storrs *v.* Scougale, 48 Mich. 387, 12 N. W. 502. The statute applied in this case (Comp. Laws of Michigan, § 5943) provided that "no person duly authorized to practice physic and surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon."

Statute providing that physician cannot be "compelled" to testify, etc., construed to provide that he shall not be allowed so to do. Boyle *v.* Northwestern M. R. Assn., 95 Wis. 312, 70 N. W. 351; Green *v.* Town of Nebagamain, 113 Wis. 508, 89 N. W. 520.

Masonic Assn. *v.* Beck, 77 Ind. 203, 40 Am. Rep. 295, was decided under a statute which provided that physicians were not competent witnesses "as to matters confided to them in the course of their profession; * * * unless with the consent of party making such confidential communications." The action was upon a policy of life insurance. The depositions of certain physicians were excluded. Their testimony in the main concerned the ailments of the patient when under their treatment, and tended to sustain the allegations of the answer that patient had certain diseases, and perhaps died from their effect. After quoting the statute, the Court says: "The question to be decided, therefore, is, whether the phy-

b. *To Refuse His Own Testimony.* — The rule also gives the pa-

sician, who, in the course of the treatment of his patient has obtained a knowledge of his ailments, is competent to testify in relation thereto, in a civil action, without consent of the patient or of the party representing the patient." It was contended that before the testimony could be excluded it must affirmatively appear that the information was confided to him which he is called on to disclose. Also that the physician might be required to testify as to what he had learned by observation or by an examination of the patient, and, indeed, as to what the patient told him, unless learned or told under an injunction of secrecy, express or implied, as in case of secret or private diseases. On this question the Court says: "We think the statute ought to have, and was designed to have, a much broader scope. The relation of physician and patient, no matter what the supposed ailments, should be protected as strictly confidential, subject only to the right of the patient to waive the restriction; or if the patient shall have died, then subject to the choice of the party who may be said to stand in the place of the deceased and whose interests may be affected by the proposed disclosure."

In Gartside *v.* Connecticut M. L. Ins. Co., 76 Mo. 446, 43 Am. Rep. 765, the statute provided that the following persons were incompetent: "A physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Under this statute the court held that any information acquired by the physician from his patient in the course of professional employment, whether from statements of the patient or from observation, is privileged. Statutes of New York and Michigan were cited which provided that no person authorized to practice physic and surgery should be allowed to "disclose any information which he may have acquired in attending any patient in a professional character," etc. It was contended that, as the Missouri statute added the words "from the patient" it was intended to limit the privilege to statements made by the patient to the physician. But it was held that information acquired by observation or inspection was acquired from the patient, as well as that obtained from oral statements. The court said: "The construction contended for by defendant's counsel, that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient, would, in our opinion, nullify the law. To hold that, while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering from syphilis; and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis, would be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz.: his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the legislature and virtually to overthrow it. It follows from what has been said that the Circuit Court erred in permitting Drs. Gregory and Bauduy, two physicians, to give in evidence the information acquired by them while attending Gartside, their patient, professionally, although such information was acquired not from what the patient said but from observation and examination. The same error was committed in reference to the admission of the evidence of Dr. Hodgen, except as to information acquired by him from observing Gartside on the street an-

tient the right to refuse to give his own testimony concerning matters confidentially communicated to his physician.[14]

B. Physician Cannot Refuse to Testify. — As the rule simply confers a right upon the patient, it does not give the physician a right to refuse to give his testimony as to matters communicated between himself and patient.[15]

C. Physician Not Incompetent as Witness. — Nor does it make a physician incompetent as a witness for or against his patient.[16]

May Testify as Expert. — The fact of attendance does not disqualify attending physician as an expert; and, in response to questions presenting a hypothetical case, he may state his opinion as to his patient's condition, although knowledge acquired while attending patient may influence his answers.[17]

terior to his employment as a physician."

14. Burgess *v.* Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364.

In Citizens' St. R. Co. *v.* Shepherd, 30 Ind. App. 193, 65 N. E. 765, the court says: "While in the case at bar appellant sought only to prove the statements of the injured party, yet, if the patient may be compelled to testify to the facts disclosed to his physician, the protection intended by the statute would be removed."

In Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462, it is held that patient cannot be compelled to state whether or not a physician had taken an X-ray photograph of a part of her body.

15. Penn. Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Zimmer *v.* Third Ave. R. Co., 55 N. Y. Supp. 308; Valensin *v.* Valensin, 73 Cal. 106, 14 Pac. 397. *Contra.* Johnson *v.* Johnson, 4 Paige Ch. (N. Y.) 460, 468.

16. Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428; Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Block *v.* Milwaukee, St. L. & C. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365; Schlosser *v.* Schlosser, 29 Ind. 488.

In Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358, the Supreme Court of Missouri refers to Harriman *v.* Stowe, 57 Mo. 93, stating that that case holds a physician to be incompetent as a witness, and disapproves the decision. It was held in an early case in New York that a physician was absolutely privileged from giving in evidence any knowledge acquired from his patient. See Johnson *v.* Johnson, 4 Paige Ch. (N. Y.) 460, 468. That case was *reversed* in 14 Wend. (N. Y.) 614, and the New York courts now hold a physician to be a competent witness. See Hoyt *v.* Hoyt, 112 N. Y. 493, 20 N. E. 402.

17. In Meyer *v.* Standard L. & A. Ins. Co., 40 N. Y. Supp. 419, the court says: "That fact (attendance) did not render such an answer incompetent, but merely affected its weight." The court further says:

"If a physician, who has professionally attended upon and prescribed for a person, and has also observed such patient while not thus in attendance, can give an opinion as to his condition, based upon facts he observed while not acting professionally, and excluding from his mind what he observed while in attendance, we can see no reason to doubt that he may also give an opinion upon a hypothetical state of facts stated in a question which excludes all knowledge of the condition of the patient which he derived while in professional attendance. The only objection that can be urged to a doctor, who has been in medical attendance upon a person, giving an opinion in answer to a hypothetical question as to the condition of his patient, is that the knowledge he derived while in attendance might af-

D. Matter Communicated Not Incompetent. — The rule does not make matter communicated to, or knowledge acquired by, a physician incompetent.[18]

E. Right Not Dependent Upon. — a. *Form In Which Testimony Is Presented.* — Patient has the right to exclude his physician's testimony, in whatever form presented, whether orally in court, or by deposition, affidavit, certificate of death, proof of death of insured person, or otherwise.[19]

fect his answer. But the same objection exists to the physician's giving an opinion founded upon observation of his patient while not in actual professional attendance. See also Edington *v.* Insurance Co., 77 N. Y. 564; Herrington *v.* Winn, 60 Hun, 238, 14 N. Y. Supp. 612; *In re* Loewenstine's Will, 2 Misc. Rep. 323, 21 N. Y. Supp. 931." Meyer *v.* Standard L. & Acc. Ins. Co., 40 N. Y. Supp. 419. To same general effect, see Crago *v.* Cedar Rapids, 123 Iowa 48, 98 N. W. 354.

18. Allen *v.* Public Admr., 1 Bradf. (N. Y.) 221; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887; Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122; Penn. *v.* Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 101, 50 Am. Rep. 769. See "Waiver," *infra.*

In May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111, the court says: "It is not the inherent incompetency of the evidence that precludes it being given, but it is the fact that the evidence comes from a person who occupies a certain relation of confidence to the patient, by virtue of which the statute says he shall not disclose his information without the consent of the person from whom he gained it." "It (statute in question) does not exclude the evidence by reason of its inherent character, but only when given by the persons within its purview." Mellor *v.* Missouri Pac. R. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36.

19. As to oral testimony or depositions, see cases generally.

"By reasonable construction it (New York statute) excludes a physician from giving testimony in a judicial proceeding in any form, whether by affidavit or oral examination, involving a disclosure of confidential information acquired in attending a patient, unless the seal of secrecy is removed by the patient himself." Buffalo, L. T. & S. D. Co. *v.* Knights Templar & M. M. A. Assn. 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839.

Certificate of Death. — Physician's certificate of death, filed with a municipal board, is not admissible to show cause of death. Davis *v.* Supreme Lodge, 165 N. Y. 159, 58 N. E. 891, *affirming s. c.* 35 App. Div. 354, 54 N. Y. Supp. 1023; Robinson *v.* Supreme Commandery, U. O. G. C. 77 N. Y. Supp. 111; *s. c. affirmed* by Appellate Division, 79 N. Y. Supp. 13; *affirmed* by Court of Appeals, 177 N. Y. 564, 69 N. E. 1130. *Contra.* But it has been held that a certificate of death required by statute to be filed is competent to show cause of death. Krapp *v.* Metropolitan L. Ins. Co. (Mich.), 106 N. W. 1107.

It has been held that in an action upon a policy of life insurance a physician's certificate of death, presented with proofs, is admissible as an admission of plaintiff, and that its reception in evidence did not violate the rule forbidding the disclosure of confidential communications. Buffalo L. T. & S. D. Co. *v.* Knights Templar & M. M. A. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839; Carmichael *v.* John Hancock L. Ins. Co., 90 N. Y. Supp. 1033. *Contra.* — But the contrary of this has been held. Dreier *v.* Continental L. Ins. Co., 24 Fed. 670.

Affidavit. — Affidavit of physician showing the condition and appearance of a certain person, and intended to be used in support of an application to appoint a guardian of such person as an habitual drunkard, is inadmissible. Matter of Hoyt, 20

Abb. N. C. (N. Y.) 162; Dick *v.* Supreme Body of I. C., 138 Mich. 372, 101 N. W. 564.

Competent as Admission of Plaintiff. — But such certificate may be introduced as an admission of plaintiff. Carmichael *v.* John Hancock L. Ins. Co., 90 N. Y. Supp. 1033.

Statements in Proof of Death. — In an action on a life insurance policy, defense being that insured had, in his application for insurance, made false representations as to his health, statements of the physician of insured set forth in proofs of death furnished by beneficiary to the insurance company are inadmissible. Dreier *v.* Continental L. Ins. Co., 24 Fed. 670. In this case the only proof as to the condition of insured at the time application was made consisted in certain statements of his physician set forth in proofs of death. The court says:

"It is clear that Dr. Hadley could not, against the will of the plaintiff, if called as a witness, have been allowed to testify to the facts contained in these statements. Pennsylvania Mut. Life Ins. Co. *v.* Wiler, *supra*; Masonic Mut. Benefit Assn. *v.* Beck, 77 Ind. 208; Connectitut Mut. Life Ins. Co. *v.* Union Trust Co., *supra*. It is true that by the terms of the policy the plaintiff, in order to have a right of action, was bound to furnish the company within a specified time 'satisfactory proof of the death;' but this did not entitle the company to go further, as it seems to have done, and require of the plaintiff a statement by the physician of his knowledge concerning the previous complaints and ailments of the deceased, which, proximately at least, did not cause the death; and I see no reason at all why such statements, when so obtained, should become available to the company as evidence, in a suit upon the policy, of facts which could not be shown by the testimony of the one who made the statement. The law which declares communications between patient and physician confidential should not be evaded in any such way." *Contra* Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977.

In Buffalo, L. T. & S. D. Co. *v.* Knights Templar & M. M. A. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, statements of physician as to cause of death were excluded as privileged communications. The exclusion was held wrong on this ground, but proper on the ground that, admission, being that of a guardian, did not bind his ward. The court says that the statute of privilege prevents a physician "testifying," not from making statements.

In Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807, it is held that the inclusion of physician's affidavit as to patient's condition in proof of death does not violate rule against disclosure of confidential communications. The court uses this language: "But it is said this was in violation of the statute already mentioned. That does not prescribe any rule of professional conduct. The physician, in disclosing the secrets of his patient in conversation or writing, violates no law of which we have knowledge, though such a course may be reprehensible, and in disregard of professional propriety. It is 'in giving testimony' in a judicial proceeding that such disclosures are prohibited by statute, and doubtless this may no more be done by affidavit than orally. But here the information ascertained professionally had been revealed in an affidavit, not for use in such a proceeding, and it was not offered nor received as evidence of the physician, or of what he said, as in that event it would have been incompetent, but as an admission by the plaintiff that its contents were true."

Books of Physician. — The books of a physician showing his accounts for services rendered to patients are not admissible. Mott *v.* Consumers' Ice Co., 52 How. Pr. (N. Y.) 148. In this case physician sued a corporation for personal injuries alleging loss of income as an element of damage. To contradict plaintiff as to amount of income, defendant made a motion to be allowed to inspect plaintiff's books showing his accounts with patients for services rendered. Motion was denied. On appeal to general term, order denying motion was affirmed. 52 How. Pr. (N. Y.) 244.

b. *Object of Testimony.* — Physician will not be permitted to give evidence of confidential communications for the purpose of impeaching a witness.[20]

c. *Patient's Relation to Action.* — The fact that physician's testimony relates to persons who are not parties to the action in which it is sought is immaterial.[21].

d. *Purpose of Consultation.* — Privilege exists, although a person consults a physician and discloses his physical condition for the purpose of obtaining his testimony, and not for purpose of treatment.[22]

6. Essentials to Exercise of Privilege. — A. PATIENT. — It is essential to a claim of privilege that the matter sought to be excluded be communicated by a person in need of, or believed to be in need of, medical or surgical assistance, or by some one in his behalf, to a physician.[23]

B. PHYSICIAN. — Statutes of many of the states use the expression "regularly licensed physician, etc." The question as to the status or qualification of medical attendant, necessary to protect knowledge acquired by him, will depend upon the phraseology of the statute under which privilege is claimed.

No opinion rendered. To same effect, see Lowenthal *v.* Leonard, 46 N. Y. Supp. 818.

A physician examined as a judgment debtor in proceedings in aid of execution will not be compelled to deliver to a receiver his books showing nature of his patients' maladies. Kelly *v.* Levy, 8 N. Y. Supp. 849.

Records of Hospital made from statements of attending physicians to superintendent, and showing nature of disease of a certain patient, are not admissible. Price *v.* Standard L. & A. Ins. Co., 90 Minn. 264, 95 N. W. 1118.

20. McConnell *v.* Osage, 80 Iowa 293, 303, 45 N. W. 550, 8 L. R. A. 778.

21. *In re* Myers Will, 184 N. Y. 54, 76 N. E. 920; Krapp *v.* Metropolitan L. Ins. Co. (Mich.), 106 N. W. 1107.

22. Doran *v.* Cedar Rapids & M. C. R. Co., 117 Iowa 442, 90 N. W. 815. In this case the court says: "Counsel for appellant urge that this witness was not consulted as a physician with reference to the treatment of plaintiff, but only for the purpose of securing his testimony as a witness, and that therefore the statute does not apply to him. We are not referred to any authorities which make this distinction. It seems to us that whenever an injured party consults a physician as physician, and discloses to him his physical condition, and thus enables him to obtain information which as an ordinary person he would not have obtained, such physician is prohibited from testifying with reference to the knowledge thus obtained, except with the consent of the injured party."

23. Communications made to physician by one acting for or on behalf of patient are privileged. Thus statements as to his wife's condition made by a husband to physician were held privileged. People *v.* Brower, 6 N. Y. Supp. 730.

In Need of Professional Services. See Doran *v.* Cedar Rapids & M. C. R. Co., 117 Iowa 442, 90 N. W. 815, where communications made to a physician for the purpose of obtaining his testimony were held privileged.

The word "patient" includes a person under disability, such as infancy, lunacy, etc. Corey *v.* Bolton, 63 N. Y. Supp. 915.

"A dead man is not a 'patient,' capable of sustaining the relation of confidence toward his physician which is the foundation of the rule given in

a. *Status. — Must Be Duly Licensed Physician.* — To substantiate claim of privilege as to communications to a certain person, he must be a physician duly licensed to practice.[24]

(1.) Failure to Comply With Statute. — A duly licensed physician is incompetent, although he has failed to register his license as required by statute.[25]

(2.) Not Licensed in Place of Treatment. — It has been held that if physician called as a witness has not been duly licensed to practice by the state in which his services were rendered, he may be compelled to testify concerning information confidentially communicated by his patient.[26]

(3.) Introduction of Diploma Not Necessary. — If a witness testify that he received a diploma from a medical college, and that he practiced in the state issuing the diploma, his qualifications are sufficiently proved, and it will not be necessary to introduce his diploma in evidence.[27]

(4.) License Presumed. — So, if he testify that he is practicing medicine, it will be presumed that he has been duly licensed.[28]

(5.) Dentist, Druggist or Veterinary. — It has been held that privilege does not extend to knowledge acquired by a dentist;[29] or by

the statute, but is a mere piece of senseless clay which has passed beyond the reach of human prescription, medical or otherwise." Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 166, 47 Pac. 1019. In this case it was held erroneous to exclude the testimony of a physician as to the cause of death of a person who had been injured in an accident, it appearing that witness had not been the physician of deceased in his lifetime.

24. Wiel *v.* Cowles, 45 Hun (N. Y.) 307.

25. M'Gillicuddy *v.* Farmers' L. & T. Co., 55 N. Y. Supp. 242.

26. Head Camp. Pacific Jurisdiction, W. of W. *v.* Loeher, 17 Colo. App. 247, 68 Pac. 136. In this case it appeared that physician called as a witness had not been duly authorized to practice in Colorado. The statute of privilege provided: "A physician or surgeon duly authorized to practice his profession under the laws of this state, shall not," etc. *Held,* witness competent.

27. McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

28. Record *v.* Saratoga Springs, 46 Hun (N. Y.) 448.

29. A dentist is not a physician or surgeon within the meaning of a statute forbidding a physician or surgeon to disclose information acquired in attending a patient. People *v.* DeFrance, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139. In this case the court says: "Counsel contend that the testimony of the witness Land was a privileged communication, under the provisions of How. Stat. § 7516, which provides that 'No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.' The question presented is whether this language includes a dentist. At the common law, information gained by a physician or surgeon while in attendance upon his patient was not privileged. The purpose of this statute was to throw around such disclosures as the patient is bound to make for the information of his attending physician the cloak of secrecy, and the prime object of the act was to invite confidence in respect to ailments of a secret nature, and the spirit of the act would not include a

a druggist;[30] or to knowledge acquired by a veterinary surgeon from examination of an animal, or from statements of its owner.[31]

b. *Necessary Intermediaries.* — Communications must have been made to physician or to a third person whose intervention was to enable physician to obtain information essential to the performance of his duty.[32]

c. *Persons Unnecessarily Present.* — Statements made by patient to physician in the presence of third persons whose presence is not necessary to assist him or his physician are not privileged as regards such persons, and such persons may give such statements in evidence.[33]

case where the infirmity was apparent to every one on inspection. In practice, however, the statute has not been so limited in construction, for the reason that the words of the act are broad enough to include any information necessary to enable the physician to prescribe or the surgeon to act. Nevertheless, the purpose of the act is to be considered in determining whether the dentist was intended to be included within its terms. Certainly the terms 'dentist' and 'surgeon' are not interchangeable, and if a dentist is to be held to be a surgeon, within the meaning of this act, it must be because his business as a dentist is a branch of surgery. It is apparent that the act relates to general practitioners, and to those whose business as a whole comes within the definition of 'physician' or 'surgeon.' A dentist is one whose profession it is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones. The only case which we have found which bears directly upon this question is that of State *v.* Fisher (Mo. Sup.), 24 S. W. 167, 22 L. R. A. 799, in which a majority of the supreme court of Missouri held that a dentist is not to be considered a surgeon. We think there was no error in admitting the testimony of this witness; that he is not within the terms or the spirit of the act."

In Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, the court, after deciding that patient may waive privilege, and does so by calling physician as a witness, says: "There was, therefore, no error in allowing the dental surgeon to testify, should he be within the purview of the statute, a question which is not considered."

A dentist is not "a person exercising the functions of a . . . practitioner of medicine" under a statute exempting such persons from jury duty. State *v.* Fisher, 119 Mo. 344, 24 S. W. 167, 22 L. R. A. 799.

30. Knowledge which a druggist obtains from purchaser of medicine is not privileged. Brown *v.* Hannibal & St. J. R. Co., 66 Mo. 588; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887.

31. In Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313, a veterinary surgeon who had treated a horse at request of the owner was asked what was said to him by the owner and by the keeper of the horse. Question was objected to as calling for privileged communication, and the court actually *sustained the objection* on the ground that the question violated the statute prohibiting disclosure of professional communications. Counsel for objecting party said in argument, "We have no case exactly in point to cite." The supreme court says: "We think that none can be found to sustain the ruling. The reasons upon which said section is based have no application whatever to a case like this. Communications are privileged in certain cases for the reason that full and free communication in those cases is necessary and to be encouraged, but these reasons do not apply to veterinary surgeons called to treat animals."

32. Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244.

33. Mason's Union L. Ins. Co. *v.*

d. *Consulting Physician.* — Physician called in to consult with regular attendant as to patient's condition and treatment cannot testify as to knowledge acquired by him in the course of his employment.[34]

Consulting Physician. — Consultation Privileged. — When regular attendant and consulting physician consult in patient's presence concerning his condition, their statements are privileged.[35]

Fact of Agreement Immaterial. — Whether they agree or not is immaterial on the question of privilege.[36]

e. *Partner.* — The privilege also extends to partner of physician who is treating a person, and a physician cannot testify as to statements made in his presence to his partner.[37]

Knowledge From Partner's Patient. — Nor to any knowledge acquired from his partner's patient.[38]

Brockman, 26 Ind. App. 182, 59 N. E. 401.

If it appear that a third person was present at only one of many visits, and question calls for information obtained during entire treatment, physician cannot testify. Murphy *v.* Board of Police Comrs. (Cal. App.), 83 Pac. 577.

Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244. In this case a boy who had been injured in getting into an elevator sued the owner of the building for damages. Defendant sought to introduce the testimony of two witnesses who were in the ambulance which conveyed the boy from the building and heard what passed between him and an attending physician. It was not shown that the proposed witnesses were in the employ of the physician or of plaintiff. The trial court excluded the evidence. *Held* that this ruling was error.

But in Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 297, 36 Am. Rep. 617, it is said that it is not necessary that examination of patient by physician be private.

In Cahen *v.* Continental Ins. Co., 41 N. Y. Super. 296, it is held that communications to physician in the presence of patient's wife and nurse are privileged. Judgment reversed on another question, but held correct on this subject, in 69 N. Y. 300.

34. Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; State *v.* Smith, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219; Prader *v.* Accident Assn., 95 Iowa 149, 63 N. W. 601; Morris *v.* New York, O. & W. R. Co., 73 Hun 560, 26 N. Y. Supp. 342; *s. c.* on appeal, 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675; Green *v.* Nebagamain, 113 Wis. 508, 89 N. W. 520.

Rule recognized in McGillicuddy *v.* Farmers' L. & T. Co., 55 N. Y. Supp. 242. But see Henry *v.* New York, L. E. & W. R. Co., 10 N. Y. Supp. 508. In this case an attending physician brought his patient to office of witness, requesting witness to examine patient to see what was the matter with him. Witness examined patient. The trial court excluded witness's testimony as to patient's condition. Judgment was reversed on this ground, the appellate court holding that there was nothing to show that witness was requested or expected to treat or prescribe for the patient, or to advise as to his treatment, or that he did either.

35. Morris *v.* New York, O. & W. R. Co., 26 N. Y. Supp. 342. See Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

36. Morris *v.* New York, O. & W. R. Co., 26 N. Y. Supp. 342.

37. Raymond *v.* Burlington, C R. & N. R. Co. (Iowa), 17 N. W. 923; *s. c.* on rehearing, and same ruling, 65 Iowa 152, 21 N. W. 495.

38. Aetna L. Ins. Co. *v.* Deming,

C. Relation. — Before an objection to a question can be sustained on the ground of its calling for privileged communication, it must appear that the relation of physician and patient existed between witness and the person making the communication, or from whom information was acquired.[39]

a. *Attendance Alone Insufficient.* — The mere fact that a physician attended a certain person does not disqualify him as a witness. Other conditions essential to exclusion of his testimony must exist.[40]

b. *What Attendance Sufficient.* — Whether or not the relation of physician and patient existed between given persons depends upon the circumstances of the case.

(1.) Casual Treatment. — It has been held that the relation exists between a physician and a person whom he casually treats, whether he be his family physician or not.[41]

(2.) Single Consultation. — Also that one consultation is sufficient to constitute the relation.[42]

123 Ind. 384, 24 N. E. 86, 375.

39. Clark *v.* State 8 Kan. App. 782, 61 Pac. 814; People *v.* Koerner, 154 N. Y. 355, 365; Henry *v.* New York, L. E. & W. R. Co., 10 N. Y. Supp. 508; State *v.* Lyons, 113 La. 959, 37 So. 890; Smoot *v.* Kansas City, 194 Mo. 513, 92 S. W. 363.

Denial of Relation by Physician. When physician testifies that his knowledge was not acquired while attending a person in his professional capacity, and that he stated to such person that he was not acting as his physician, his testimony is not privileged. People *v.* Koener, 154 N. Y. 355, 365, 48 N. E. 730.

In Babcock *v.* People, 15 Hun (N. Y.) 347, a person applied to a physician for medicine for one not a member of his family. *Held,* that his testimony as to what was stated was properly admitted, it not appearing that the person addressing the physician was addressing him for himself, or that he was representing any one who needed or desired medical assistance.

40. Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; James *v.* Kansas City, 85 Mo. App. 20; People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783; Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564; Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580; Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 63 N. E. 808, *reversing s. c.,* 71 N. Y. Supp. 406; James *v.* Kansas City 85 Mo App. 20.

In State *v.* Lyons, 113 La. 959, 37 So. 890, questions were asked as to communications between a certain person and a physician. The court says: "The accused had been taken after the homicide to the Charity Hospital, where he was under the treatment of the surgical staff of that institution. Dr. Richard was the coroner, and presumably a physician and surgeon. He was acquainted with the defendant, and visited him on a particular occasion whilst the latter was in the hospital; but it does not appear that he paid such visit, or any other, in the capacity of physician or surgeon, or that he ever occupied that relation towards the accused. The objection was therefore inapplicable to the facts, and was properly overruled. Whether it would have made any difference, under our law, if Dr. Richard had been the attending physician, need not be considered." Hamilton *v.* Crowe, 175 Mo. 634, 75 S. W. 389.

41. Edington *v.* Mutual L. Ins. Co., 5 Hun (N. Y.) 1.

42. In Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372, it is held that physician is disqualified to testify as to knowledge acquired from patient, al-

though he met him only once in his professional capacity.

Same ruling in same case below, in which it is held that relation is established if examination takes place at the first interview between physician and person treated. See 24 Hun (N. Y.) 43.

But see Edington *v.* Aetna Mut. L. Ins. Co., 5 Hun (N. Y.) 1. In this case a person requested physician to examine an eruption upon his skin. The physician complied, but neither gave advice nor prescription. *Held*, that person making examination was not an attending physician, and that it could not be said that his knowledge was acquired to enable him to prescribe as a physician.

In Grattan *v.* Metropolitan L. Ins. Co., 24 Hun (N. Y.) 43, action was brought to recover the amount of a life insurance policy. Defendant claimed that insured had made false statements in his application, in stating that his brother was in good health, and had never had any pulmonary or other constitutional disease, whereas, as defendant claimed, the brother had a disease of the lungs. Defendant attempted to show the brother's condition by the testimony of a physician. It appeared that the brother's employer took him to a physician whom he requested to make an examination. After a careful examination, the physician stated to the brother that he would not live long. The physician's testimony was admitted by the trial court. In holding that this ruling was erroneous, the appellate court says: "The defendant insists that there was no relation of physician and patient between Mereness and Grattan. First. Because Mereness had not known Grattan before this interview. But the first interview with a physician is as sacred as any other. Second. Because Grattan did not consult him as to a prescription, and the doctor did not prescribe. But the day has passed when it was thought that a physician's advice was of no use unless he ordered a dose of medicine. Third. Because the examination was made for Grattan's employer, and the employer paid the doctor. Then if a father calls a physician to examine and advise as to a child, the child is not the physician's patient. Or if, out of benevolence, a man requests a physician to examine some poor person, the physician is at liberty to reveal all he discovers.

Next, the defendant insists that there was no attendance of the doctor on Grattan, because he was not called upon to examine or consult, in order to give advice or relief. The defendant cannot mean that a physician must attend at the patient's house instead of having the patient at the physician's office. And the doctor was requested to give advice—advice of the most important kind—that is, whether Grattan was capable of doing certain work. Such advice, in a case of consumption, was probably more valuable than any prescription would have been.

Next, the defendant insists that the doctor did not act in a professional capacity, because he gave no prescription and no advice. But it is plain enough that there are cases where a physician, on examining a patient, sees that medicine will do no good; and that there is no advice to give, except just what the doctor gave to Grattan, to make the best of the present, because he would not remain here very long. And it is incorrect to say that the words in section 834, 'which was necessary to enable him to act in that capacity,' limit the restriction imposed by the section to cases where the physician actually prescribes a dose of medicine or gives some medical advice. In fact the physician does act in a professional capacity when, after examining a patient, he decides that neither medicine nor advice are needed, and therefore gives neither. I am unable to see how this testimony can be allowed under the statute. The information which the doctor acquired was not such as might have been obtained by any person on a casual sight of Grattan. It was obtained by removing a part of Grattan's clothing; and by percussing and by listening to the action of the lungs. These are professional acts,

(3.) Physician Called by Stranger. — Also that relation exists between a sick person and a physician called to attend him by a person sustaining no legal relation to such person,[43] upon the ground that if a person is suffering, *in extremis*, and unable to call a physician, any person is authorized to call one to attend him.[44]

(4.) Accompanying Attending Physician. — A physician who, although not employed so to do, accompanies a hospital physician on his rounds and administers treatment to inmates, occupies the relation of physician towards persons so treated.[45]

(5.) Jail Physician. — Between prisoner and jail physician, relation does not exist to the extent that the latter is disqualified as an expert as to prisoner's condition.[46]

(6.) State's Physician Attending Subject of Crime. — Relation exists between a physician sent by prosecuting officer to examine a person who has been the subject of a crime and such person, if his services are accepted; and statements made by such person to the physician are privileged.[47]

and the information was obtained professionally. (Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185; Grattan *v.* Met. Life Ins. Co., 21 Alb. Law Jour., 288.)" But see Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 63 N. E. 808, *reversing s. c.*, 71 N. Y. Supp. 406.

43. Meyer *v.* Supreme Lodge, K. of P., 178 N. Y. 63, 70 N. E. 111, *affirming s. c.*, 81 N. Y. Supp. 813; Munz *v.* Salt Lake City R. Co., 25 Utah 220, 70 Pac. 852.

44. Meyer *v.* Supreme Lodge, K. of P., 178 N. Y. 63, 70 N. E. 111, *affirming s. c.*, 81 N. Y. Supp. 813.

45. Physician who states that he made the rounds of a hospital with the attending physician, "out of curiosity," and assisted him in making examination of a certain person, and "partly attended her," but did not have charge of her, and had charge of the different wards with the attending physician, cannot testify as to the condition of a person so examined. Grossman *v.* Supreme Lodge, 6 N. Y. Supp. 821. The court says: "To bring the case within the statute, 'it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity.' (Quoting Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770.) Whether the witness was actuated by curiosity or a higher motive makes no difference. His own admission that he attended the deceased, although he qualifies the statement by the use of the adverb 'partly,' sufficies to establish the existence of the professional relation." See also Green *v.* Nebagamain, 113 Wis. 508, 89 N. W. 520.

46. People *v.* Schuyler, 43 Hun (N. Y.) 88.

47. In People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661, defendant was charged with attempt to produce an abortion. A physician was sent by the prosecuting attorney to examine the female upon whom the abortion was attempted. Defendant questioned the physician as to the statements made to him by the woman. *Held*, that her statements were privileged. The court uses this language: "Here the patient was living, and the disclosure which tended to convict the prisoner inevitably tended to convict her of a crime, or cast discredit and disgrace upon her. We have no doubt upon the evidence that between her and the witness whose disclosure was resisted there was established the relation of physician and patient. Although he was selected by the public prosecutor and sent by him, yet she accepted his services in his professional character, and he rendered them in the same character. She was at liberty to refuse and might have declined his assistance, but when she accepted it, she had

c. *What Insufficient to Constitute Relation.* — **(1.) Employed by Third Person for Purpose Other Than Treatment.** — When a third person employs a physician to examine a person for the purpose of acquiring information for the use of such third person, the relation does not exist between the physician and the person examined.[48] Thus, the relation does not exist between an injured person and a physician sent by the person claimed to be liable for the injury, to ascertain its nature and extent, and who states to the injured person that he visits him on behalf of his employer.[49]

Service Rendered After Such Statement. — But if, after stating to injured person that he calls on behalf of defendant, the physician

a right to deem him her physician and treat him accordingly. It follows that the exception to his disclosure of what he learned while thus in professional attendance was well taken." See note 25, under I, 7, B, j, "COMMUNICATIONS AS TO CRIME."

48. When an attorney who prepares a will employs two physicians to examine his client to ascertain his mental condition at time of execution, and they make such examination, then become subscribing witnesses to the will, they may, upon an issue involving the validity of the will, testify as to the mental condition of testatrix, as learned from their examination. Matter of Freeman, 46 Hun (N. Y.) 458. The court based its ruling upon the facts that testatrix, though perfectly conscious, did not accept the services of witnesses as physicians, that they were not employed to so attend her, and that information acquired by them was not information acquired while attending a patient in a professional capacity which was necessary to enable them to act in that capacity. The court says: "The section implies that the physician is to do some act in his professional capacity. Of course, this act may be merely negative, that is, the physician may decide that no medicine is needed. But in this case these physicians were not to do, or to omit to do, anything for the deceased. The signing of the will as witnesses was not a professional act. I think there was no error in allowing these physicians to testify."

In Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216, a physician instituted an action against a newspaper to recover damages caused by publication of a statement to the effect that plaintiff had caused the death of one child and the illness of others by the use of a certain instrument. Several physicians who visited the children stated to have been made ill were permitted to testify as to their condition. Their testimony was objected to because their knowledge was acquired during visits made as attending physicians. *Held*, that the relation of physician and patient did not exist, and no confidence was reposed in witnesses; therefore, their testimony was admissible.

In *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169, a physician had been sent by a son-in-law to ascertain the mental condition of his mother-in-law, for the purpose of determining whether or not to apply to the court for a release from guardianship to which she had voluntarily submitted. Afterwards, the will of the mother-in-law was contested on the ground of unsoundness of mind. *Held*, that physician who had examined her was competent to testify, in the will contest, as to her mental condition.

49. In Heath *v.* Broadway, etc. R. Co., 8 N. Y. Supp. 863, physician of railway company visited and examined person injured by alleged negligence of the company. Upon seeing this person, he stated that he came on behalf of the company. *Held*, that statements made to him by the injured person were not privileged.

continues to visit and prescribe for him, the relation is established, and the physician's knowledge is privileged.[50]

(2.) Physician Sent by State to Examine Prisoner. — The relation of physician and patient does not exist between a person imprisoned on a criminal charge and a physician sent by the prosecuting officer to report upon prisoner's sanity,[51] or to obtain other information necessary to be used in conducting prosecution.[52]

(3.) Employment Refused. — The relation does not exist if physician refuse the employment, and he may testify concerning statements of person to whom he has stated that he will not act as his physician,[53] or to whom he states that he is not acting as his physician.[54]

(4.) Administering Temporary Relief. — The administration of temporary relief to a person, while awaiting the arrival of his regular physician, does not constitute one an attending physician, although the person so acting had, some years previously, practiced medicine.[55]

(5.) Acting as Friend. — One who renders friendly assistance to friend and neighbor who has been injured, does not thereby assume the relation of physician, although that is his profession.[56]

If witness testifies that he called to attend a person who had been injured, that when the regular family physician of the injured person came, witness considered him as in charge of the case, that witness had called later to inquire as to condition of the injured person; and witness testifies that he has not been dis-

50. Freel *v.* Market St. R. Co., 97 Cal. 40, 31 Pac. 730.

51. People *v.* Sliney, 137 N. Y. 570, 33 N. E. 150; People *v.* Hoch, 150 N. Y. 291, 303, 44 N. E. 976. Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

In People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9, physicians who had been sent by prosecuting attorney to examine a prisoner and report as to his mental condition were permitted to testify as to the result of their examination. Their testimony was held properly admitted. The court distinguishes the case from People *v.* Stout, 3 Park. Crim. (N. Y.) 670, by stating that in the latter case physicians whose testimony was sought, attended and prescribed for the prisoner, while in the Kemmler case the physicians were not questioned concerning any conversations had with prisoner, or any transactions in the jail.

As to physician sent by state, whose conduct leads prisoner to believe that he attended him as a physician, and who actually renders professional services, see People *v.* Stout, 3 Park. Crim. (N. Y.) 670. See statement and quotation in note 65 under I, 6, C, e.

52. People *v.* Glover, 71 Mich. 303, 38 N. W. 874; State *v.* McCoy, 109 La. 682, 33 So. 730.

State *v.* Height, 117 Iowa 650, 91 N. W. 935; 94 Am. St. Rep. 323, 59 L. R. A. 437. In this case physicians examined a prisoner to ascertain the existence of a certain disease, but no communications were made to them by him.

53. If physician refuses to act for person requiring medical aid, the relation is not created. State *v.* Smith, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219; (See statement in note 24, *infra*); Jacobs *v.* Cross, 19 Minn. 454.

Attendance Refused. — See I, 6, C. d. (1.), *post.*

54. People *v.* Koerner, 154 N. Y. 355, 365, 48 N. E. 730.

55. Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580.

56. Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580.

charged, and it appears that the injured person regarded witness as his physician, the relation is established.[57]

d. *Matters Not Essential to Relation.* — **(1.) Direct Employment.** Relation may exist, although physician was not employed directly by patient;[58] and has been held to exist although patient refused attendance, and commanded physician to leave him.[59]

Physician Employed by Adversary. — Relation of physician and

57. Patterson *v.* Cole, 67 Kan. 441, 73 Pac. 54.

58. Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661; Duggan *v.* Phelps, 81 N. Y. Supp. 916.

59. Meyer *v.* Supreme Lodge, K. of P., 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839, *affirming s. c.*, 81 N. Y. Supp. 813. In this case the court says: "The deceased was *in extremis*, incapable of acting or deciding for himself, and from the necessity of the case anyone was authorized to call a physician to treat him. Without the knowledge or consent of the dying man Dr. Bruso was called for that purpose and for that purpose alone he attended. He found Mr. Meyer, the deceased, in bed in an upper room of a hotel 'suffering intense pain and vomiting.' Meyer told him to get out of the room, that he did not want him there, but he did not leave. He remained to treat him as a physician, and in order to treat him intelligently tried to find out what the matter was. He learned from Meyer, partly in answer to questions and partly through voluntary disclosures, that he had taken a preparation of arsenic, known as Rough on Rats, 'because he wanted to die.' From this information, and from observation of the physical symptoms, he decided that Meyer was suffering from arsenical poisoning. Thus informed as to the nature of the disease, he at once administered a remedy and soon followed it by another. The helpless man, without friends to aid or advise, hopeless of life and courting death, objected and tried to curse him away from his bedside. The doctor, loyal to the instincts of his profession, refused to listen to the ravings of the would-be suicide and continued to prescribe in order to relieve suffering and prolong life. Upon the trial he was not allowed to disclose the information acquired under these circumstances, and we are now to determine whether there was enough evidence to warrant the trial judge in deciding, as a preliminary question of fact, that such information was acquired 'in attending a patient, in a professional capacity,' and that it 'was necessary to enable him to act in that capacity.' (Code Civ. Pro. § 834; Griffiths *v.* Met. St. Ry. Co., 171 N. Y. 106, 111.) The learned doctor was called as a physician; he attended as a physician; he made a diagnosis as a physician and he administered remedies as a physician. In all that he did he acted in a professional capacity. While it is true that in all he did he acted against the will and in spite of the remonstrance of a man whose condition imperatively called for professional treatment, still the meeting was professional in nature, and all that he said or did was strictly in the line of his profession. . . . When one who is sick unto death is in fact treated by a physician as a patient even against his will, he becomes the patient of that physician by operation of law. The same is true of one who is unconscious and unable to speak for himself. If the deceased had been in a comatose state when the physician arrived, the existence of the professional relation could not be questioned. The relation of physician and patient, so far as the statute under consideration is concerned, springs from the fact of professional treatment, independent of the causes which led to such treatment. An examination made in order to prescribe establishes the same relation."

patient exists between an injured person and a physician regularly employed by his adversary to treat its employes.[60]

60. When two corporations maintain a hospital which is supported by contributions reserved from the wages of their employes for the purpose, and an employe of one of them, who is injured while engaged in his employment, is treated by the surgeon in charge of this hospital, who receives his salary from the corporation, the relation of physician and patient exists between the injured person and the surgeon; and knowledge acquired by the latter in performing his professional duty is privileged. Colorado Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875; McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209.

Railroad Surgeon and Employe. Statements of injured railway employe to surgeon of the same corporation who inquires as to nature of accident in which injury occurred are privileged. Raymond *v.* Burlington, C. R. & N. R. Co. (Iowa), 17 N. W. 923; *s. c.* on rehearing, 65 Iowa 152, 21 N. W. 495 and same ruling. In this case, which was an action by an employe against a railway company to recover damages for personal injuries, it was claimed that the injury complained of was caused by the sudden starting of defendant's train. Defendant's surgeon stated that he questioned plaintiff in regard to the injury; that he desired this information to enable him to judge if the company was responsible; also that it was necessary to enable him to make a diagnosis of the case. He also stated that the injury would be more severe if the cars were in motion. It was held that plaintiff's statements concerning the manner in which the accident occurred were privileged. To same general effect, see Keist *v.* Chicago, G. W. R. Co., 110 Iowa 32, 81 N. W. 181; New York, C. & St. L. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954; Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543.

In Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543, the court says: "It may be conceded that the sole purpose of the agent in calling the physician was that the latter might ascertain the condition of plaintiff, and thus be prepared to advise the company, should occasion therefor arise, or be a witness on its behalf, if necessary. Certainly, if the visit of the physician had been confined to the limits incident to such purpose alone, his eligibility as a witness on behalf of the company might not be open to question. Without doubt, a railway company, with the utmost propriety, may thus advise itself of the fact of injury, and the character and extent thereof, in anticipation of a possible claim against it for damages. And with that end in view, it may send a physician to inspect and take notes, or otherwise inform himself of existing conditions. But this can avail the company nothing unless the physician shall strictly retain his character as an employe of the company. If, upon request or upon his own motion, he assumes to advise or administer treatment to the patient, and the latter in any manner acquiesces therein, the physician thereby casts aside his relation as an employe of the company, and transfers his allegiance to the patient. In such instances a case is presented where one cannot serve two masters at one and the same time. The allegiance of the physician must be wholly upon one side or the other. It matters not, in this connection, who calls him in the first instance, or who pays him. He may present himself at the side of the patient on his own motion, and he may not expect, or in fact receive, pay. The reason for this is apparent upon a moment's reflection. If the physician assumes to advise or treat, he should be put in possession of all facts necessary or material to enable him to do so properly. If the patient acquiesce, he should have the right to, and should, communicate freely and fully, without fear of exposure or of having his confidence made common property. It was to this end that the statute was enacted, and manifestly the purpose thereof may not be frustrated by

(2.) Payment Unnecessary. — Relation exists although physician's bill is not paid by person treated,[61] or never paid.[62]

(3.) Consultation for Self or Friend. — It is immaterial whether a person consults a physician to relieve his own anxiety or that of a friend.[63]

(4.) Prescription or Treatment. — Also immaterial that no prescription was given or treatment administered.[64]

e. *Sufficient If Patient Believes Relation Exists.* — In a case where a physician has attended upon a person under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit has been so regarded and acted upon by such person, the relation of physician and patient may be said to exist.[65]

proof that, at the time of rendering professional service, the physician was under contract of employment to serve the interest of the person or company subsequently charged with responsibility for the identical injury he is called upon or assumes to treat."

61. Grattan *v.* Metropolitan L. Ins. Co., 24 Hun (N. Y.) 43; Noble *v.* Kansas City, 95 Mo. App. 167, 68 S. W. 969.

62. Grattan *v.* Metropolitan L. Ins. Co., 24 Hun (N. Y.) 43.

63. Grattan *v.* Metropolitan L. Ins. Co., 24 Hun (N. Y.) 43.

64. Grattan *v.* Metropolitan L. Ins. Co., 24 Hun (N. Y.) 43.

65. People *v.* Stout, 3 Park. Crim. (N. Y.) 670, was a prosecution for murder in which the circumstances indicated that the person committing the murder had received some injury. When defendant was arrested he gave signs of having been injured. Physicians were sent to the jail to examine defendant. Two of the physicians stated to defendant that they had been sent by the coroner to examine the nature and extent of his injuries. Each physician made an examination. The first gave no prescription, but stated what he intended prescribing. The last two physicians testified that they examined defendant in the same manner as they examined their own patients. Defendant consented to the examination, granted every request, answered every question, and requested them to call again. One of the last two physicians stated that from the manner of himself and companion defendant had reason to think they were physicians. The testimony of the physicians was objected to as calling for disclosure of privileged communications. Objection sustained. The court uses this language:

"The spirit of this statute we apprehend to be that, whenever the confidential relation of physician and patient has once existed, and the patient has, in consequence thereof, yielded to examinations and made communications which he would not otherwise have made, the seal of secrecy shall be set on the transaction. It follows that it is the duty of the court to give full effect to this wise and humane provision. Such effect cannot, however, be given unless the party be protected in all cases of confidential disclosures whenever the patient had reason to suppose that the relation existed, and did, in fact and truth, so suppose. The injury to him is as great, in the case of divulgement of information thus obtained, as it would be if the relation had technically existed; for it is plain that the opportunities for gaining the information would not have been voluntarily afforded had it not been for an entire confidence in the fact of such relation existing. We are of opinion, therefore, that in a case in which a physician has attended upon a person, under circumstances calculated to induce the opinion that his visit was of a professional nature, and the visit has been so regarded and acted upon by the person, that the relation of physician and patient contemplated by the statute may fairly be said to exist. The spirit of

f. *Relation Presumed.* — When it appears physician made an examination of a certain person, it will be presumed that the relation of physician and patient existed, and that information obtained was for the purpose of enabling physician to act.[66]

D. COMMUNICATION. — It is essential to claim of privilege that the communication in question was confidential.[67]

Knowledge Intended To Be Made Known. — Thus, knowledge which patient knows physician must necessarily make known to another person is not privileged.[68]

Examination of Dead Person, Not Patient. — A physician may state what was disclosed by his examination of a dead person, who had not been in his lifetime a patient of witness, the information not having been imparted in confidence.[69]

It is not essential that the examination or consultation be conducted or held in secret.[70]

the statute is thereby respected, and no great violence done to its literal terms. We are also of opinion that the prisoner had reasonable ground of apprehension that Drs. Avery and Montgomery called to render him aid. Their language to him which introduced this interview, though to our minds and at this distance from the occasion conveying a different meaning from that in which the prisoner manifestly received it, did not necessarily exclude the idea of their visit being one of a professional nature. By a person reduced by pain and very much in need of treatment the language would not be closely scanned, and it might well be understood by him as a message from the coroner to examine into his injuries. Their manner to him was, moreover, purely professional, and as we now look at the description of it, aside from the other matters, we naturally adopt the conclusion that it was by professional men for professional purposes, rather than by government witnesses to obtain testimony for the prosecution."

66. Munz *v.* Salt Lake City R. Co., 25 Utah 220, 70 Pac. 852.

67. Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216. (See statement in note 48 under I, 6, C, c, (1.); Clark *v.* State, 8 Kan. App. 782, 61 Pac. 814.

"Confidential Communication," "Necessary Information." — There seems to be some uncertainty in the use of these expressions. In many cases they are used interchangeably. In some decisions the expression "confidential communication" is used to indicate either communications directly made, or knowledge in any manner acquired by reason of the relation of physician and patient. Other cases limit "communication" to matter communicated to physician by an act of patient. In this article the expressions are treated as synonymous.

68. In Clark *v.* State, 8 Kan. App. 782, defendant was prosecuted for bastardy. Defendant and relatrix agreed that relatrix should be examined by a physician, and if his examination showed that pregnancy of relatrix was of not more than four months' duration, defendant would marry her. *Held,* that statements made by relatrix to physician were not privileged.

69. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 166, 47 Pac. 1019.

70. Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 297, 36 Am. Rep. 617.

In Cahen *v.* Continental Ins. Co., 9 Jones & S. (N. Y.) 296, it was held that communication to physician in presence of patient's wife and nurse are privileged. Judgment reversed on another ground, but this question not discussed. See also Murphy *v.* Commissioner (Cal. App.), 83 Pac. 577.

As to third persons unnecessarily present, see *ante,* I, 6, B, c.

But it has been held that all knowledge is privileged, whether confidential or not.[71]

E. Necessary Information. — It is also essential that knowledge acquired by a physician was necessary.[72]

a. *Prescribe for or Treat Patient.* — Knowledge must have been necessary to enable physician to prescribe for[73] or treat his patient for an actual or supposed ailment.[74]

71. Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 63 N. E. 808.

72. "The word 'necessary' should not be so restricted as to permit testimony of statements or information in good faith asked for or given to enable intelligent treatment, although it may appear that the physician might have diagnosed the disease and prescribed for it without certain of the information, so that it was not strictly necessary. Sloan *v.* N. Y. C. R. Co., 45 N. Y. 125; Grattan *v.* Met. Life Ins. Co., 80 N. Y. 281; Renihan *v.* Dennin, 103 N. Y. 573." *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169; *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874.

73. The word "prescribe" as used in statutes of privilege, should not be limited to its ordinary sense of writing directions for drugs or medicines, but should be held to include any directions given to alleviate the patient's condition. *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169; *In re* Hunt's Will, 122 Wis. 46, 100 N. W. 874.

74. Necessary Information. Statement to, or knowledge acquired by, a physician is not privileged, unless it was necessary to enable him to perform his duties.

Arkansas. — Collins *v.* Mack, 31 Ark. 684, 694.

California. — *In re* Black's Estate, 132 Cal. 392, 64 Pac. 695; Harris *v.* Zanone, 93 Cal. 59, 71, 28 Pac. 845.

Iowa. — Sutcliffe *v.* Iowa State T. M. Assn., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298.

Kansas. — Clark *v.* State, 8 Kan. App. 782, 61 Pac. 814; Kansas City, etc. R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. 646.

Michigan. — Campau *v.* North, 39 Mich. 606, 33 Am. Rep. 433; People *v.* Glover, 71 Mich. 303, 38 N. W. 874; Lincoln *v.* Detroit, 101 Mich. 245, 59 N. W. 617; People *v.* Cole, 113 Mich. 83, 71 N. W. 455.

Missouri. — James *v.* Kansas City, 85 Mo. App. 20; Smart *v.* Kansas City, 91 Mo. App. 586, 596; Hamilton *v.* Crowe, 175 Mo. 634, 75 S. W. 389; Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89; Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363.

New York. — Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564; Henry *v.* New York L. E. & W. R. Co., 10 N. Y. Supp. 508; People *v.* Koerner, 154 N. Y. 355, 365, 48 N. E. 730; Green *v.* Metropolitan St. R. Co., 171 N. Y. 201, 63 N. E. 958, *reversing s. c.* 72 N. Y. Supp. 524, 89 Am. St. Rep. 807; Griebel *v.* Brooklyn H. R. Co., 74 N. Y. Supp. 126; De Jong *v.* Erie R. Co., 60 N. Y. Supp. 125; Brown *v.* Rome, W. & O. R. Co., 45 Hun 439; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887, 893; People *v.* Abrahams, 88 N. Y. Supp. 924; Benjamin *v.* Tupper Lake, 97 N. Y. Supp. 512. Grattan *v.* National L. Ins. Co., 15 Hun 74.

Wisconsin. — James *v.* State, 124 Wis. 130, 102 N. W. 320.

But see Doran *v.* Cedar Rapids & M. C. R. Co., 117 Iowa 442, 90 N. W. 815; Hewitt *v.* Prime, 21 Wend. (N. Y.) 79.

In Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523, it was held that a physician could testify concerning his patient's mental condition, it appearing that his knowledge was acquired while collecting a bill for services, and not in the course of consultation.

"It is not sufficient to authorize the exclusion that the physician acquired the information while attending his patient; but it must be

b. *To Confirm Previous Examination.* — If an examination be made to confirm previous observation, the information thereby obtained is privileged.[75]

c. *Privileged, Whether Necessary or Not.* — But it has been held that all information acquired by a physician in the discharge of his duty is privileged, whether such information was necessary or not.[76]

d. *Necessary Character, Question for Court.* — Whether or not certain information was necessary to enable physician to act, is a question for the court.[77]

Whether or Not Necessary. — The question whether or not certain information was necessary, will be determined by the court from examination of physician offered as a witness, and if he states that information was not necessary to enable him to prescribe for or treat his patient, his evidence as to the information in question will be admitted.[78]

the necessary information mentioned" (in statute above quoted). Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564. See Hoyt *v.* Hoyt, 112 N. Y. 493, 20 N. E. 402.

Information Acquired Partly at Social Visits. — Where testimony of physician showed that he had attended a certain person professionally for a number of years, that he made some visits which were not professional, and for which he made no charge, his testimony as to that person's mental condition, founded upon knowledge acquired during the period testified to should be excluded. Brigham *v.* Gott, 3 N. Y. Supp. 518. In this case the issue was the mental condition of patient, it being sought to show by her physician that at a certain time her memory became defective. It was contended that the testimony was competent, because some of the information testified to might have been obtained at non-professional visits; but the appellate court held that the evidence showed that the information was acquired during a period when physician was prescribing for patient as such, and was privileged.

Physician Unable to Segregate. If physician is unable to separate what he learned from patient by confidential communication or examination from that which he learned from social visits, his testimony should be excluded. *In re* Darragh's Estate, 5 N. Y. Supp. 58.

Competent, if Segregation Possible. — But his testimony is competent, if confidential matter can be separated from matter not confidential. Seifert *v.* State, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340.

Information Casually Obtained from general observation of a person while attending other members of his family is not privileged, it not appearing that the person in question consulted the physician. Jennings *v.* Supreme Council, L. A. Ben. Assn., 81 N. Y. Supp. 90.

75. In Smart *v.* Kansas City, 91 Mo. App. 586, 596, the court holds that such information, although acquired after the relation has ceased, is continuing information and privileged.

76. Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687. (See statement in note 21, under I, 7, B, f, (3.); New York, C. & St. L. R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, rehearing denied, 38 N. E. 871; McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209; Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977.

77. *In re* Redfield's Estate, 116 Cal. 637, 644, 48 Pac. 794.

78. *In re* Halsey's Estate, 9 N. Y. Supp. 441.

Necessity Shown by Physician's Statement. — Kenyon *v.* City of Mondovi, 98 Wis. 50, 73 N. W. 314.

Where physician called as a witness stated that he did not attend a certain

Presumed Necessary From Relationship. — But the relationship of physician and patient being shown, it will be presumed that the information in question would not have been imparted to the physician, except for the purpose of aiding him to prescribe.[79]

F. Information Acquired in Discharge of Duty. — It is essential to a claim of privilege that the information in question be acquired while the physician is engaged in rendering professional service to his patient, the mere fact of the existence of the relation being insufficient.[80]

person as a physician, and there was nothing from which the contrary appeared, ruling admitting his testimony will not be disturbed upon appeal. Stowell *v.* American C. R. Assn., 5 N. Y. Supp. 233.

In State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979, 987, it is said that the physician must determine for himself whether the information acquired by him from his patient is necessary.

79. Necessary Character Presumed. — Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Fenney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; State *v.* Kennedy, 177 Mo. 98, 75 S. W. 979, 988.

In Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185, 194, the court says: "The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient."

In Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543, the court says: "We are not to be regarded as overlooking the further contention of counsel for appellant in the case at bar to the effect that the testimony here sought to be elicited did not relate to any communication 'necessary and proper to enable him to discharge the functions of his office,' etc. It may be true, possibly, that the knowledge acquired by the physician was not, in point of fact, and strictly speaking, necessary and proper to enable him to perform the functions of his office. But of this we are not in position to judge, nor are we called upon to determine what the fact might be when reduced to a last analysis. It was the condition of plaintiff that was the subject of the inquiry, and it was the professional judgment of the physician that was called for. The privilege cannot be subject to measurement by metes and bounds, and we may well assume that all that was told to the physician, and all that was developed by his examination or came under his observation, was necessary and proper for his understanding of the condition of his patient. The relation of physician and patient being established, if by any fair intendment communications made have relation to the physical or mental condition of the patient, we are bound to hold them privileged."

80. Herries *v.* Waterloo, 114 Iowa 374, 86 N. W. 306; Hamilton *v.* Crowe, 175 Mo. 634, 75 S. W. 389; *In re* Black's Estate, 132 Cal. 392, 64 Pac. 695.

In Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523, a physician was questioned as to his patient's mental condition. It appeared that he had been employed by patient, but that his knowledge on the question in issue was acquired while collecting from patient a bill for professional services. *Held,* that his testimony was admissible.

Seifert *v.* State, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340. In this case a physician called to collect his bill from a woman upon whom an abortion had been committed. In response to his inquiry as to whether a certain man would pay the bill, she said the man referred to had had nothing to do with producing her condition. *Held,* that this statement could be proved by the physician.

Information of the condition of a

Duty Not Connected With Patient. — As to information acquired by physician in the course of performing duty not relating to person examined, see cases in notes.[81]

7. Extent of Privilege. — A. What Matters Privileged. — a. *Physical Condition of Patient.* — As privilege extends to all information[82] necessarily acquired by physician in the course of professional employment, it follows that he cannot testify concerning the physical condition of his patient.[83]

b. *Fact of Disease.* — Nor as to whether his patient had a certain disease.[84]

c. *Nature of Disease.* — Nor as to the nature of the disease for which he was treated.[85]

person, acquired by a physician prior to formation of the relation is not privileged. *In re* Lowenstine's Estate, 21 N. Y. Supp. 931.

81. It has been held that when hospital physician attends a patient of his hospital, and, in accordance with the rules of his hospital questions patient as to the cause of injury, the information thus acquired is privileged, as being necessary to enable the physician to perform his professional duty. Griebel *v.* Brooklyn Heights R. Co., 74 N. Y. Supp. 126.

But in Green *v.* Metropolitan St. R. Co., 171 N. Y. 201, 63 N. E. 958, 89 Am. St. Rep. 807, it appeared that the same state of facts existed, that is, a physician, in order to comply with hospital rules, questioned a patient as to cause of injury. Objection to question was sustained, and upon appeal this ruling was held erroneous. The court did not discuss the question of necessity as affected by hospital rules, but held the testimony admissible.

As to admissibility of record, required by hospital rule to be made by physician as to inmate, and as to waiver arising from its introduction by patient, see Kemp *v.* Metropolitan St. R. Co., 88 N. Y. Supp. 1.

82. "Information." — "Information" mentioned in the New York statute extends to all facts which necessarily come to the knowledge of the physician in a given professional case. People *v.* Stout, 3 Park. Crim. (N. Y.) 670.

All Necessary Knowledge Privileged. — Kenyon *v.* City of Mondovi, 98 Wis. 50, 73 N. W. 314; Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543.

83. Physical Condition of Patient. — Finnegan *v.* Sioux City, 112 Iowa 232; Jones *v.* Brooklyn, B. & W. E. R. Co., 3 N. Y. Supp. 253; Grossman *v.* Supreme Lodge, 6 N. Y. Supp. 821; Lackland *v.* Lexington Coal Min. Co., 110 Mo. App. 634, 85 S. W. 397.

Even as Regards Sobriety. Finnegan *v.* Sioux City, 112 Iowa 232, 83 N. W. 907.

In Edington *v.* Aetna L. Ins. Co., 13 Hun (N. Y.) 543, the following questions were held improper: "Was he cured when he left your hands?" "Was he better or worse after you ceased treating him?" Also the question whether or not, on a certain day, patient was in good health, was of sound body, and one who usually enjoyed good health. The last question was held objectionable, as based upon information acquired in professional attendance.

Whether Patient Conscious or Unconscious. — Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543.

Physician can not give statements of patient as to condition of health prior to time of making statement. Barker *v.* Cunard S. S. Co., 36 N. Y. Supp. 256, *affirmed* without opinion, 157 N. Y. 693, 51 N. E. 1089.

Contra, as to Condition. — Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4.

84. Nelson *v.* Nederland Ins. Co., 110 Iowa 600, 81 N. W. 807; Sloan *v.* New York, C. R. Co., 45 N. Y. 125.

85. Nelson *v.* Nederland L. Ins.

Testimony Incompetent, Though Specific Disclosure Not Made. — It has been held that it is error to admit the testimony of physicians, although it makes no specific disclosure of nature of disease, if it shows that they treated a person for a considerable time and that they were specialists in the disease which caused the patient's death.[86]

Whether Certain Illness Was Last Illness. — Physician cannot be asked when he was applied to in relation to the last illness of his patient, as such question requires statement of information which could be acquired in professional capacity only; as whether or not the illness in question was patient's last illness, involves a consideration of the nature of the disease.[87]

Cause of Death. — Nor can he state the cause of his patient's death.[88]

d. *Fact of Treatment.* — Or that he treated patient for a certain disease.[89]

Co., 110 Iowa 600, 81 N. W. 807; Lammiman *v.* Citizens' St. R. Co., 112 Mich. 602, 71 N. W. 153; Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300; Hunn *v.* Hunn, 1 Thomp. & C. (N. Y.) 499; Redmond *v.* Industrial Ben. Assn., 28 N. Y. Supp. 1075; *s. c. affirmed* 150 N. Y. 167, 44 N. E. 769; Davis *v.* Supreme Lodge K. of H., 54 N. Y. Supp. 1023; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617.

In Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894, 901, it was held that a question to a physician as to whether or not he had treated a person for a certain disease was proper But in Jones *v.* Banker's Life Assur. Co. 120 Mich. 211, 79 N. W. 204, the supreme court of Michigan says of Brown *v.* Metropolitan L. Ins. Co., that that decision must be limited to the facts there involved. The court states that in Brown *v.* Metropolitan L. Ins. Co., the testimony of a physician was admitted because an injured person had in one application for insurance stated that she had had a certain disease for which she had been treated by a physician whom she named, and stated in her second application that she had never been sick. The court in Jones *v.* Life Assn. said this ruling was correct.

86. McCormick *v.* United L. & A. Ins. Assn., 29 N. Y. Supp. 364. This was an action upon policy of life insurance. Defense, breach of warranty by insured. Defendant claimed that when insured made his application he was suffering from cancer. Three physicians were permitted to testify for defendant against plaintiff's objection. On this subject the court says: "It is urged that these physicians disclosed no information derived from Story while they were treating him in a professional capacity. While this may be technically true, we think that by permitting the defendant to show by these witnesses that they had treated him for some disease for a long time anterior to the date of the policy, and that they were specialists, and accustomed to treat cancers, and diseases of the tongue and throat, the spirit of the section was violated, and an error was committed in admitting this evidence over the objection of the plaintiff."

87. Patten *v.* United L. & A. Ins. Assn., 16 N. Y. Supp. 376; *reversed* 133 N. Y. 450, 31 N. E. 342, but this subject is not discussed.

88. Physician cannot state cause of a person's death, if knowledge of the disease which caused it was acquired in the course of professional treatment. Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 298; *s. c.* 92 N. Y. 274, 287, 36 Am. Rep. 617.

89. McGowan *v.* Supreme Order I. O. F., 104 Wis. 173, 80 N. W. 603.

e. *Mental Condition.* — Nor can he testify concerning patient's mental condition.[90]

Competent in Inquisition in Lunacy. — But it has been held in New York that upon an inquisition in lunacy a physician may testify concerning mental condition of his patient.[91]

f. *Opinion Founded Upon Professional Communication.* — Physician may not state his opinion of his patient's condition, mental or physical, when that opinion is based upon knowledge obtained from patient's statements, or from an examination made in course of professional employment.[92]

g. *Means of Acquiring Knowledge Immaterial.* — Privilege extends to information acquired from examination or observation of patient, as well as to matters communicated to physician orally.[93]

90. *California.* — *In re* Flint's Estate, 100 Cal. 391, 34 Pac. 863; *In re* Nelson's Estate, 132 Cal. 182, 64 Pac. 294; *In re* Redfield's Estate, 116 Cal. 637, 644, 48 Pac. 794.

Indiana. — Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303; Towles *v.* McCurdy, 163 Ind. 12, 71 N. E. 129.

New York. — Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770, *affirming* 38 Hun 270; *In re* Coleman, 111 N. Y. 220, 19 N. E. 71; Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. 874; Mason *v.* Williams, 6 N. Y. Supp. 479; *In re* Connor's Will, 7 N. Y. Supp. 855; Van Orman *v.* Van Orman, 11 N. Y. Supp. 931; *In re* Preston's Will, 99 N. Y. Supp. 312. *In re* Darragh's Estate, 5 N. Y. Supp. 58.

Wisconsin. — *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874.

91. In *In re* Benson, 16 N. Y. Supp. 111, the court admitted an affidavit of attending physician showing that person whom he had treated professionally was insane. The court held that the statute of privilege did not extend to inquisition of lunacy. The court also held that, even if statute did extend to such cases, the privilege was waived by failure to object, although the record does not show that patient was represented on the hearing.

92. Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

See statement of case of Grattan *v.* Metropolitan L. Ins. Co. 24 Hun (N. Y.) 43. When this case was sent back for new trial, the trial court excluded a question to the examining physician calling for his opinion founded upon knowledge of the general appearance of the person examined, on the theory that all the physician's information was acquired at one examination, and if part was privileged, all was. On appeal to general term this ruling was held correct. See 28 Hun (N. Y.) 430. Opinion not reported.

In Rose *v.* Supreme Court O. of P., 126 Mich. 577, 85 N. W. 1073, a physician was asked, "Excluding any knowledge or information you obtained while treating the insured, and judging from her appearance at the time of the treatment, what is your opinion, whether she was a woman in good health and sound body, and a woman who usually enjoyed good health?" *Held,* improper, as calling for opinion based upon information acquired during treatment.

Jail Physician as Expert. — The nominal professional relation between jail physician and a prisoner does not disqualify the physician as an expert upon the subject of the prisoner's mental condition. People *v.* Schuyler, 43 Hun (N. Y.) 88.

93. *Colorado.* — Colorado Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875.

Indiana. — Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; Carthage Tpk. Co. *v.* Andrews, 102 Ind. 138, 52 Am. Rep. 653; Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep.

409; Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; Masonic Assn. *v.* Beck, 77 Ind. 203, 40 Am. Rep. 295.

Iowa. — Battis *v.* Chicago, R. I. & P. R. Co., 124 Iowa 623, 100 N. W. 543; Prader *v.* Accident Assn., 95 Iowa 149, 63 N. W. 601.

Michigan. — Briggs *v.* Briggs, 20 Mich. 34.

Missouri. — Smart *v.* Kansas City, 91 Mo. App. 586, 595; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; Streeter *v.* City of Breckenridge, 23 Mo. App. 244, 251; Smoot *v.* Kansas City, 194 Mo. 513, 92 S. W. 363.

New York. — Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372; *s. c.* 80 N. Y. 281, 36 Am. Rep. 417; *s. c.* 15 Hun 74; Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; Sloan *v.* New York Cent. R. Co., 45 N. Y. 125; People *v.* Stout, 3 Park. Cr. 670.

Wisconsin. — Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409; *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874.

In Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185, *s. c.* 5 Hun 1, the statute in question prohibited physician disclosing any "information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." The court says: "It is also urged that the statute does not prohibit the disclosure of the knowledge which the physicians acquired otherwise than by communications made by the patient. We think such a construction would be too narrow. The word 'information,' as used in the statute, comprehends the knowledge which the physicians acquired in any way while attending the patient, whether by their own insight, or by verbal statements from him, or from members of his household, or from nurses or strangers, given in aid of the physician in the performance of his duty. Such is the true signification of the word 'information.' Knowledge, however communicated, is information. It may be as well derived through the sense of sight as that of hearing. The principle is the same in whatever way the information passes. (Coveney *v.* Tannahill, 1 Hill 35; Robson *v.* Kemp, 5 Esp. 53.) A dumb patient and one whose vocal organs have been paralyzed, are equally protected by the statute with others. The secrets of the sick chamber cannot be revealed, because the patient was too sick to talk, or was temporarily deprived of his faculties by delirium or fever, or any other disease, or because the physician asked no questions. The statute seals the lips of the physician against divulging in a court of justice the intelligence — or, if the word is preferred, the knowledge or information — which he acquired while in the necessary discharge of his professional duty. It was enacted for the purpose of extending to the relation between a patient and his physician, the same rule of public policy by means of which the common law protected the professional confidence necessarily existing between a client and his attorney." Judgment *reversed* on appeal, but ruling on this subject held correct. See also Grattan *v.* National L. Ins. Co., 15 Hun (N. Y.) 74.

"If the knowledge is acquired in the chamber of the patient, and in the discharge of professional duty, the physician can make no disclosure. This is true, whether the knowledge is communicated by the words of the patient, or is gained by observation, or is the result of a professional examination. The law forbids the physician from disclosing what he learns in the sick-room, no matter by what method he acquires his knowledge." Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

The word "communication" as used in a statute, means much the same as the word "information." Prader *v.* Accident Assn., 95 Iowa 149, 63 N. W. 601.

In Briggs *v.* Briggs, 20 Mich. 34, 41, referring to a state statute which forbade a physician to disclose any information which he may have acquired in attending any patient in his professional character, the court says: "We do not understand the information here referred to, to be confined

(1.) Silence of Patient. — Physician will not be permitted to testify that his patient made no statement in regard to a particular pain or ailment.[94]

to communications made by the patient to the physician, but regard it as protecting, with the veil of privilege, whatever in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose."

"It is the acquisition of information through the medium of professional attendance that is the essential thing. When the patient submits his person to the physician, no word may be necessary; and if necessary, this makes no difference, since in both cases the information is acquired from the patient." Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363.

Privilege extends to knowledge acquired from the patient himself, not only communications received from his lips, but from observations of his appearance and symptoms and from the statements of others who may surround him at the time. Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185. See statement of Gartside *v.* Connecticut Mut. L. Ins. Co., 76 Mo. 446, 43 Am. Rep. 765, and language quoted therefrom in note 13 under I, 5, A, a, *ante*.

In Squires *v.* City of Chillicothe, 89 Mo. 226, 231, 1 S. W. 23, it is said that the case of Gartside *v.* Ins. Co., has been overruled. No decision rendered between the dates of the two cases expressly overrules Gartside *v.* Ins. Co. An overruling of that decision was not necessary in Squires *v.* Chillicothe. It would seem that in the Squires case the court intended to refer to Harriman *v.* Stowe, 57 Mo. 93, a decision which is inconsistent with the principle announced in Squires *v.* Chillicothe. This is strengthened by the fact that the Squires case refers to Groll *v.* Tower, 85 Mo. 249, as the overruling case, and in Groll *v.* Tower, Harriman *v.* Stowe is expressly disapproved, while Gartside *v.* Ins. Co., is not even criticized, the court stating that the ruling therein was correct, but the facts being different from those involved there (Groll *v.* Tower), the case was not a controlling authority in that case. Further, Gartside *v.* Ins. Co. is cited as authority in Thompson *v.* Ish, 99 Mo. 160, 173, a case decided three years subsequent to decision of Squires *v.* Chillicothe, and in Kling *v.* City of Kansas, 27 Mo. App. 231, 241.

Knowledge is privileged whether gathered from statements of patient, or from examination. Colorado Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541, 46 Pac. 875, in which the court says: "As we view the case, and as we believe the law to be, the inhibition is broad enough to exclude an examination of the surgeon as to any information which he has acquired while attending a patient, whether this information is deduced from statements or gathered from his professional or surgical examination. It is a common knowledge that the eye and finger of the attending surgeon is vastly more expert in locating cause or trouble than the tongue of the most astute patient. The authorities hold that no matter how the information may be acquired, whether it comes to the surgeon in the shape of oral statements, or by reason of his examination, he cannot be interrogated respecting it. Freel *v.* Railway Co., 97 Cal. 40, 31 Pac. 730; Gartside *v.* Insurance Co., 76 Mo. 446; Briggs *v.* Briggs, 20 Mich. 34; Dilleber *v.* Insurance Co., 69 N. Y. 256; Masonic Assn. *v.* Beck, 77 Ind. 203."

Contra, Limited to Communications Made by Patient. — Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4.

94. If patient makes no reference to a certain feeling or pain, his physician is justified in assuming that it does not exist, and thus acquires information as to his patient's condition. This information is privileged. Smart *v.* Kansas City, 91 Mo. App. 586. In this case the court says: "There were several questions asked of physicians, who attended plaintiff in a professional capacity, which

(2.) **Question by Patient.** — Physician will not be permitted to testify as to question asked him by patient concerning disease or condition treated.[95]

h. *Statement of Prior Condition.* — The privilege extends to statements of patient showing his condition prior to first consultation with physician.[96]

i. *Statements and Acts of Physician.* — Privilege also extends to statements of physicians to patient,[97] and to testimony of physician as to medicine prescribed.[98]

Prescription. — A physician's prescription is also privileged.[99]

j. *Information Acquired After Death of Patient,* but which is the result of continued observation, is privileged.[1]

k. *Information Acquired From Other Treatment.* — The Court of Appeals of New York, following its policy of applying a liberal

raise important legal questions of evidence. In order to support defendant's theory that the hurt from the fall on the sidewalk did not cause the amputation, two of the physicians who waited upon her for several weeks before the amputation, were asked questions designed to show that she never mentioned to them the fall on the sidewalk. The offer of this testimony was objected to by plaintiff and rejected by the court. Defendant insists that this was not a communication from the patient to the physician, but was, on the other hand, evidence that there was *no* communication and was thereby not covered by the statute. The statute (section 4659, Revised Statutes 1899) reads that a physician and surgeon shall not testify 'concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.' It will be observed that the statute does not use the word, 'communication'; the statutory word is, 'information.' It is knowledge common to everyone, but especially acted upon by physicians, that information may be had by lack of communication; and in many instances it is acted upon as if there was an affirmative statement. A physician hearing no complaint or statement as to certain feeling, or pain, or other condition of his patient, must assume that it does not exist; he thereby gains 'information' that it does not exist. The effort made by defendant to show as a fact that no complaint of the fall was made, was, of course, that the jury might be informed that, in all probability, no injury resulted from the fall. In other words, defendant wanted to convey to the jury the information which the doctor received through the silence of his patient. Information is not confined to communications. Briggs *v.* Briggs, 20 Mich. 34."

95. Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

96. Barker *v.* Cunard S. S. Co., 36 N. Y. Supp. 256.

97. Consultation of patient's physicians in his presence is privileged. Morris *v.* New York & W. O. R. Co., 26 N. Y. Supp. 342.

Physician cannot state whether or not he informed his patient of the nature of the disease treated. Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807.

98. Streeter *v.* City of Breckinridge, 23 Mo. App. 244, 251.

99. Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807.

1. Smart *v.* Kansas City, 91 Mo. App. 586, 596. In this case it was attempted to be shown by a surgeon that several days after a certain amputation, he examined the bones of the amputated limb and ascertained that a certain condition had not existed. It was held that his knowledge was the result of continued observation and was privileged. The court said that, whether or not that condition existed was a matter of

construction to statutes of privilege, has held that a physician may not testify, if his knowledge of the condition or disease sought to be proved was acquired in the course of treatment of another disease, and to treat which the knowledge so acquired was not necessary.[2]

B. What Matters Not Privileged. — a. *Fact of Attendance and Treatment.* — The fact that a physician attended a certain person professionally is not privileged, and physician may be compelled to state that he did examine, or treat, or prescribe for such person,[3] or that a certain person consulted him professionally;[4] or

opinion before the operation, and of demonstration afterward.

2. *In re* Redfield's Estate, 116 Cal. 637, 644, 48 Pac. 794; *In re* Preston's Will, 99 N. Y. Supp. 312.

Nelson *v.* Oneida, 156 N. Y. 219, 50 N. E. 802, 66 Am. St. Rep. 556. This case was an action against a municipal corporation for damages sustained by a fall due to a defective sidewalk. Plaintiff claimed to have suffered, as the result of the accident, an umbilical hernia, prolapsus of the uterus, and several bruises. Defendant claimed that plaintiff had an umbilical hernia prior to the accident, and offered her attending physician as a witness. The physician testified that prior to the accident he had attended and treated plaintiff as her physician more or less during eight or ten years, during which period he had attended her twice in childbirth. At this point plaintiff's counsel objected. In response to questions by the court the witness stated that he learned all he knew in regard to plaintiff in his capacity as her physician, and that it was necessary to enable him to treat her case. The court refused to strike out the evidence given by witness, and inquired if defendant proposed to obtain any other non-privileged testimony from the witness. To this inquiry defendant's counsel stated that he proposed to show that plaintiff had never been treated by witness for umbilical hernia; but that, on the occasion of other treatment, witness had discovered that plaintiff had a hernia, and that the information was not necessary to enable him to treat her for the trouble for which he did treat her. The court excluded the evidence on the ground that the knowledge sought to be disclosed was acquired while treating plaintiff in a confidential capacity. This ruling was held to have been correct. The statute relied upon provided: "A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." The court says: "The evidence offered was clearly within the protection of the statute. The witness acquired the information which the defendant desired to elicit from him, while attending the patient in a professional capacity, and the discovery of an umbilical hernia was a necessary incident of the investigations made to enable him to act in that capacity."

3. *Indiana.* — Haughton *v.* Aetna L. Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

Michigan. — Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894, 901; Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977; Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176; Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125.

Minnesota. — Price *v.* Standard L. & A. Ins. Co., 90 Minn. 264, 95 N. W. 1118.

New York. — Numrich *v.* Supreme Lodge, 3 N. Y. Supp. 552; Patten *v.* United L. & A. Ins. Co., 133 N. Y. 450, 31 N. E. 342; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887.

4. Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807.

Physician may state that he had an interview with a certain person when he wanted medicine. Bab-

that he, as a physician, prescribed remedies for a certain person.[5]

b. *Identity of Patient.* — He may also identify his patient.[6]

c. *Facts as to Patient.* — Physician may also testify that a certain person was sick;[7] that he was the family physician of a certain person, and the number and dates of his visits;[8] also the place where, and the time during which his treatment continued;[9] also that a patient was, at a certain time, discharged from treatment;[10] also that witness refused to attend a patient because another physician was called in without consent of witness.[11]

d. *Ordinary Observation.* — A physician may testify as to the existence of any facts concerning his patient which are equally open to the observation of any other person, and to the apprehension of which a medical education is not essential.[12]

cock *v.* People, 15 Hun (N. Y.) 347.

5. Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807.

6. Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887.

7. Patten *v.* United L. & A. Ins. Co., 133 N. Y. 450, 31 N. E. 342.

8. Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977; Patten *v.* United L. & A. Ins. Co., 133 N. Y. 450, 31 N. E. 342; Becker *v.* Metropolitan L. Ins. Co., 90 N. Y. Supp. 1007, *reversing s. c.*, 87 N. Y. Supp. 980; Sovereign Camp W. O. W. *v.* Grandon, 64 Neb. 39, 89 N. W. 448.

9. Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887; Price *v.* Standard L. & A. Ins. Co., 90 Minn. 264, 95 N. W. 1118.

10. Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125.

11. Dittrich *v.* Detroit, 98 Mich. 245, 57 N. W. 125.

12. Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523; Staunton *v.* Parker, 19 Hun (N. Y.) 55; Steele *v.* Ward, 30 Hun (N. Y.) 555, 563. See discussion in Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363, although not necessary to decision; *s. c. disapproved* on this point in Kling *v.* City of Kansas, 27 Mo. App. 231, 245; Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564; Fisher *v.* Fisher, 129 N. Y. 654, 29 N. E. 951; *In re* Loewenstine's Estate, 21 N. Y. Supp. 931.

On this subject, see Jones *v.* Brooklyn, B. & W. E. R. Co., 3 N. Y. Supp. 253. The court says: "The counsel of appellant insisted that the statute did not apply to this testimony; that the condition of a broken leg did not call for the disclosure of any of the secrets of the patient; that the condition of the leg was obvious to all; that privacy, the reason of the rule, having failed, the rule itself failed. The scars received sometimes in the wars of Venus are as plain to sight as a leg broken in a railroad accident; yet the physician has no more right to expose the latter to public gaze than the former. Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. Rep. 320; Grattan *v.* Insurance Co., 80 N. Y. 281. The counsel seems to have been misled by the following language of the learned judge delivering the opinion in Edington *v.* Insurance Co., 77 N. Y. 571, viz.: 'Suppose a patient has a fever, or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him testify to these matters? In so doing there would be no breach of confidence, and the policy of the statute would not be invaded.' If this is the law, what would prevent the physician from testifying to cancers, fistulas, tumors, syphilitic marks and sores, all of which may be obvious to others than the medical expert? But such is not the law; and the same judge, in referring to this citation, says in Renihan *v.* Dennin, 103 N. Y. 579, 9 N. E. Rep. 320, where the same question, viz., that the statute should be confined in its application to information of a confidential nature, came before the

Contra. — But the contrary of this rule has also been held.[13]

e. *Condition of Corpse of Non-Patient.* — A physician may testify as to the result of his examination of the body of a dead person who was not his patient in his lifetime.[14]

f. *Unnecessary Information.* — Information, though obtained in the course of treatment, which is not necessary to enable physician to prescribe for or treat his patient, is not privileged.[15]

(1.) Contra. — But the contrary has been held.[16]

(2.) Unnecessary Statements. — Physician may give in evidence statements of his patient relating to matters, knowledge of which was not necessary to enable him to prescribe.[17]

(A.) Cause of Condition. — Consequently he may testify as to

court [as] in Grattan *v.* Insurance Co., 80 N. Y. 281: 'I again attempted to enforce the same view upon my brethren and again failed, and it was then distinctly held that the statute could not be confined to information of a confidential nature, and that the court was bound to follow and give effect to the plain language, without interpolating the broad exception contended for.'" Chicago City R. Co. *v.* McCaughna, 216 Ill. 202, 74 N. E. 819, *affirming s. c.* 117 Ill. App. 538.

Independent Knowledge. — Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4. In this case the following questions were held proper. "From your treatment of Mrs. Sarah Howle, and the facts you have testified to, what do you say was her state of health on Nov. 12, 1894?" "You may state what was her condition on that day." "What, if anything, did you prescribe for her, if you remember?" The action of the trial court in sustaining objection to that question was held erroneous, the appellate court holding that the question did not call for anything communicative by patient to physician, but for the independent knowledge of the latter.

13. In Post *v.* State, 14 Ind. App. 452, 42 N. E. 1120, it was held that a physician could not testify as to whether or not a certain person accompanied a patient who consulted witness professionally.

14. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 166, 47 Pac. 1019.

15. Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564; *In re* O'Neil's Estate, 7 N. Y. Supp. 197; Griebel *v.* Brooklyn Heights R. Co., 74 N. Y. Supp. 126; De Jong *v.* Erie R. Co., 60 N. Y. Supp. 125; People *v.* Abrahams, 88 N. Y. Supp. 924; Benjamin *v.* Tupper Lake, 97 N. Y. Supp. 512.

In Brown *v.* Rome, W. & O. R. Co., 45 Hun (N. Y.) 439, a physician who treated a person who had been injured by a railway train was offered as a witness to prove that plaintiff stated to him that he, plaintiff, heard several persons hallooing to him, and saw a man wave his hat, but did not think where he was until the train was upon him. This evidence was excluded. *Held,* error as the information was not necessary to enable physician to act in his professional capacity.

In *In re* O'Neil's Estate, 7 N. Y. Supp. 197, it was held that physician might testify that decedent had made declarations as to making a will, and that witness had advised him on that subject. See also In Matter of Halsey, 2 Connolly (N. Y.) 220.

Physician may testify that a certain person acted as nurse for his patient. *In re* McQueen's Estate, 13 N. Y. Supp. 705.

16. Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687. (See statement in note 21 under I, 7, B, f, (3.), *post.*) New York, C. & St. L. R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954; rehearing denied, 38 N. E. 871; McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209.

17. *Arkansas.* — Collins *v.* Mack, 31 Ark. 684, 694.

patient's statements concerning the cause of his condition, if information thereby acquired was not necessary to enable him to prescribe.[18]

(B.) Cause of Accident. — Physician may also give statement of patient as to cause of accident in which his injury was sustained.[19]

(C.) Contra, Cause of Accident Privileged. — But it has been held that a physician may not give in evidence conversations between himself and patient as to the manner in which the accident was sustained which caused the injury for which patient was being treated.[20]

(3.) Contra, Statements Privileged, Whether Necessary or Not. — But it has been held that statements made by patient to physician are privileged, whether information thereby conveyed was necessary or not.[21]

Kansas. — Kansas City, Ft. S., etc. R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. 646.

Missouri. — James *v.* Kansas City, 85 Mo. App. 20.

Michigan. — Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176; People *v.* Cole, 113 Mich. 83, 71 N. W. 455.

New York. — Brown *v.* Rome, W. & O. R. Co., 45 Hun 439; *In re* Halsey's Estate, 9 N. Y. Supp. 441; In Matter of Halsey, 2 Connolly 220; De Jong *v.* Erie R. Co., 60 N. Y. Supp. 125; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Griebel *v.* Brooklyn Heights R. Co., 74 N. Y. Supp. 126; People *v.* Abrahams, 88 N. Y. Supp. 924; Benjamin *v.* Tupper Lake, 97 N. Y. Supp. 512.

In Cleveland *v.* New Jersey Steamboat Co., 5 Hun (N. Y.) 523, it was held that statement by patient to physician that he was restless at night was admissible, but on what ground does not appear. *Reversed* 68 N. Y. 306, but no discussion of this subject.

Patients' statements as to physician's bill are not privileged. Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89.

18. Campau *v.* North, 39 Mich. 606, 33 Am. Rep. 433. Plaintiff sued for damages alleging that blows administered by defendant caused a rupture. Plaintiff's physician was called as a witness, and, having testified that he had been employed and had acted as her physician, that he had charge of her case, and that all the facts which had come to his knowledge of and concerning her had been acquired by him while attending her in his professional capacity, was tendered as a witness to prove that she admitted to him at a certain time and place that she had been ruptured before she went to live with defendant, and had not been ruptured by him. This offer of proof was objected to as calling for confidential communication. Objection was sustained. On appeal this ruling was held erroneous. Green *v.* Metropolitan St. R. Co., 171 N. Y. 201, 63 N. E. 958, *reversing s. c.* 72 N. Y. Supp. 524.

19. Kansas City, Ft. S. & M. R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. 646.

20. McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209; Norton *v.* City of Moberly, 18 Mo. App. 457; Streeter *v.* City of Breckinridge, 23 Mo. App. 244, 251; Kling *v.* City of Kansas, 27 Mo. App. 231, 241.

Such was the holding in Green *v.* Metropolitan St. R. Co., 72 N. Y. Supp. 524; but in *s. c.* 171 N. Y. 201, 63 N. E. 958, the Court of Appeals reversed the decision of the Appellate Division on the ground that physician's testimony as to patient's statements concerning manner in which accident was sustained was erroneously excluded.

21. Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687. In this case plaintiff sued for damages caused by defendant's negligence. Defendant called as a witness a physician who had attended plaintiff, and who

g. *Examination to Ascertain Mental Condition of Non-Patient.* It has been held that information acquired by a physician for the purpose of ascertaining the mental condition of a person, not his patient, and not to enable him to render professional service, is not privileged.[22]

had while engaged in his professional duties, conversed with him. It was proved that the physician asked plaintiff how the accident occurred, and that plaintiff had answered that defendant company was not to blame. Objection to this evidence was sustained on the ground that the communication was privileged. It was, on appeal, contended that, as the physician's inquiry was propounded, not to ascertain the nature of the injury, but to learn whether the appellee was to blame for the injury, the information so acquired was not privileged. The court uses this language: "The appellant called one Dr. Schill as a witness. The doctor had assisted in dressing the appellee's injuries, and while engaged in such professional duties he conversed with appellee, and the doctor was interrogated on the subject, and it was proposed to prove by him that he asked the appellee how the accident occurred, and that appellee answered that the company was not to blame for the accident; that he tried to get off the train before it stopped, and slipped off the step. The objection was sustained to this evidence, on the grounds that the communication was privileged, and made to the doctor while engaged professionally in treating the appellee for the injury. It is contended by appellant that this question was propounded, not to ascertain the nature of the injury, but to learn whether the appellee was to blame for the injury. In this ruling there was no error. The case of Heuston *v.* Simpson, 115 Ind. 62, 7 Am. St. Rep. 409, and other decisions collected and cited in that opinion, are decisive of this question. The physician had no business to interrogate his patient for any purpose or object other than to ascertain the nature and extent of the injury, and to gain such other information as was necessary to enable him to properly treat the injury and accomplish the object for which he was called professionally, and such communications are privileged, and he cannot disclose them. If the physician took advantage of the fact of being called professionally, and while there in that capacity made inquiries of the injured party concerning matters in which he had no interest or concern professionally, or for the purpose of qualifying himself as a witness, he cannot be permitted to disclose the information received. The patient puts himself in the hands of his physician; he is not supposed to know what questions it is necessary to answer to put the physician in possession of such information as will enable the physician to properly treat his disease or injury, and it will be conclusively presumed that the physician will only interrogate his patient on such occasions as to such matters and facts as will enable him to properly and intelligently discharge his professional duty, and the patient may answer all questions propounded which in any way relate to the subject or to his former condition, with the assurance that such answers and communications are confidential, and cannot be disclosed without his consent."

To same effect, see New York, C. & St. L. R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; McRae *v.* Erickson, 1 Cal. App. 326, 82 Pac. 209.

22. *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169. This case involved the validity of a will contested on ground of unsoundness of mind. The proof showed that testatrix had been, by her own consent, placed under guardianship. To ascertain whether or not to apply to court for a release from guardianship, a son-in-law of testatrix caused physicians to examine her to ascertain her mental condition. This examination was made about four months prior to the date of the will. The examining phy-

h. *Examination to Obtain Evidence.* — Nor is information acquired in course of examination conducted for the purpose of obtaining evidence.[23]

i. *Examination to Prepare as Witness.* — Information acquired at an examination made to enable physician to testify concerning the condition of a certain person is not privileged.[24]

j. *Communications as to Crime.* — Communications to a physician for the purpose of securing his action or assistance in the commission of a crime are not privileged.[25]

sicians were offered as witnesses in the will contest, and their testimony excluded, on the ground that their information was confidential. This ruling was, on appeal, held erroneous. The Supreme Court of Wisconsin uses this language: "Applying such rule, it is nevertheless apparent that the word 'prescribe,' when used as applicable to physicians, embodies the purpose of cure, remedy, or alleviation. The word means 'to advise, appoint, or designate as a remedy for disease.' Cent. Dict. Indeed, the counsel for proponents has the same understanding. He says in his brief: 'The word "prescribing," used in the statute, does not only apply to prescribing medicines. It has a broader sense. After a physician has professionally examined a patient, he may find that the patient does not need any medicine, but that he needs different air, different food, different employment, must keep away from bad company, etc., and advises him what to do *so as to regain his health.*' We think, therefore, that the purpose to cure or alleviate is an essential element in the meaning of the words 'to prescribe as a physician,' as used in this statute, and that the prohibition against disclosing information only applies when such purpose is present. It may be contended, not without force, that there is the same reason for confidence when the examination is only to ascertain whether a certain disease exists, without any purpose that the physician shall attempt any prescription or advice for cure, but the legislature has not seen fit to so declare, and such a case is as it was before the statute. In the present case, the purpose of attempting anything remedial was wholly wanting in the interview between the medical witnesses and the deceased. The question was not whether resumption of control over her property would or would not be beneficial to her physically or mentally, but whether her mental condition was such that the county court would be likely to restore such control to her. Advice, if any, was sought, not with reference to treatment of any disease, but as to whether to make an application to the court. We hold, therefore, that the information obtained by the physicians at the interview of September 18, 1896, was not necessary, and was not obtained for the purpose of enabling them to prescribe for the testatrix as physicians, and therefore they were not incompetent to give testimony thereof."

23. In James *v.* State, 124 Wis. 130, 102 N. W. 320, defendant was indicted for rape of a child. It appeared that defendant was suffering from a venereal disease at the time of the offense. The child's mother had her examined by a physician for the sole purpose of determining whether or not she had this disease. *Held,* that physician's testimony as to the child's condition was admissible. The court based its ruling on the ground that the information was not acquired for the purpose of enabling the physician to prescribe. The court cites, *In re* Will of Brundl, 102 Wis. 45, 78 N. W. 169. *Compare* Doran *v.* Cedar Rapids & M. C. R. Co., 117 Iowa 442, 90 N. W. 815.

24. Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; State *v.* McCoy, 109 La. 682, 33 So. 730. *Compare* Doran *v.* Cedar Rapids & M. C. Co., 117 Iowa 442, 90 N. W. 815.

25. Seifert *v.* State, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340;

Mere Fact of Criminal Charge Not Sufficient. — But the mere fact that the person making communication is being tried on a criminal charge in the case in which the testimony is offered, is not sufficient to justify its exclusion; and if it appear that the communication in question was made in good faith and to secure medical assistance for one in need, it will be held privileged.[26]

k. *Privilege Not Allowed to Shield Criminal.* — It has been several times held that if the allowance of a claim that certain information is privileged will result in shielding a criminal, the claim will not be allowed.[27]

McKenzie *v.* Banks, 94 Minn. 496, 103 N. W. 497.

In State *v.* Smith, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219, defendant, a physician, requested another physician to perform an abortion upon a woman under defendant's care. *Held,* that the physician so requested was competent to testify as to what was said by defendant in regard to the patient's condition. The court held that the privilege extended to a consulting physician, but that, as the communication was made for the purpose of doing an unlawful act, the physician's testimony was properly admitted.

26. In People *v.* Brower, 6 N. Y. Supp. 730, defendant requested a physician to attend his wife who was suffering from consequences of an act performed by both defendant and wife for the purpose of producing a miscarriage. Upon defendant's trial for manslaughter the evidence showed that defendant desired to relieve his wife's suffering. *Held,* that his statements to the physician were privileged.

27. People *v.* Griffith, 146 Cal. 339, 80 Pac. 68; State *v.* Height, 117 Iowa 650, 91 N. W. 935.

In a prosecution for producing an abortion, a physician who attended the subject of the crime may give evidence of what he discovered during his examination; also that a miscarriage occurred in his presence. The court said: "The rule declared by the statute, which forbids a physician to reveal in evidence matters discovered by him in the course of professional attendance or treatment of a patient, is intended to protect the latter, and not to shield one who is charged with perpetrating an unlawful act upon the patient. The statute cannot be so construed as to permit a party charged with crime, to invoke it as a weapon of defense in his own favor, instead of its being used as a protection to his victim." Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

In People *v.* Lane, 101 Cal. 513, 36 Pac. 16, and People *v.* West, 106 Cal. 89, 39 Pac. 207, the California statute on the subject of privileged communications (C. C. P. § 1881) was held limited to civil cases.

In State *v.* Grimmell, 116 Iowa 596, 88 N. W. 342, the court says: "But we need not go into this matter further than to demonstrate that even in civil cases we have extended the language of the statute, and expressly hold that the prohibition may be waived, either by the testator, or after his death by those who stand for him. Denning *v.* Butcher, *supra.* This, as will be observed, is a criminal case, and it surely will not do to hold that a statute intended to protect a patient should operate as a shield for one who is charged with murder. Such a construction, while perhaps technically correct, is evidently so foreign to the purpose and object of the act, and so subversive of public justice, that it ought not to be adopted, except for the most imperative reasons. The safety of the public is the supreme law of the commonwealth, and we do not think the legislature, in passing the act in question, intended it to operate as a barrier to the enforcement of the criminal laws of the state. If the patient were alive, perhaps no one but she could waive the prohibition. But in this case she is dead and unable to speak. If in a civil case her

representative may waive the prohibition, we see no good reason for saying that in a criminal one the prohibition is absolute. The purpose of the statute, as we have said, is to protect the patient, and not to shield one who feloniously takes his life. The authorities uniformly support this position. Hauk *v.* State, 148 Ind. 238, 46 N. E. 127; People *v.* Harris, 136 N. Y. 424, 33 N. E. 65; Underh. Cr. Ev. § 351."

In Pierson *v.* People, 79 N. Y. 424, 35 Am. Rep. 524, defendant was indicted for causing the death, by poison, of W. The court states the case and discusses the question involved as follows: "While Withey was sick, suffering from the poison which is supposed to have been administered to him, Dr. Coe, practicing physician, was called to see him by the prisoner; and he examined him and prescribed for him. On the trial he was called as a witness for the people, and this question was put to him: 'State the condition in which you found him at that time, both from your own observation and from what he told you?' The prisoner's counsel objected to this question on the ground that the information which the witness obtained was obtained as a physician, and that he had no right to disclose it; that the evidence offered was prohibited by the statute. The court overruled the objection, and the witness answered, stating the symptoms and condition of Withey, as he found them from an examination then openly made in the presence of Withey's wife and the prisoner, and as he also learned them from Withey, his wife and the prisoner. There was nothing of a confidential nature in any thing he learned or that was disclosed to him. The symptoms and condition were such as might be expected to be present in a case of arsenical poisoning. It is now claimed that the court erred in allowing this evidence, and the statute (§ 834 of the Code) is invoked to uphold the claim. . . The design of the provision was to place the information of a physician, obtained from his patient in a professional way, substantially on the same footing with the information obtained by an attorney professionally of his client's affair. The purpose was to enable a patient to make such disclosures to his physician as to his ailments, under the seal of confidence, as would enable the physician intelligently to prescribe for him; to invite confidence between physician and patient, and to prevent a breach thereof. (Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, 77 id. 564.) There has been considerable difficulty in construing this statute, and yet it has not been under consideration in many reported cases. It was more fully considered in the *Edington* case than in any other or all others. It may be so literally construed as to work great mischief, and yet its scope may be so limited by the courts as to subserve the beneficial ends designed without blocking the way of justice. It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail, it will be extremely difficult, if not impossible, in most cases of murder by poisoning, to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not been understood among lawyers and judges to be within the prohibition of the statute. . . . But we do not think it expedient, at this time, to endeavor to lay down any general rule applicable to all cases, limiting the apparent scope of this statute. We are quite satisfied with the reasoning upon it of Judge Talcott, in his able opinion delivered at the General Term of the Supreme Court, and we agree with him 'that the purpose for which the aid of this statute is invoked, in this case, is so utterly foreign to the purposes and objects of the act, and so diametrically opposed to any intention which the legislature can be supposed to have had in the enactment, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is charged with his murder, that in such a case the stat-

l. *Information From Person Subject of Crime.* — Testimony as to information acquired by physician from a person who was the subject of a crime will not be excluded upon objections of defendant.[28]

m. *Communication Presumed Lawful.* — Communications are presumed to have been made for a lawful purpose.[29]

n. *Testamentary Cases. — Authorities Conflicting.* — On the question whether or not statutes creating privilege are applicable to cases in which the testimony of physicians is offered to show testator's mental condition for the purpose of sustaining or invalidating a will, the authorities are conflicting.

(1.) Statute Not Applicable. — Physician's Testimony Competent. — It has been held that in contests between devisees or legatees and heirs at law, all claiming under the same deceased person, any party to the contest may require an attending physician to give in evidence information acquired in the course of his professional treatment of testator.[30]

ute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim.' This objection was, therefore, not well taken."

In People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661, the court says of Pierson *v.* People, that the statute as to confidential communications "did not cover a case where it was invoked solely for the protection of a criminal, and not for the benefit of the patient, and where the latter was dead so that an express waiver of the privilege had become impossible." When Pierson *v.* People was heard before an intermediate appellate tribunal, it was held that objections to physician's testimony were properly overruled. The court said: "It is the duty of the courts so to construe statutes as to meet the mischief and to advance the remedy, and not to violate fundamental principles."

28. People *v.* Murphy, 161 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661.

In People *v.* Benham, 63 N. Y. Supp. 923, 937, 30 Misc. 466, defendant was indicted for murder of his wife by poison. *Held,* competent to show by wife's physician that she had been addicted to the use of morphine for a long time. The court cites People *v.* Murphy, Pierson *v.* People and People *v.* Harris, *supra,* and says that if statements to physicians are competent when they tend to prove the crime of murder, they should be equally competent when they tend to disprove it.

29. In Guptill *v.* Verback, 58 Iowa 98, 12 N. W. 125, a physician was asked if plaintiff had consulted him in regard to producing a miscarriage. The question was objected to as calling for the disclosure of a privileged communication. Against the objection it was contended that as the communication was made for the purpose of committing a crime, it was not privileged. The court states that the production of a miscarriage is not a crime when necessary to save life, and that until it be shown that the communication was made for an illegal purpose, it would be presumed to have been made for a legal purpose.

30. Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *In re* Shapter's Estate (Colo.), 85 Pac. 688.

In Iowa, it is held that the statute of that state does not apply to testamentary cases, and that in a contest between a devisee or legal representative and heirs at law, all claiming under deceased, the attending physician of deceased may be called as a witness by either party. The statute provides: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or

(2.) **Contra. — Physician's Testimony Incompetent.** — But it has also been held that the statute does apply in such cases, and that physician is not a competent witness on the subject of testator's mental condition.[31]

o. *Non-Confidential Matter in Course of Consultation.* — If in course of consultation patient communicates to physician matters

priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice and discipline. Such prohibitions shall not apply to cases where the party in whose favor the same are made waives the right conferred." The Court discusses the question of the right of waiver, reviews authorities on the subject, and concludes: "It is not very material to the result whether we say the heir or devisee may, in the interest of the estate of the deceased, waive the privilege, or that the statute does not apply to a case where the proceedings are not adverse to the estate, and the interest of the deceased as well as his estate could only be the determination of the truth. In either event, we hold that in a dispute between the devisee or legal representative and the heirs at law, all claiming under the deceased, the attending physician may be called as a witness by either party." Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428.

31. Statute Applies in Testamentary Cases. — *California.* — *In re* Nelson's Estate, 132 Cal. 182, 64 Pac. 294; *In re* Redfield's Estate, 116 Cal. 637, 644, 48 Pac. 794.

Indiana. — Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303; Towles *v.* McCurdy, 163 Ind. 12, 71 N. E. 129.

New York. — Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; *In re* Coleman, 111 N. Y. 220, 19 N. E. 71; Loder *v.* Whelpley, 111 N. Y. 239, 18 N. E. 874; Renihan *v.* Dennin, 38 Hun 270 (*affirmed* in 103 N. Y. 573, 9 N. E. 320); Mason *v.* Williams, 6 N. Y. Supp. 479; *In re* Connor's Will, 7 N. Y. Supp. 855; Van Orman *v.* Van Orman, 11 N. Y. Supp. 931; In re Preston's Will, 99 N. Y. Supp. 312.

Wisconsin. — *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874.

In Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770, the Court says: "But it is claimed that the statute should be held not to apply to testamentary cases. There is just as much reason for applying it to such cases as to any other, and the broad and sweeping language of the two sections cannot be so limited as to exclude such cases from their operation. There is no more reason for allowing the secret ailments of a patient to be brought to light in a contest over his will than there is for exposing them in any other case where they become the legitimate subject of inquiry. An exception so important, if proper, should be engrafted upon the statute by the legislature, and not by the courts."

Contra in New York. — The courts of New York have not always held the statute applicable to cases involving validity of wills.

In Allen *v.* Public Administrator, 1 Bradf. (N. Y.) 221, the statute under consideration provided that "no person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." The court held that this statute did not apply in testamentary cases. The court says that the statute does not establish a general and absolute prohibition of such testimony, in all cases, but secures a personal privilege to the party, not to the witness, which may be waived. The discussion, however, seems to proceed not so much on the ground of waiver, as

not necessary to enable him to perform his duty, he may testify concerning them.[32]

p. *Action Against Physician.* — In action against physician for damages caused by his malpractice the rule does not apply, and physician may testify as to what occurred between himself and patient.[33]

upon a holding that the statute does not apply to probate proceedings. On the question of waiver, the court seems to hold that, if the statute did apply, the death of testator put it beyond possibility to assert or waive the privilege. Allen *v.* Public Administrator, is approved in Whelpley *v.* Loder, 1 Dem. (N. Y.) 368, 376; Pearsall *v.* Elmer, 5 Redf. (N. Y.) 181, 190, and is recognized in Pierson *v.* People, 18 Hun (N. Y.) 239. (See pp. 247, 249.) It is overruled by Renihan *v.* Dennin, 103 N. Y. 573, 57 Am. Rep. 770.

In Staunton *v.* Parker, 19 Hun (N. Y.) 55, evidence of physician as to testator's sanity seems to have been admitted upon the ground that questions as to mental condition did not call for anything communicated under the seal of professional confidence. As to New York statute, see *In re* Hopkins' Will, 77 N. Y. Supp. 178.

32. Statement Confidential in Part. — Seifert *v.* State, 160 Ind. 464, 67 N. E. 100, 98 Am. St. Rep. 340. In this case a woman requested a physician to perform an abortion upon her. In the course of her conversation she stated that a certain man had caused her condition. It was held that the physician could give the latter statement in evidence. The court says: "The matter of difficulty in this case is the segregation of the competent from the incompetent. We think, however, that the questions asked were fairly calculated alone to develop that which was competent. If the deceased requested the physician to perform a criminal abortion upon her person, as the offer to prove tended to show, that fact could have been developed as a proper introductory fact, and that would furnish the basis for a showing in a negative way that the proper subject on which professional advice had been sought and given had no relation to an abortion, and was no longer under discussion. This being shown, it would *prima facie* appear that the balance of the conversation was not privileged. The statute under consideration is highly beneficient in its operation, and it should not be frittered away by permitting the answering of questions which tend to reveal that which should be kept inviolate. All doubtful points must be solved against the competency of the proposed testimony, but if counsel, by a line of questions, can develop the isolated point, concerning which the court can say, this is competent, and at the same time avoid the disclosure of that which should be kept sacred, it is his privilege to pursue that course. In the case of McDonald *v.* McDonald, 142 Ind. 55, where the court below has let in evidence of a disclosure to an attorney, although it was claimed that the conversation opened with a prior professional communication, this court held that the subsequent statement was competent, by way of admission, on the ground that the opening and subsequent statements were as separate and distinct as though they had been made at different times." The court cites McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, which makes a similar holding concerning communications to attorneys.

33. Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Becknell *v.* Hosier, 10 Ind. App. 5, 37 N. E. 580.

In Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752, the decision seems to be based upon the ground of necessity, that is, that defendant's own testimony was necessary to enable him to maintain his defense.

In Becknell *v.* Hosier and Cramer *v.* Hurt, the court intimates that the institution of such action may be considered a waiver of privilege.

Consulting Physician. — In such case a physician called in to consult may also testify.[34]

q. *Action Against Patient for Physician's Services.* — But in an action by physician's assignee against patient, to recover for professional services, the physician cannot testify as to information acquired from patient while attending him in a professional capacity.[35]

General Denial No Waiver. — In such case the filing of a general denial to plaintiff's declaration does not constitute a waiver of privilege.[36]

Competent as to Value of Service. — But a physician who assists at an operation may testify as to the value of services rendered in performing it.[37]

8. Duration of Privilege. — The privilege does not cease upon the death of patient,[38] nor upon the cessation of the relation of physician and patient,[39] but continues, unless waived by patient, or by some person representing him.

9. Waiver of Privilege. — As privilege is created for protection of patient, and is designed for his benefit, it may be waived.[40]

34. Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442.

35. Van Allen *v.* Gordon, 31 N. Y. Supp. 907; MacEvitt *v.* Maass, 67 N. Y. Supp. 817.

Nor can physician prove case against his patient by testimony of another physician, who attended patient professionally, as to patient's condition, M'Gillicuddy *v.* Farmer's L. & T. Co., 55 N. Y. Supp. 242.

36. Van Allen *v.* Gordon, 31 N. Y. Supp. 907.

37. In MacEvitt *v.* Maass, 67 N. Y. Supp. 817, the court says: "The defendant then excepted to the admission of the testimony of the plaintiff and of the said surgeons as experts in respect of the value of the plaintiff's services, on the ground that as the nature and particulars of the surgical operation had not been given in evidence, there was no basis for such evidence. There was evidence that a capital surgical operation was performed, of the time it took, and of the number of visits the plaintiff made to the patient before and after it; but there was none to show what the operation really was. But while there were no particulars before the jury to serve as a basis for the value of the surgical operation, the witnesses knew the particulars. The statute excluding such particulars cannot justly be held to exclude such evidence of value by the surgeons who saw them. It was the best evidence which the nature of the case admitted of; and that has been held to justify the admission of evidence. The operation of the statute having created an exceptional case it had to be treated in an exceptional manner. Van Allen *v.* Gordon, 31 N. Y. Supp. 907."

38. Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1; Edington *v.* Mutual L. Ins. Co., 5 Hun (N. Y.) 1, 9; Cahen *v.* Continental L. Ins. Co., 41 N. Y. Super. 296. Judgment *reversed,* but ruling on this subject held correct, 69 N. Y. 300, 308; Shuman *v.* Supreme Lodge K. of H. 110 Iowa 480, 81 N. W. 717.

39. Smart *v.* Kansas City, 91 Mo. App. 586, 596.

40. Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173. See also cases cited in notes 41-53, *post.*

In Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769, it is said: "Notwithstanding the abso-

A. Waiver Not Contrary to Public Policy. — To permit waiver of privilege is not contrary to public policy.[41]

B. By Whom Waived. — a. *Patient.* — Privilege may be waived by patient[42] who may make it through his attorney.[43]

b. *Personal Representative.* — Or by his personal representative.[44]

Executor Cannot Waive in Action to Revoke Probate and Substitute a Later Will. — It has been held that in an action to revoke probate of a will and substitute therefor a later will, the executor named in the first will cannot waive privilege as to testimony of physician.[45]

lutely prohibiting form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive. It gives no right to the physician to refuse to testify, and creates no absolute incompetency."

"The right of waiving a privilege must be as broad as the privilege itself." Blair *v.* Railroad Co., 89 Mo. 334, 1 S. W. 367, *quoted* in Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122.

The Missouri statute considered in Adreveno *v.* Mutual R. F. Assn., 34 Fed. 870, was as follows: "The following persons shall be incompetent to testify: A physician or surgeon concerning any information which he may have acquired from any patient while attending him in a professional character, which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." It was held that this statute conferred a privilege, which might be waived.

41. Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173; Adreveno *v.* Mutual R. F. Assn., 34 Fed. 870.

42. *United States.* — Adreveno *v.* Mutual R. F. L. Assn., 34 Fed. 870.

Indiana. — Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Morris *v.* Morris, 119 Ind. 341, 21 N. E. 918.

Iowa. — Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69.

Michigan. — Grand Rapids & I. R. Co. *v.* Martin, 41 Mich. 667, 3 N. W. 173.

Missouri. — Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Blair *v.* Chicago & A. R. Co., 89 Mo. 334, 1 S. W. 367; Blair *v.* Chicago & A. R. Co., 89 Mo. 383, 1 S. W. 350; Davenport *v.* Hannibal, 108 Mo. 471, 18 S. W. 1122.

43. Alberti *v.* New York, etc. R. Co., 118 N. Y. 77, 86, 23 N. E. 35, 6 L. R. A. 765; Dougherty *v.* Metropolitan L. Ins. Co., 33 N. Y. Supp. 873.

44. Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Morris *v.* Morris, 119 Ind. 341, 21 N. E. 918; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Twaddell *v.* Weidler, 96 N. Y. Supp. 90. *Contra.* — Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1. Decided under C. C. P., §§ 835, 836 as in force in 1885.

In Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882, defendants, proponents of a will which was sought to be set aside on ground of mental incapacity of testator, were permitted to interrogate testator's attending physician as to his condition while witness was treating him. The court states that as a person may waive the privilege during his lifetime, those who represent him after his death may waive it for the protection of the interests they claim under him.

Under statute of New York conferring right of waiver upon "personal representatives" it is held that those words apply only to executors and administrators. Beil *v.* Supreme Lodge K. of H., 80 N. Y. Supp. 751.

45. In Heaston *v.* Kreig (Ind.), 77 N. E. 805, the court says: "A waiver must have its basis in the right of the decedent, and in such a case as this it can only be invoked by the executor who is seeking to support what *prima facie* at least was the valid act of his testator."

c. *Heir at Law.* — Privilege may be waived by heir at law of deceased person.[46]

Heirs at Law Alone. — It has been held that in case of a will contest the heirs at law of decedent are the only persons who have right to waive privilege.[47]

(A.) Will Contest. — In contest of validity of proposed will, when no executor has been appointed, an heir at law cannot waive privilege as to testimony of testator's attending physician.[48]

(B.) Action on Insurance Policy. — Heirs at law, not claiming as such, but as appointees of insured in life insurance policy, cannot, in an action on the policy, waive privilege.[49]

d. *Joint Action Not Necessary.* — It is not necessary that executor, widow and heir at law join in making waiver of privilege. The action of any one person having right of waiver is sufficient.[50]

e. *Guardian.* — Privilege may be waived by the guardian of a minor.[51]

f. *Parents.* — It has been held that the privilege may be waived by parents of child who had been treated by physician.[52]

g. *Husband Cannot Waive.* — In action brought by a man against a physician to recover damages for producing an abortion on plaintiff's wife, the husband cannot waive his wife's privilege as to information acquired by defendant from professional examination.[53]

46. Roche *v.* Nason (N. Y.), 77 N. E. 1007.

47. In Staunton *v.* Parker, 19 Hun (N. Y.) 55, the court holds that heirs at law are the only ones who succeed to rights of testator as to privilege. The court states that at that stage of the proceedings the person named as executor is a stranger to the estate; and the heirs at law, contesting probate, were the parties who succeeded to decedent's rights. The court cites Allen *v.* Public Admr., 1 Bradf. (N. Y.) 221, although in that case the court appears to hold that privilege died with the decedent, and after his death no one could waive it. The court also cites Thayer *v.* Allen, Selden's notes, p. 93.

48. In *In re* Flint's Estate, 100 Cal. 391, 34 Pac. 863, statute prohibited physician from testifying "without the consent of his patient." *Held,* that in contest of probate of will, an heir at law could not waive privilege.

49. **Heirs at Law. — Life Policy.** Shuman *v.* Supreme Lodge, K. of H., 110 Iowa 480, 81 N. W. 717.

50. *In re* Hopkins' Will, 77 N. Y. Supp. 178.

Heirs and Devisees. — One Set Cannot Waive. — In Towles *v.* McCurdy, 163 Ind. 12, 71 N. E. 129, it is said, although not expressly decided, that in a contest among heirs and devisees involving validity of a will, one set of heirs or devisees cannot, against the wishes of others, waive privilege as to testator's attending physician.

51. Corey *v.* Bolton, 63 N. Y. Supp. 915, *affirming s. c.,* 61 N. Y. Supp. 917, was an action by a father to recover for loss of service of his son. Against defendant's objection a physician was permitted to testify to nature of injuries causing such loss. *Held,* that the child's father and mother, being his natural guardians, could waive privilege as to physician's testimony.

52. State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000, was a case of prosecution for rape upon the person of a young girl. *Held,* that the child's parents could waive privilege as to the physician who treated her.

53. Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. 258, 77 Am. St. Rep. 752.

h. *Beneficiary of Life Insurance Policy May Waive.* — In an action to recover money agreed to be paid by a policy of life insurance, the beneficiary therein named may waive privilege as to testimony of physician who treated or examined the insured.[54]

i. *Assignee of Policy.* — The assignee of a policy of life insurance has the same right.[55]

j. *Contra.* — *Patient Alone May Waive.* — But it has been held that the privilege is personal to patient, and can be waived by him alone.[56]

C. Relation Essential to Waiver. — A person has no power of waiver unless the relation of physician and patient existed be-

54. Penn Mut. L. Ins. Co., *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 679.

In Edington *v.* Mutual L. Ins. Co., 5 Hun (N. Y.) 1, 9, the court refers to the litigant (beneficiary) as the "party" upon whom statute confers power of waiver. Ruling on this subject held correct, though judgment reversed on appeal, 67 N. Y. 185. *Contra.* — Beil *v.* Supreme Lodge K. of H., 80 N. Y. Supp. 751.

In Shuman *v.* Supreme Lodge K. of H., 110 Iowa 480, 81 N. W. 717, two persons claimed to be appointees of insured. It was held they could not waive privilege as to physician's testimony.

55. Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185, 196.

56. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 167, 47 Pac. 1019; *In re* Hunt's Will, 122 Wis. 460, 100 N. W. 874.

In Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1, action was brought on a policy of life insurance which provided that it should be void if insured would die by his own hand. Insured hanged himself. To prove that the act of hanging was done by insured while insane, plaintiff, executor of deceased, called a physician who had attended him and inquired as to his condition. The question was objected to and objection sustained. It was contended that plaintiff, as executor, could waive the privilege. The statute provided as follows: § 834 provides that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

The court says: "Section 836 provides that 'the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or client.' It is thus seen that clergymen, physicians and attorneys are not only absolutely prohibited from making the disclosures mentioned, but that by an entirely new section it is provided that the seal of the law placed upon such disclosures can be removed only by the express waiver of the persons mentioned. Thus there does not seem to be left any room for construction. The sections are absolute and unqualified. These provisions of law are founded upon public policy, and in all cases where they apply the seal of the law must forever remain until it is removed by the person confessing, or the patient or the client. Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185; Edington *v.* Aetna Life Ins. Co., 77 N. Y. 564; Pierson *v.* People, 79 N. Y. 424; *s. c.*, 35 Am. Rep. 524; Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281; *s. c.*, 36 Am. Rep. 617." See also Territory *v.* Corbett, 3 Mont. 50, 59.

Under statute providing that a physician may not testify without the consent of his patient, it has been held that a personal representative has no right to waive privilege. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 167, 47 Pac. 1019.

tween him, or a person whom he represents, and the person whose testimony is offered."

D. Waiver. — How Shown. — Waiver may be express or implied.

a. *Express.* — (1.) **Any Apt Language.** — Any language indicating an intention not to insist upon the application of the rule operates as a waiver, whether it be oral or written.[85]

(2.) **Stipulation in Life Insurance Policy.** — A stipulation in a policy of life insurance to the effect that proofs of death shall consist in part of the affidavit of attending physician, which shall state the cause of death and such other information as may be required by the insurer, constitutes a waiver by insured of his privilege as to testimony of physician who attended him in his last illness.[86]

85. In an action upon policy of life insurance, defendant sought to show breach of warranty by questioning physicians of applicant's relatives as to information acquired from them in professional confidence.

It was contended that waiver in application made this testimony competent. Held, that waiver was personal to insured, and could not operate beyond him, as he had no power to impose conditions upon any one else, or to waive privilege belonging to another person. Davis v. Supreme Lodge K. of H., 54 N. Y. Supp. 1093, *affirmed* 165 N. Y. 659, 58 N. E. 801.

86. Foley v. Royal Arcanum, 151 N. Y. 196, 45 N. E. 450, 56 Am. St. Rep. 621, *affirming* 2 A. D. 28 N. Y. Supp. 652; Adrevens v. Mutual Reserve Fund L. Assn., 34 Fed. 870; Western Travelers' Acc. Assn. v. Munson (Neb.), 105 N. W. 688; Trull v. Modern Woodmen of Am. (Idaho), 85 Pac. 1081; Fuller v. Knights of Pythias, 109 N. C. 318, 20 S. E. 65, 85 Am. St. Rep. 744; Keller v. Home L. Ins. Co., 95 Mo. App. 607, 69 S. W. 612. To same effect, see Proppe v. Metropolitan L. Ins. Co., 34 N. Y. Supp. 172.

Waiver in Writing. — In Foley v. Royal Arcanum, 151 N. Y. 196, 45 N. E. 450, 56 Am. St. Rep. 621, action was brought to recover on life insurance policy. The defense was misrepresentation as to physical condition and breach of warranty. The representations complained of were statements by insured that he did not have certain diseases. It was proved that he was affected with and did die from diseases from which he had represented himself to be free. His application, which was held to constitute part of the contract of insurance, contained the following: "I hereby expressly waive any and all provisions of law now existing or that may hereafter exist preventing any physician from disclosing any information acquired in attending me in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever, and I hereby consent and request that any such physician testifying concerning my health and physical condition, past, present, or future." *Held*, that this language constituted a waiver of the right of insured to claim privilege.

(3.) Statute Requiring Waiver at Trial. — § 836. N. Y. C. C. P. provides that the section creating privilege shall apply unless its provisions "are expressly waived on the trial or examination by the person confessing, the patient or the client."[60]

b. *Implied.* — Waiver may also be implied. Waiver may be implied from various acts or omissions of person entitled to privilege.

(1.) Failure to Object. — By failing to object to question, the answer to which would involve disclosure of privileged communications between himself and his physician, patient waives privilege.[61]

(2.) Contra. — Omission of Objection No Waiver. — But the contrary has been held.[62]

In Marx *v.* Manhattan R. Co., 10 N. Y. Supp. 159, the court refers to plaintiff's testifying to subject of consultation with his physician as an express waiver of privilege.

60. Meyer *v.* Supreme Lodge, K. of P., 81 N. Y. Supp. 813; Scher *v.* Metropolitan St. R. Co., 73 N. Y. Supp. 625; Holden *v.* Metropolitan L. Ins. Co., 165 N. Y. 647, 59 N. E. 150, *reverses s. c.* below which held that waiver contained in application for life insurance policy was sufficient, and overrules Dougherty *v.* Metropolitan L. Ins. Co., 33 N. Y. Supp. 873, which made a similar holding.

Calling physician as witness for patient or his representative is an express waiver at the trial within this statute. Holcomb *v.* Harris, 166 N. Y. 257, 59 N. E. 820; Pringle *v.* Burroughs, 74 N. Y. Supp. 1035.

61. Johnson *v.* Johnson, 14 Wend. (N. Y.) 637; Lincoln *v.* City of Detroit, 101 Mich. 245, 59 N. W. 617; Lissak *v.* Crocker Estate Co., 119 Cal. 442, 51 Pac. 688; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887.

One claiming privilege must object to question put to physician. It will be too late to permit question to be answered, then move to strike out testimony. Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977.

Privilege cannot be claimed, unless question objected to. Hoyt *v.* Hoyt, 112 N. Y. 493, 514, 20 N. E. 402.

Failure to object constitutes waiver, although the person against whom the evidence is offered is insane. *In re* Benson, 16 N. Y. Supp. 111. This case was an inquisition of lunacy. Affidavit of an insane person's physician was received to show his mental condition.

62. In Pennsylvania R. Co. *v.* Durkee, 147 Fed. 99, the court says: "In the brief of defendant in error it is asserted that the privilege accorded to the patient under section 834 may be waived by failure to object, and cannot be rendered effectual except by the interposition of an objection. No cases are cited in support of this proposition, and in the absence of any controlling decision we would be inclined to hold the converse. Section 834 in explicit and peremptory language forbids the physician from disclosing any information obtained in a professional capacity, and it is not apparent why such prohibition should not bind him, whether the defendant sits silent or raises an objection. Until the express waiver in open court, which section 836 provides for, it is the duty of the witness to refuse to betray the confidence reposed in him as a professional man, and the trial judge would no doubt of his own motion prevent any disclosures which the statute forbids. Had it been the intention of the legislature that the prohibition of the statute should be operative only when the patient took affirmative action to exclude the testimony by interposing an objection, presumably it would have used language appropriate to indicate such an intention. On the contrary, it has placed the prohibition on the statute book, to be lifted only upon the taking of express affirmative action by the patient to obtain a disclosure by the physician. The situation is very different from that arising when a

(3.) Calling Physician as Witness. — Patient waives privilege by calling physician to give in evidence information acquired in treating patient professionally.[63]

Cross-Examination, Where Privileged Matter Not Referred to on Direct. If patient's representative interrogate physician as to fact of treatment and number of times medicine administered, his opponent may, on cross-examination, question witness as to the nature of disease for which he treated patient.[64]

(4.) Cross-Examination by Patient. — If opponent examine physician as to fact of treatment, introduction by patient's representative, on cross-examination of testimony showing patient's condition, operates as a waiver.[65]

party to a civil action, who apparently must be cognizant of the facts of some controverted issue, avoids cross-examination by not going on the witness stand, or persuades some witness to remain out of reach of a subpoena, or destroys documentary evidence. The prohibition against disclosure of professional secrets is manifestly an exercise of public policy. It secures a right to every individual which he is under no obligation to waive or abandon. 'The statements of an attending physician are excluded, not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between physician and patient, but on grounds of public policy as well. The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it.' Davis *v.* Supreme Lodge, 165 N. Y. 159, 58 N. E. 891."

The statute in question, § 834, N. Y. Code of Civ. Proc. provided that physician "shall not be allowed to disclose any information."

63. Patient waives privilege by calling physician to give evidence as to information acquired in a professional character. Carrington *v.* St. Louis, 89 Mo. 208, 216, 1 S. W. 240, 58 Am. Rep. 108; Lawson *v.* Morning Journal Assn., 52 N. Y. Supp. 484; Alberti *v.* New York, etc., R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765; Lissak *v.* Crocker Estate Co., 119 Cal. 442, 51 Pac. 688; Kemp *v.* Metropolitan St. R. Co., 88 N. Y. Supp. 1; Powers *v.* Metropolitan St. R. Co., 94 N. Y. Supp. 184.

Personal representative of patient waives privilege by calling physician as witness. Morris *v.* Morris, 119 Ind. 341, 21 N. E. 918; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

New York Statute. — Deposition of Physician Not Read by Claimant. Under New York Code Civ. Proc. §§ 834, 836, providing that waiver must be made when in open court, or on written stipulation of attorneys, if person claiming privilege takes deposition of physician but does not read it, he may object to the testimony when offered by his opponent. Clifford *v.* Denver & R. G. R. Co., 97 N. Y. Supp. 707.

64. Ellis *v.* Baird, 31 Ind. App. 295, 67 N. E. 960.

65. Sovereign Camp, W. O. W. *v.* Grandon, 64 Neb. 39, 89 N. W. 448, involved an action upon a policy of life insurance. Defendant examined a physician as to fact of attendance upon deceased. On cross-examination, plaintiff introduced a writing signed by witness, containing statements of the condition of deceased. *Held,* that the introduction of this writing constituted a waiver. The court says: "No privilege was violated in so doing, and the defendant in error, by introducing the written statement of the doctor that Grandon was not seriously sick until the evening previous to his death, opened up the question of his condition, and thereby waived the privilege which the statute gave her."

When in action for personal in-

(5.) No Waiver From Voluntary Statement on Voir Dire. — When in an action for personal injuries, defendant questions plaintiff's physician concerning plaintiff's condition, and plaintiff obtains leave to question witness, in order to lay foundation for objection on the ground of privilege, a waiver does not arise, if, in answer to plaintiff's question, witness states that plaintiff was unconscious at the time referred to, it appearing that witness had already given such answer in response to question by defendant.[66]

(6.) Waiver From Calling One of Several Physicians. — It has been held that if person who has been treated by two or more physicians interrogates one of them as to information acquired by means of confidential communications, he waives his privilege as to the testimony of the others, so far as relates to information acquired at the same consultation, or in the course of examination jointly conducted.[67]

juries patient, on cross-examination testified that a certain physician had treated her for headaches only, such conduct was held not to constitute a waiver of privilege to object to such physician's evidence when introduced by defendant to show for what disease he had treated patient. Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89, 95.

66. Nugent *v.* Cudahy Pack Co., 126 Iowa 517, 102 N. W. 442.

67. In Morris *v.* New York, O. & W. R. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675, plaintiff sued defendant for damages caused by personal injuries. About the time the action was commenced plaintiff was attended by two physicians for the purpose of examining her case and ascertaining the nature and extent of her injuries. On the trial the plaintiff called as a witness one of the physicians who testified as to her injuries and condition. Plaintiff did not call the other physician, but defendant did, and interrogated him as to his opinion of plaintiff's injuries, based upon his observation and examination of the case. This testimony plaintiff objected to, under a statute prohibiting the testimony of a physician as to information acquired professionally. Defendant contended that, by calling one of her physicians, plaintiff waived her privilege as to both. The trial court sustained the objection. This ruling was held erroneous. The court says: "In this case, it was the privilege of the plaintiff to insist that both physicians should remain silent as to all information they obtained at the consultation, but she waived this privilege when she called Dr. Payne as a witness and required him to disclose it. The plaintiff could not sever her privilege and waive it in part and retain it in part. If she waived it at all, it then ceased to exist, not partially, but entirely. The testimony of Dr. Payne having been given in her behalf, every reason for excluding that of his associate ceased. The whole question turns upon the legal consequences of the plaintiff's act in calling one of the physicians as a witness. She then completely uncovered and made public what before was private and confidential. It amounted to a consent on her part that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained. I have not been able to find any controlling authority in this court in support of the idea that the waiver applied only to the witness that the plaintiff called. On the contrary, the principle decided in McKinney *v.* Grand Street etc. R. Co., 104 N. Y. 352, supports the views herein expressed. That was a case where the plaintiff called and examined her own physician as to her physical condition on the first

Joint Action Necessary. — But to constitute such waiver it must appear that the physicians attended patient at the same time, or examined him together.[68]

The mere fact of calling one of two or more physicians who treated patient does not constitute a waiver as to the testimony of those not called by patient or his representatives.[69]

trial. On a subsequent trial, he was called by the defendant, and the same objection was made to his testimony that was made in the case at bar. This court held that it was admissible, on the ground that the statutory prohibition having once been expressly waived by the patient, and the waiver acted upon, it could not be recalled, but the information was open to the consideration of the entire public, and the patient was no longer privileged to forbid its repetition. The reasoning of Chief Judge Ruger in support of these propositions in that case is applicable here. It furnishes a safe basis for holding that when a waiver is once made it is general and not special, and its effect cannot properly be limited to a particular purpose or a particular person. After the information has once been made public, no further injury can be inflicted upon such rights and interests of the patient as the statute was intended to protect, by its repetition at another time or by another person." After citing decisions hereinafter noted, the court continues: "We think that a construction of the statute which permits a patient, who has been attended by two physicians at the same examination or consultation, to call one of them as a witness to prove what took place or what he learned, thus making public the whole interview, and still retain the right to object to the other, is unreasonable and unjust, and should not be followed. The waiver is complete as to that consultation when one of them is used as a witness. The considerations and reasons upon which the statute was founded no longer exist when full disclosure is made by either with the consent of the patient, and every party to the transaction thus disclosed is relieved from any injunction of secrecy. The patient cannot limit the scope or effect of the waiver when made, any more than she can recall it. When the plaintiff in this case called one of the physicians, who disclosed the whole consultation, the law determined the legal effect of that act, irrespective of any mental reservations on her part. Upon every principle of reason and justice, this act amounted to a waiver of the right to object to the testimony of the other physician, when called by the defendant as to the same transaction."

In Hennessy *v.* Kelly, 64 N. Y. Supp. 562, it was held that, by calling one of several attending physicians, patient waives his privilege as to the others. The judgment in this case was reversed on appeal to the Appellate Division (66 N. Y. Supp. 871), the court holding that patient's conduct did not constitute a waiver. In the reversing opinion the court considers the New York cases cited in note 69, next succeeding, and attempts to reconcile them with Morris *v.* New York, etc. R. Co., *supra.*

68. Tracey *v.* Metropolitan St. R. Co., 63 N. Y. Supp. 242; Metropolitan St. R. Co. *v.* Jacobi, 112 Fed. 924, 50 C. C. A. 619.

69. *United States.* — Metropolitan St. R. Co. *v.* Jacobi, 112 Fed. 924, 50 C. C. A. 619.

Indiana. — Citizens' St. R. Co. *v.* Shepherd, 30 Ind. App. 193, 65 N. E. 765; Springer *v.* Byram, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244.

Iowa. — Baxter *v.* Cedar Rapids, 103 Iowa 599, 72 N. W. 790.

Michigan. — Dotton *v.* Albion, 57 Mich. 575, 24 N. W. 786.

Missouri. — Mellor *v.* Missouri Pac. R. Co., 105 Mo. 455, 14 S. W. 758, and 16 S. W. 849, 10 L. R. A. 36.

New York. — Hope *v.* Troy & L.

(7.) Patient Testifying. — By giving in evidence matters communicated between his physician and himself, a person waives his privilege as to the matters communicated.[70]

(A.) Testimony as to General Condition No Waiver. — But he does

R. Co., 40 Hun 438, *s. c. affirmed* by Court of Appeals, 110 N. Y. 643, 17 N. E. 873; Record *v.* Saratoga Springs, 46 Hun 448, *s. c. affirmed* by Court of appeals, 120 N. Y. 646, 24 N. E. 1102; Barker *v.* Cunard S. S. Co., 36 N. Y. Supp. 256; *affirmed* without opinion, 157 N. Y. 693, 51 N. E. 1089; Duggan *v.* Phelps, 81 N. Y. Supp. 916.

In Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 102, 50 Am. Rep. 769, the court says: "The plaintiff, by way of rebuttal, introduced as a witness the physician, who on behalf of the defendant as medical examiner, had examined the insured for this insurance, and elicited testimony from him tending to prove that the insured was in good health at the time of the application. Afterwards the defendant recalled the physicians before introduced by the defendant, and again sought from them the evidence which had been excluded as above stated. Upon objection, their testimony was again excluded. This offer was made upon the theory that the plaintiff, by having herself introduced the testimony of one physician, had waived her right to object to the testimony of other physicians. This theory is not well founded. If the plaintiff's examination of said medical examiner as a witness could be regarded as a waiver of a privilege, the consent of the patient, or of one entitled to stand as his representative, to the production in evidence of facts learned in a professional capacity by one physician, could not be construed as consent to the divulging of other confidential communications to other physicians."

70. Lane *v.* Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Highfill *v.* Missouri Pac. R. Co., 93 Mo. App. 219; Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89; Marx *v.* Manhattan R. Co., 56 Hun. 575, 10 N. Y. Supp. 159.

In Rauh *v.* Deutscher Verein, 51 N. Y. Supp. 985, the court says: "Did the plaintiff, by her testimony detailing the operations that were performed upon her at the hospital by the physicians, the treatment she then received, the statement of the physician as to the fact of the operation and as to the advice he gave to the patient, operate as a waiver of her privilege to exclude the testimony of the physician who performed the operation and who gave the advice? The waiver of the privilege cannot be limited to a particular purpose or a particular person, and if the plaintiff, by so testifying on her direct examination, waived this privilege, then it was competent for the physician to testify. We think it clear from principle and authority that she did. . . . If these physicians who attended her at the hospital cannot testify as to what happened at the hospital as to the operations performed and the treatment prescribed, it is clear that there is no one else that can. The condition would be that the plaintiff could testify to what she pleased as to the treatment she received without danger of contradiction. If this contention of the plaintiff is sustained, the plaintiff is entirely safe in testifying to anything that it pleased her to say as to what happened to her or was done to her at the hospital, for the mouth of the only witness that could contradict her is silenced by this section of the Code cited. The reasoning of the court of appeals in the case of Morris *v.* Railroad Co., supra, applies with full force to this contention. . . And it would appear to be equally unfair and unreasonable to allow a plaintiff—the one most interested in the recovery —to testify to what took place at the time of the examination by the physicians, or of the operations that were performed or the treatment received, and at the same time en-

join silence upon the physician. A physician, when called, may be said to be, under ordinary circumstances, a disinterested witness. His professional position and his reputation would of themselves be a pledge for his not intentionally violating his oath, and generally he would have no great object in making a false statement as to the result of his investigations, while his professional knowledge would enable him to state correctly the result of his investigations and the treatment he prescribed or the operations he performed. In the case, however, of a plaintiff, irrespective of the interest that he would have in coloring the testimony to suit his case, his lack of professional knowledge would expose him to mistakes in testifying, and would make it quite possible, with the utmost good faith on the part of the party testifying, that the testimony would be grossly misleading. It must be apparent that such a rule would work the greatest injustice, and would expose the defendant to danger on account of the fact that the rule would prevent him from examining into the truth of the plaintiff's statements. The question was presented at the late general term in this department in the case of Marx *v.* Railway Co., 56 Hun 575, 10 N. Y. Supp. 159, and it seems to me that the opinion of the presiding justice is a most satisfactory solution of the question. The conclusion there stated by him seems to me to be unassailable. As therein said: 'It seems to us clear that, having thus himself gone into the privileged domain to get evidence on his own behalf, he cannot prevent the defendant from assailing such evidence by the only testimony available for that purpose.'"

In Treanor *v.* Manhattan R. Co., 16 N. Y. Supp. 536, the court says: "The thing forbidden by the Code is the disclosure of professional information, and the policy of the enactment is to protect patients in the free revelation of their maladies to the physician. But what if, in order to enforce a claim against a stranger, the patient himself promulgates the information, and uncovers his maladies and infirmities in court, does he not thereby break the seal of secrecy, and absolve the physician from the obligation of silence? Does he not, in the strictest and most emphatic sense, waive his privilege? Is it to be tolerated that, to mulct another in damages, he may inflame a jury with a false or exaggerated story of his injuries and suffering, and yet the physician whom he has consulted is not to be allowed to prevent the meditated injustice by a truthful statement of the case? It is to be borne in mind, too, that here the physician was not called to reveal the ailments of the patient, but to prove that she suffered from no such injuries as she represented. Obviously respondent's contention is as inconsistent with the object and policy of the statute as it is fatal to the interests of justice. In McKinney *v.* Railroad Co., 104 N. Y. 352, 10 N. E. Rep. 544, the court of appeals held that, when the condition of the patient is once disclosed with his consent, 'it is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the statute;' declaring as the ground of its decision that, 'the object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement.' In Hunt *v.* Blackburn, 128 U. S. 464, 470, 9 Sup. Ct. Rep. 125, the supreme court of the United States, by Field, J., said: 'The privilege is that of the client alone, and no rule prohibits him from divulging his own secrets; and, if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney.' In People *v.* Schuyler, 106 N. Y. 306, 12 N. E. Rep. 783, the court of appeals say, *per curiam*: 'The object of the statute was to prevent the disclosure by a physician of his patient's ailments and infirmities, and it may be queried whether it makes him incompetent to testify that his patient was free from disease of any kind. Can a party himself upon trial expose his ailments and make them the subject of inquiry, and then object that his physician shall tell anything he

not waive privilege by giving testimony as to his general health or physical condition,[71] or by stating in evidence the general nature of his injuries,[72] or that a certain person had attended him as physician, and had prescribed.[73]

(B.) VOLUNTARY STATEMENT, NO WAIVER. — Patient does not waive

knows about them?' In Marx *v.* Railroad Co., *supra*, the supreme court at general term in this department, per Van Brunt, J., say: 'The patient may keep the door of the consultation-room closed, but he cannot be permitted to open it so far as to give an imperfect and erroneous view of what took place, and then close the door when the actual facts are about to be disclosed. . . . In construing this legislation, we must consider the object that was sought to be attained, viz., the greatest freedom in consultations with a physician. The reason for the rule no longer exists where the party himself pretends to give the circumstances of the privileged interview.'"

In Morris *v.* New York, O. & W. R. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675, the Court of Appeals says the Treanor case "pushes the principle too far." Treanor *v.* Manhattan R. Co., is disapproved in City of Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42, and in May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

In Fox *v.* Union Tpk. Co., 69 N. Y. Supp. 551, it is said that Treanor *v.* Manhattan R. Co., is overruled by Morris *v.* Manhattan R. Co.

The courts of New York speak of the waivers in Marx *v.* Manhattan R. Co., and Treanor *v.* Manhattan R. Co., as *express* waivers. The ruling statute provided that privilege might be expressly waived in open court, making no reference to acts which would create an implicaton of waiver. In *In re* Coleman, 111 N. Y. 220, 19 N. E. 71, the Court of Appeals of New York had held that the act of a testator in causing his attorney to become subscribing witness to his will was an express waiver.

In action for personal injuries, where plaintiff goes into detail, showing that he has been treated by certain doctors at certain times prior to the alleged injury for certain ailments different from the one at issue in the case, he thereby waives his privilege, and such physicians become competent witnesses as to the matters testified to by plaintiff. Webb *v.* Metropolitan St. R. Co., 89 Mo. App. 604.

71. City of Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42; McConnell *v.* City of Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; Butler *v.* Manhattan R. Co., 23 N. Y. Supp. 163, 30 Abb. N. C. 78; Dunckle *v.* McAllister, 74 N. Y. Supp. 902; May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111; Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89, 95.

Contra. — But in State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000, a mother who had employed a physician to examine her minor child, testified concerning the nature and extent of injuries sustained by the child, who had been the victim of a criminal assault. *Held,* that her conduct in so doing constituted a waiver of privilege as to physician's testimony.

72. Jones *v.* Brooklyn R. Co., 3 N. Y. Supp. 253, *affirmed* 121 N. Y. 683, 24 N. E. 1098; Indianapolis & M. R. T. Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242; Fox *v.* Union Tpk. Co., 69 N. Y. Supp. 551.

In Jones *v.* Brooklyn R. Co., it was held that plaintiff did not, by stating that his leg was broken, waive privilege as to testimony of physician who treated him for the injury.

73. Williams *v.* Johnson, 112 Ind. 273, 13 N. E. 872; Indianapolis & M. R. T. Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242; McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550. 8 L. R. A. 778; May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

privilege by making voluntary statement, not in response to question, as to statements of physician, when such statement is objected to by party afterwards alleging waiver.[74]

(C.) Patient Answering Cross-Examination, No Waiver. — Answering questions on cross-examination as to a matter of privilege does not constitute a waiver of patient's right to object to physician's testimony.[75]

74. Smart *v.* Kansas City, 91 Mo. App. 586, 595.

In this case the court says: "Defendant called another of plaintiff's physicians and asked him what was the condition of plaintiff's knee as he found it after the fall. The question was not allowed by the court. Defendant bases its claim to this evidence on the ground that plaintiff had testified to what the physician had stated to her was the condition of the knee and thereby had estopped herself from claiming the privilege of the statute under the case of Webb *v.* Railroad, 89 Mo. App. 604. But the difficulty with defendant's position is that what plaintiff said as to the statement of the physician was not in answer to a question. Her statement was objected to by defendant and the answer was disclaimed by plaintiff's attorney by telling her that 'what the doctor said was not good evidence.' Defendant's counsel seemed then to be satisfied, as nothing further was said by him and no ruling asked of the court."

75. Burgess *v.* Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364. In this case the court says: "But the testimony of the client or patient as to the communication, which will constitute a waiver of the privilege so as to admit the attorney or physician to testify with reference thereto, must be voluntarily given; for the privilege is that of the client or patient, and it exists in his favor until in some way abandoned. No doubt, under this privilege, the client or patient may refuse to answer on cross-examination when asked with reference to the privileged communication. Barker *v.* Kuhn, 38 Iowa 392; Bigles *v.* Reynolds, 43 Ind. 112; Hemenway *v.* Smith, 28 Vt. 701; State *v.* White, 19 Kan. 445, 27 Am. Rep. 137; Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362. But we are not willing to hold that the failure to insist on this privilege makes the testimony which he may give on cross-examination voluntary, in such sense as to constitute a waiver of his privilege with reference to the communication to his attorney or physician. In McConnell *v.* Osage, 80 Iowa, 293, this court said that even the voluntary act of the plaintiff in that case, as a witness, in testifying to her physical health at a particular time, would not constitute a waiver of objection to testimony by her physician as to communications made by her to him at that time showing that she was not in good health, and that the mere fact of the exclusion of the physician's testimony might result in putting the condition of her health at the time referred to in a false light before the jury would not be a sufficient reason for implying a waiver. And it was further said (and this is especially pertinent to our present inquiry) that it was improper to ask witness on cross-examination whether she was willing that the physician might disclose any communications which she had made to him with reference to her health. Accordingly it was held that the propounding of such a question to the witness over the objection of her attorney, and to which her answer was, 'No,' constituted error; this language being used: 'The statute gives the prohibition. It is a legal right, and a party should no more be required to state under oath that he did not want to surrender it, than any other legal right he possessed. We think a fair trial requires that such a matter should not even be referred to; that the jury should not be impressed with a belief that there is

(D.) Testimony as to Treatment by One Physician, No Waiver. By testifying concerning treatment of himself by one physician, patient does not waive right to object to testimony of other physicians who treated him at another time for the same affliction.[76]

(E.) No Waiver, Unless Communication Referred To. — Patient's act in testifying does not constitute a waiver, unless in his testimony he gives evidence concerning matter communicated to his physician.[77]

(F.) No Waiver, Unless Necessary Information Referred To. — Patient does not, by testifying, waive privilege, unless he testifies concerning matter necessary to be stated to his physician. No waiver arises from testimony in regard to collateral matters.[78]

(8.) Introducing Proofs of Death Showing Cause. — Beneficiary of a life insurance policy waives privilege by introducing in evidence proofs of death furnished to the insurance company which contain affidavit or certificate by attending physician showing cause of death.[79]

(9.) Statement in Application for Life Insurance. — If applicant for policy of life insurance state in his application that he has been treated by a certain physician for a certain disease, beneficiary cannot, in an action on the policy, exclude the testimony of the physician referred to concerning the disease mentioned in the aplication.[80]

even reluctance to giving such assent. The subject-matter of such a waiver has no place for reference in the taking of testimony, except by the party permitted to make it.' In the case before us it is evident that any objection of the witness on cross-examination to testify as to the communication might well have been prejudicial, and therefore that the answer of the witness with reference thereto cannot be treated as a waiver of the privilege, for it is essentially not voluntary. If counsel saw fit on cross-examination to inquire into this matter, he must be bound by the answer, and cannot afterwards claim that the witness, by answering without objection, voluntarily waived the privilege."

76. Webb *v.* Metropolitan St. R. Co., 89 Mo. App. 604; Green *v.* Nebagamain, 113 Wis. 508, 89 N. W. 520.

77. In other words, the mere act of testifying does not operate as a waiver. Butler *v.* Manhattan R. Co., 30 Abb. N. C. 78, 23 N. Y. Supp. 163.

78. In Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89, it was held that patient's testimony concerning conversation with physician in regard to his bill did not constitute a waiver of privilege as to necessary matter communicated.

79. Proppe *v.* Metropolitan L. Ins. Co., 34 N. Y. Supp. 172; Kelwig *v.* Mutual L. Ins. Co., 132 N. Y. 331, 28 Am. St. Rep. 578. These cases seem to proceed more upon the theory of estoppel than waiver.

In Kelwig *v.* Mutual L. Ins. Co., beneficiary of a life insurance policy sued to recover the amount thereby agreed to be paid. Plaintiff introduced in evidence the proofs of death presented to the company. These proofs included sworn statement of attending physician of deceased which contradicted certain statements in plaintiff's application. Plaintiff contended that this statement could not be received in evidence because the matter therein contained was such as the physician could not have been compelled to testify to. But the court held that, as plaintiff had put in the proof without qualification, she could not claim that the statements of the physician were privileged.

80. In Brown *v.* Metropolitan L.

Waiver Limited. — But the waiver in such case relates to matters stated in the application only, and does not affect privilege as to any information acquired by physician prior to issuance of the policy sued on.[81] Nor does including in the proofs statements as to diseases which did not proximately cause death of insured, operate as a waiver of privilege concerning such diseases.[82]

(10.) Certain Acts as Waiver. — (A.) Showing Prescription. — It has been held that by showing physician's prescription to a druggist, who fills the same, patient waives privilege as to the contents of the prescription.[83]

(B.) Introducing Hospital Record Made by Physician. — It has also been held that if person who has been injured introduces in evidence an entry made in a hospital record by physician of hospital where such person has been treated, he thereby waives his right to object to that physician's testimony as to matters entered in the book showing the history of the case, and as to patient's statements concerning injury.[84]

(C.) Physician Subscribing Witness to Will. — By requesting his physician to become subscribing witness to his will testator waives privilege as to physician's testimony concerning testator's mental condition.[85]

(11.) Certain Acts, No Waiver. — Reference is made in the notes to certain acts which have been held not to operate as waiver of privilege.[86]

Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894, plaintiff sued upon policy of life insurance. In her application for insurance deceased stated that she had been treated by a certain physician for typhoid fever. The trial court refused to permit the physician referred to to testify concerning his treatment of deceased for typhoid fever. The Supreme Court held that under the circumstances the representative of insured could not claim privilege regarding the fact of treatment or non-treatment for typhoid fever. But the case is different where application makes no reference to the disease concerning which physician is questioned. Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

81. Redmond *v.* Industrial Ben. Assn., 28 N. Y. Supp. 1075, *s. c.* judgment *affirmed* by Court of Appeals. See 150 N. Y. 167, 44 N. E. 769.

82. Dreier *v.* Continental L. Ins. Co., 24 Fed. 670. To same general effect, see Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977.

83. Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887.

84. Kemp *v.* Metropolitan St. R. Co., 88 N. Y. Supp. 1.

85. *In re* Mullin's Estate, 110 Cal. 252, 42 Pac. 645.

86. Certain Conduct no Waiver. Fact of Suing for Personal Injury. The fact of instituting an action for personal injuries does not operate as a waiver of privilege as to testimony of physician who treated plaintiff for such injuries. Jones *v.* Brooklyn R. Co., 3 N. Y. Supp. 253; Butler *v.* Manhattan R. Co., 23 N. Y. Supp. 163, 30 Abb. N. C. 78.

Referring Insurance Company to Physician of Applicant. — A person applying for issuance of policy of life insurance does not waive privilege, by referring the insurance company to his physician. Edington *v.* Mutual L. Ins. Co., 5 Hun (N. Y.) 1, 9.

Examination by Opponent of His Own Physician. — In action for damages, no waiver of privilege by

E. Effect of Waiver. — a. *Privilege Waived, Testimony Compulsory.* — If patient waives privilege and physician refuses to testify, the court should compel him to do so.[87]

Heir at Law. — Same if heir at law waives.[88]

b. *Binding on Representatives and Beneficiaries.* — If applicant for life insurance expressly waives privilege, his waiver is binding upon his personal representative, and upon the beneficiary of the policy.[89]

Not Binding on Assignee. — But it has been held that such waiver is not binding upon person to whom policy has been assigned.[90]

F. Waiver Irrevocable, or Not. — Upon the question of the irrevocability of waiver the authorities are conflicting.

a. *Irrevocable.* — After some hesitation the courts of New York

plaintiff is shown by the fact that defendant examines its own physician, who, at its request, examines plaintiff's injuries. Jones *v.* Brooklyn R. Co., 3 N. Y. Supp. 253, *affirmed* 121 N. Y. 683, 24 N. E. 1098.

Patient's Submission to Cross-Examination No Waiver. — Butler *v.* Manhattan R. Co., 23 N. Y. Supp. 163, 30 Abb. N. C. 78.

Giving Name of Family Physician. Applicant for life insurance does not waive privilege by stating the name of his family physician in his application. Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind. 203, 211, 40 Am. Rep. 295.

Notice to Produce Letter. — By giving notice to adversary to produce in evidence a letter written by a person's physician, the party giving the notice does not waive right to object to the admission of confidential communications between that person and his physician. Phillips *v.* United States Ben. Soc., 120 Mich. 142, 79 N. W. 1.

General Denial in Suit by Physician. — If in action by physician to recover for services defendant interposes general denial, such act does not constitute a waiver. Van Allen *v.* Gordon, 83 Hun 379, 31 N. Y. Supp. 907.

Exhibition of Peculiarities. — By consenting to exhibition of his physical peculiarities to physicians other than his regular attendant, who inspect the same for scientific purposes, and by not objecting to publication of an article by his physician describing his case, patient does not waive privilege in the manner required by New York statute. Scher *v.* Metropolitan St. R. Co., 75 N. Y. Supp. 625.

87. Zimmer *v.* Third Ave. R. Co., 55 N. Y. Supp. 308; Valensin *v.* Valensin, 73 Cal. 106, 14 Pac. 397.

88. Roche *v.* Nason (N. Y.), 77 N. E. 1007.

89. Foley *v.* Royal Arcanum, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; Metropolitan L. Ins. Co. *v.* Willis (Ind.), 76 N. E. 560; Fuller *v.* Knights of Pythias, 129 N. C. 318, 40 S. E. 65, 85 Am. St. Rep. 744.

In Adreveno *v.* Mutual R. F. L. Assn., 34 Fed. 870, the court says: "As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative." Keller *v.* Home L. Ins. Co., 95 Mo. App. 627, 69 S. W. 612.

In Proppe *v.* Metropolitan L. Ins. Co., 34 N. Y. Supp. 172, it is said that such a waiver is "an agreement and condition binding upon the plaintiff."

90. Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977.

have settled upon the doctrine that waiver once duly made is irrevocable.[91]

b. *Revocable.* — The supreme courts of Michigan and Iowa have held that waiver is revocable, to the extent that waiver made upon first trial of an action is not binding upon a retrial.[92]

G. Effect of Change of Statute. — If express waiver of privilege be made in writing it is not affected by change in the law made between the making of the waiver and the time of trial of the action in which it is invoked.[93]

91. McKinney *v.* Grand St. P. R. Co., 104 N. Y. 352, 10 N. E. 544.

Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372, was an action to recover the amount of a life insurance policy. Upon the trial plaintiff waived privilege as to physician's testimony. Upon a second trial of the action, plaintiff objected to the testimony of the physician to whose testimony upon the first trial he had consented. It was contended that, the privilege having been renounced, it could not afterwards be asserted. But the court held otherwise, ruling that plaintiff could insist upon his privilege. But Grattan *v.* Metropolitan L. Ins. Co., was practically overruled by the same court in McKinney *v.* G. St. R. Co., 104 N. Y. 352, 10 N. E. 541. The McKinney case does not mention the Grattan case, although the brief of counsel asserting the privilege cites it. But as the McKinney case makes a decision diametrically opposite to the holding in the Grattan case, the latter is, in effect, overruled. McKinney *v.* Grand St. R. Co. is followed, and waiver made upon first trial of an action held irrevocable in Schlotterer *v.* New York Ferry Co., 85 N. Y. Supp. 847. In this case the court holds that the statutory provision requiring waiver to be made "upon the trial," does not require that waiver be made upon the particular trial under review.

92. Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977. In this case it was held that while plaintiff in an action upon life insurance policy waived privilege by introducing proofs of death containing physician's statement as to cause, plaintiff might, upon a second trial of the same action assert his privilege. The court *approves* Grattan *v.* Metropolitan L. Ins. Co., and *disapproves* McKinney *v.* Grand St. R. Co., stating that the former case announces the better rule. The court says: "Privilege includes both the security against publication and the right to control the introduction in evidence, of such information or knowledge communicated to or possessed by the physician. The latter right exists although the former has ceased to be of any benefit. The public may know; but shall the jury be permitted to receive and weigh testimony derived from a source which the law has put the seal of silence upon, unless released by the party who alone has the right to say whether that particular witness shall be the medium of conveying such knowledge to the jury? For instance, the party may have disclosed to a third person all that he has to his physician. Now, while his admissions may be proved in a proper manner by such third person, they cannot be proved by the physician against the objection of the party. The privilege conferred is that the physician shall not disclose or testify to those matters which the statute inhibits without the consent of the party to whom the privilege is extended, and this objection may be interposed whenever and as often as the party's rights may be affected by proffered testimony, if the objection be timely made. McConnell *v.* City of Osage, 45 N. W. Rep. 550." See also Burgess *v.* Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 89 Am. St. Rep. 359, 54 L. R. A. 364, which also rejects the rule announced in McKinney *v.* Grand St. R. Co.

93. Foley *v.* Royal Arcanum, 151

H. Extent of Waiver. — If privilege is once waived, the waiver extends to the whole professional conduct of the physician.[94]

I. Waiver Not Presumed. — Upon appeal it will not be presumed that a patient waived a privilege to which the record shows he was entitled.[95]

J. Conduct of Adverse Counsel as to Waiver. — Counsel for party adverse to patient or his representative will not be allowed to ask patient whether or not he will waive his privilege.[96]

N. Y. 196, 45 N. E. 456, 56 Am. St. Rep. 621. See statement of this case in note 59 *ante*. Between the time of signing the application containing the waiver and the trial of the action, § 836, Code of Civ. Proc., which gave the right to waive privilege as to the testimony of physicians, was so amended as to provide that waiver must be made upon the trial of the action. The court held the waiver binding, notwithstanding the amendment of the statute, holding that the provision for waiver was made as a contract, the obligation of which was not impaired by a change in the law.

In Holden *v.* Metropolitan Ins. Co., 165 N. Y. 647, 59 N. E. 150, a waiver similar to that applied in the Foley case was held ineffectual, because made subsequent to the adoption of the amendment to § 836.

94. Morris *v.* New York, O. & W. R. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675; Rauh *v.* Deutscher Verein, 51 N. Y. Supp. 985; Powers *v.* Metropolitan St. R. Co., 94 N. Y. Supp. 184; Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89.

95. Holcomb *v.* Harris, 59 N. Y. Supp. 160.

Carthage Tpk. Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653. In this case the court holds that certain testimony offered to be given by a physician was incompetent, and adds: "Appellee, probably, might have waived the point, and allowed his physician to testify, but we cannot indulge the presumption that he would have done so in order to overthrow the ruling of the court below, especially when he resisted the continuance, and argues here the incompetency of the witness to testify to the facts stated in the affidavit for the continuance."

96. McConnell *v.* Osage, 80 Iowa 293, 303, 45 N. W. 550, 8 L. R. A. 778. In this case the court says: "While plaintiff was on the witness stand, and being cross-examined, she was asked this question: 'Q. Are you willing that the physicians who have treated you for past ten or fifteen years may disclose to this jury any conversation you made to them, at times they treated you, in reference to your conditions?' Objections to the question being overruled, the plaintiff answered that she was not. The ruling is assigned as error, and we think it was manifestly so. Counsel for appellee does not in argument attempt to vindicate the ruling, and it would seem that an attempt must result in failure. The statute gives the prohibition. It is a legal right, and a party should no more be required to state under oath that he did not want to surrender it than any other legal right he possessed. We think a fair trial requires that such a matter should not even be referred to; that a jury should not be impressed with a belief that there is even reluctance to giving such assent. The subject-matter of such a waiver has no place for reference in the taking of testimony except by the party permitted to make it. That prejudice resulted from the ruling in question is more than probable. After making oath that she would not consent to the testimony, the jury was left to assume something—we know not what. It would naturally believe that, if assent had been given, testimony unfavorable to the plaintiff would have been the result. However, we need not speculate as to the probable consequences. It was clearly error."

K. Comment on Refusal to Waive. — Patient's conduct in calling as a witness one of three physicians who attended him, and objecting to the testimony of others, is a legitimate subject for consideration by the jury in determining the merits of the case.[97]

10. Protection of Privilege. — A. Objection to Testimony. a. *Who May Object.* — **(1.) Patient.** — It is obvious that when physician is interrogated concerning information necessarily acquired from his patient, the question may be objected to by the patient.[98]

(2.) Personal Representative, Beneficiary, Assignee. — Such question may also be objected to by the patient's personal representative,[99] or beneficiary of life insurance policy;[1] or by the assignee of a life insurance policy.[2]

(3.) Any Party to Action. — It has been stated, though not expressly decided, that any party to an action in which privileged matter is sought to be proved by a physician may object to his testimony.[3]

(4.) Physician. — It has been held that in certain cases the physician himself may raise the question of his patient's privilege, by objecting to the production of testimony which would make known their confidential communication.[4]

97. Cooley *v.* Foltz, 85 Mich. 47, 48 N. W. 176. See notes 29, 30 *post*, under I, 10, F.

98. Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358; Corbett *v.* St. Louis, I. M. & S. R. Co., 26 Mo. App. 621. See generally cases cited in notes.

99. Groll *v.* Tower, 85 Mo. 249, 55 Am. Rep. 358; Heuston *v.* Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

1. Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182.

2. Briesenmeister *v.* Knights of Pythias, 81 Mich. 525, 45 N. W. 977.

3. Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1.

In Davis *v.* Supreme Lodge, K. of H., 35 App. Div. 354, 54 N. Y. Supp. 1023, action was brought to recover amount of life insurance policy. To show breach of warranty, physicians who had attended certain relatives of applicant were offered as witnesses. *Held*, that their testimony could be excluded upon plaintiff's objection.

In Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, the court in commenting on Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185, says that in that case it was not decided that a personal representative could waive the protection of the statute, but "it was held that the personal representative or assignee of the patient could make the objection to evidence forbidden by the statute, and the opinion might have gone further and held that any party to an action could make the objection, as the evidence itself is objectionable, unless the objection be waived by the person for whose protection the statutes were enacted." The court in Westover *v.* Aetna L. Ins. Co., also says: "The purpose of the laws would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted."

4. Mott *v.* Consumer's Ice Co., 52

(5.) Objection Unavailing if Patient Consent, or Waive. — If patient consents to testimony of physician, the objection of any other person is unavailing, and the physician may testify.[5]

b. *Patient Cannot Object After Testifying.* — If a person has testified that he had a certain disease, he cannot afterwards object to the testimony of a state officer, who is a physician, which confirms his own testimony on the subject.[6]

c. *Objection Not Obviated.* — If question is objectionable as calling for privileged communication, the objection is not obviated by a subsequent question calling for witness' opinion on the matter covered by former question, although second question excludes any knowledge or information acquired while treating patient.[7]

B. Burden of Proof. — The burden is upon one claiming privilege to show the existence of conditions entitling him to insist upon the exclusion of the proposed testimony.[8]

a. *Facts Must Be Shown.* — Facts showing incompetency of proposed testimony must appear.[9]

Relation. — Thus, person claiming privilege must show that the

How. Pr. (N. Y.) 148; *s. c.* on appeal, 52 How. Pr. 244; Lowenthal *v.* Leonard, 46 N. Y. Supp. 818; Kelley *v.* Levy, 8 N. Y. Supp. 849. See reference to these cases in note 19, *ante*, I, 10, a (4).

5. In Territory *v.* Corbett, 3 Mont. 50, 59, defendant objected to question addressed to a physician who had treated one of the witnesses in the case. The patient consented to the testimony. *Held*, that physician's testimony was properly admitted.

6. State *v.* McCoy, 109 La. 682, 33 So. 730.

7. Edington *v.* Aetna L. Ins. Co., 13 Hun (N. Y.) 543.

8. Stowell *v.* American Co-op. Relief Assn., 5 N. Y. Supp. 233; Heath *v.* Broadway & S. A. R. Co., 8 N. Y. Supp. 863; Henry *v.* New York, etc. R. Co., 10 N. Y. Supp. 508; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Green *v.* Metropolitan St. R. Co., 171 N. Y. 201, 63 N. E. 958, 89 Am. St. Rep. 807; Griffiths *v.* Met. ropolitan St. R. Co., 171 N. Y. 106, 63 N. E. 808; Jennings *v.* Supreme C. L. A. B. Assn., 81 N. Y. Supp. 90; Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887; Van Bergen *v.* Catholic, R. & B. Assn., 99 App. Div. 72, 91 N. Y. Supp. 362; James *v.* Kansas City, 85 Mo. App. 20.

9. People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783, *affirming s. c.* 43 Hun 88; Bowles *v.* Kansas City, 51 Mo. App. 416; Stowell *v.* American C. R. Assn., 5 N. Y. Supp. 233.

Party objecting to testimony has a right to demand that witness' relation to the person in question be defined, as, otherwise, the court cannot rule. Tracey *v.* Metropolitan St. R. Co., 63 N. Y. Supp. 242.

In Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564, the court says: "Before the exclusion is authorized, the facts must in some way appear upon which such exclusion can be justified." The court also says: "It is not incumbent on the party who seeks information from a physician who has been in attendance upon a patient, to show that the information was not acquired as specified in the statute; but the party objecting must in some way make it appear, if it does not otherwise appear, that the information is within the statutory exclusion."

It is incumbent upon one claiming privilege to support his objection by proof of the facts necessary to bring the case within the definition upon which objection was based. Henry *v.* New York, etc. R. Co., 10 N. Y. Supp. 508.

relation of physician and patient existed between witness and the person to whom his testimony relates.[10]

b. *All Conditions of Exclusion Must Exist.* — To exclude proposed testimony claimant must show the existence of all the conditions of exclusion.[11]

C. How Burden Sustained. — Burden is sustained when claimant obtains from physician a statement that whatever he learned he learned in his professional capacity as a physician, and that such information was necessary to enable him to treat the case.[12]

D. Prima Facie Case Made by Showing. — What Sufficient. a. *Professional Attendance.* — To make a *prima facie* case of incompetency, it is sufficient to show that the physician offered as witness attended a person in that capacity.[13]

10. People *v.* Koerner, 154 N. Y. 355, 365, 48 N. E. 730; Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; Weitz *v.* M. C. R. Co., 53 Mo. App. 39; Clark *v.* State, 8 Kan. App. 782, 61 Pac. 814.

Hospital Physician. — In Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 63 N. E. 808, a boy was injured by a street car. He was taken to a drug store, where a physician volunteered his services. This physician rode about three blocks in an ambulance with the boy as the latter was being conveyed to a hospital. The physician was an employe of the hospital, it not appearing whether his employment commenced before the accident. About ten days afterward he saw the boy at the hospital, and questioned him as to the accident. Physician's testimony as to the boy's statements was excluded. Upon appeal to Appellate Division this ruling was held correct. (See Griffiths *v.* Metropolitan St. R. Co., 71 N. Y. Supp. 406). Upon appeal to the court of appeals the judgment of the Appellate Division was reversed, the court holding that plaintiff did not successfully sustain the burden of showing that the relation of physician and patient existed.

11. Gartside *v.* Connecticut Mut. L. Ins. Co., 8 Mo. App. 592, where the court says: "(1.) Where the whole testimony of a physician is excluded on the ground that he cannot separate impressions received by him growing out of the relation of physician and patient, and those received by observations of the patient when that relation did not exist, the fact justifying such exclusion must appear; the statement of the physician to that effect is not sufficient. (2.) The fact that such discrimination can be made by the witness may be developed on a proper cross-examination." Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 111, 63 N. E. 808.

"All the conditions of exclusion must exist, and, one failing, the presence of the others amounts to nothing." Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363.

In addition to fact of attendance claimant must show that information was necessary to performance of professional duty. Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363; People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783; Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564.

But if testimony shows that a third person was present at only one of many consultations, and question to physician calls for information acquired during entire treatment, the physician's testimony should be excluded. Murphy *v.* Board of Comrs. (Cal. App.), 83 Pac. 577.

12. Van Bergen *v.* Catholic, R. & B. Assn., 99 App. Div. 72, 91 N. Y. Supp. 362.

13. Brigham *v.* Gott, 3 N. Y. Supp. 518; Jones *v.* Brooklyn, R. Co., 3 N. Y. Supp. 253.

b. *Examination for Treatment,* and examined him for the purpose of enabling physician to prescribe.[14]

c. *Relation Not Disproved by Record.* — When the fact of attendance is shown and there is nothing in the record to show that relation did not exist, physician cannot testify.[15]

Relationship Denied. — Witness Competent. — When physician called as a witness testifies that he did not attend a certain person, and there is nothing in the record from which the contrary appears, a ruling that witness was competent will not be disturbed upon appeal.[16]

E. How Privilege Determined. — a. *Question by Person Calling Physician.* — The court will permit the party calling a physician as witness to ask him whether or not the information to which his questions are directed was necessary to enable him to prescribe professionally.[17]

b. *Question by Claimant.* — Or the court will permit objector to interrogate witness as to the existence of relation, or character of information proposed to be shown.[18]

c. *Preliminary Question Necessary.* — Objection cannot be formulated until it appear whether or not witness obtained his knowledge in such manner as to disqualify him.[19]

d. *Formal Proof of Character of Information Not Required.* — It is not necessary to show in the first instance by formal proof that the information in question was necessary to enable physician to prescribe, as the character of the information will be inferred from the relationship of the parties.[20]

e. *Character of Information Inferred From.* — **(1.) Form of Question.** — Fact of attendance being shown, the question itself justifies the inference that the information to which it was directed was acquired in a professional capacity.[21]

14. Weitz *v.* M. C. R. Co., 53 Mo. App. 39; James *v.* Kansas City, 85 Mo. App. 20.

15. Weitz *v.* M. C. R. Co., 53 Mo. App. 39; James *v.* Kansas City, 85 Mo. App. 20.

16. Stowell *v.* American C. R. Assn., 5 N. Y. Supp. 233.

17. Herrington *v.* Winn, 14 N. Y. Supp. 612.

18. Nugent *v.* Cudahy Pack. Co., 126 Iowa 517, 102 N. W. 442.

19. Tracey *v.* Metropolitan St. R. Co., 63 N. Y. Supp. 242.

20. Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, 194; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 297; *In re* Darragh's Estate, 5 N. Y. Supp. 58; Feeney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.

Nor is an examination of patient necessary. Brigham *v.* Gott, 3 N. Y. Supp. 518, *citing* Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770.

Formal Proof of Status of Witness. — See notes *ante.*

21. In Sloan *v.* New York Cent. R. Co., 45 N. Y. 125, a physician was asked if plaintiff had a certain disease while under his care. The court says: "The presumption is, from the question, that he learned it as a physician, for the purpose of prescribing. The question itself implies it. To require the plaintiff to make the preliminary inquiry

(2.) **Fact of Attendance.** — The fact that the information was necessary to professional treatment may be inferred from the fact of attendance,[22] especially in connection with the nature of the question.[23]

(3.) **Inference From Profession and Relation.** — The profession of the witness, the fact of treatment, the fact that information was received in professional capacity, and the relation of physician and patient being shown, it follows as a necessary inference that witness' knowledge was acquired in his character of physician.[24]

f. *Status Presumed.* — If witness states that he is a physician, it will be presumed that he has the license required by law.[25]

g. *Information Partly Confidential.* — When part of witness' information of his patient's mental condition was acquired at confidential, and part at non-confidential interviews, it appearing that impressions gathered at the latter necessarily related to knowledge acquired through professional treatment, and that witness cannot

whether he learned the fact for the purpose of prescribing would in effect, if the fact existed, have deprived the plaintiff of the protection of the statute. It would have proved the fact indirectly, which might be as injurious as if proved legitimately." *Approved* in Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 299.

Fact of consultation, in connection with the nature of the questions themselves is sufficient in the absence of other proof, to bring them within the prohibition of the statute. Feeney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544.

22. Munz *v.* Salt Lake City R. Co., 25 Utah 220, 70 Pac. 852.

The fact that a physician is called to attend a person creates the presumption that he examined him for the purpose of enabling himself to prescribe for that person's ailment. James *v.* Kansas City, 85 Mo. App. 20.

23. See note 21 *ante,* under I, 10, E, e, (1.).

24. Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 297.

In re Redfield's Estate, 116 Cal. 637, 644, 48 Pac. 794. In this case physician testified that he had treated a person for consumption. He stated that he had no information as to his patient's condition, mental or physical, except such as he had acquired as a physician to enable him to act for her. *Held,* that he could not be interrogated as to patient's mental condition.

25. Record *v.* Saratoga, 46 Hun (N. Y.) 448, *affirmed* without opinion, 120 N. Y. 646. This was an action for damages for personal injuries. Defendant offered to show by plaintiff's physician the nature of plaintiff's injuries. Objection was sustained. Defendant claimed that, as witness did not produce his license, and was not examined as to his being a duly licensed physician, objection was not well founded. *Held,* that in the absence of any objection taken at the trial to the sufficiency of the proof, patient was entitled to the benefit of the presumption that witness had the license required by law. The court says: "If the privilege were the physician's, he might, if the objection were taken, be required to prove by the best evidence that he was duly authorized; but it is the patient's privilege, and, in the absence of any objection upon the trial to the sufficiency of the proof, she is now entitled to the benefit of the presumption that the physician had the license which the law requires to entitle him to practice. If any objection had been taken upon the trial to the sufficiency of the proof, no doubt it could have then been supplied. It cannot now be entertained."

separate confidential knowledge from that otherwise acquired, the witness will be held incompetent.[26]

Segregation Possible, Testimony Competent. — But where witness is able to separate confidential statements from those which were non-confidential, he may give the latter in evidence.[27]

h. *Court Not Bound by Physician's Statement.* — The court is the judge of the admissibility of testimony, and may hold that a given statement was not confidential, notwithstanding physician's statement to the contrary.[28]

F. Inference From Refusal to Waive. — It has been held that the refusal of a patient to permit a physician to testify notwithstanding the law against disclosure of confidential communications, authorizes the jury to draw therefrom inferences unfavorable to patient.[29]

26. In *In re* Darragh's Estate, 5 N. Y. Supp. 58, the court says: "It is urged upon the part of the appellant that it was not shown that the knowledge which he had acquired in respect to his patient by the physician while he was attending her was necessary to enable him to prescribe for her. But it seems to us, in view of the rule laid down by the court of appeals, in construing the statute prohibiting the disclosure by physicians of the information they have received in respect to the condition of their patients, that it was not necessary that this should be established, and that all that it was necessary to establish in order to preclude the physician from testifying was that he had obtained the information during the course of his professional employment. And this is the only reasonable construction to be placed upon the statute, because otherwise it is placing it within the physician's power to violate the statute at will. The information which the physician receives by his eyes, by his ears, and by his touch, is in the course of his professional employment, and it may or may not be necessary for the purpose of prescribing, and this necessity may only be disclosed by the very fact of the imparting of the information, and therefore, although information of this character may be communicated, supposedly under the safeguards thrown around such communications by the law, yet it may turn out that such disclosure was not necessary to enable the physician to act in a professional capacity; but this could only be ascertained after the disclosure had been made. It is so difficult to draw the line that it is certainly best to err upon the side of safety, and shut the door against all disclosures of information acquired by a physician in attending a patient in a professional capacity, without requiring absolute proof that such information was necessary to enable him to act in that capacity. The intention evidently was to protect all communications made by a patient to his physician, which the patient supposed, or had reason to believe, were protected by the provisions of the law. This seems to be the construction of this section adopted by the highest court, and that it is the one which accords best with the evident policy of the law is manifested by the restriction which it has thrown around the disclosures to attorneys and priests. Therefore, in the case at bar, this physician being unable to separate the knowledge which he had acquired as a physician, or while attending her in a professional capacity, from the knowledge which he acquired when paying her a friendly visit, it is clear that his testimony was properly rejected."

27. Seifert *v.* State, 160 Ind. 464, 67 N. E. 100.

28. Griffiths *v.* Metropolitan St. R. Co., 171 N. Y. 106, 113, 63 N. E. 808.

29. Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887. (See quotation in note 31.) But see Mc-

Contra. — But the contrary has been held by other courts.[30]

G. Instruction as to Refusal to Waive. — It is not error to refuse to instruct the jury that "under the law, communications from a patient to a physician are privileged, and cannot be given in testimony, except that the privilege be waived, and could have been waived in this case by the plaintiff, but her refusal to waive it does not warrant the jury in indulging in any inferences unfavorable to her or to her cause of action. She stood upon her legal rights, and because of doing so she cannot be prejudiced in the eyes of the jury."[31] But it is held that it is error for the court to

Connell *v.* Osage, 80 Iowa 293, 303, 45 N. W. 550, 8 L. R. A. 778, under I, 9, J. n. 96, *ante*.

Deutschmann *v.* Third Ave. R. Co., is *disapproved* in Pennsylvania R. Co. *v.* Durkee, 147 Fed. 99, 102, which involved an application of the same statute.

30. No Inference From Refusal to Waive. — Pennsylvania R. Co. *v.* Durkee, 147 Fed. 99, 101. The court, in this case, says: "To hold that, because the patient does not waive or abandon the prohibition, inferences adverse to his side of the controversy may be drawn by the jury, would be to fritter away the protection it was intended to afford. When it is the legal right of a party not to have some specific piece of testimony marshaled against him, he may exercise that right without making it the subject of comment for the jury. The law of evidence provides that the copy of a document shall not be proved until the failure to produce the original shall be satisfactorily explained. When a copy is offered, the party against whom it is offered may, if he choose, waive this particular objection; but, if he does not, are the jury to be allowed to draw unfavorable inferences from his insisting upon the cause being tried in the orderly way in which the law provides? In a case where communications between client and counsel were inquired about, Lord Chelmsford said: 'The exclusion of such evidence is for the general interest of the community, and therefore to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which for public purposes the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?' Wentworth *v.* Lloyd, 10 House of Lords, 589."

31. Deutschmann *v.* Third Ave. R. Co., 84 N. Y. Supp. 887. In this case the court says: "The jury is always justified in taking into consideration the attitude, appearance, and acts of parties and witnesses upon a trial, and to deduce therefrom such inferences as fairly arise out of the given circumstances, and we see no reason why they may not also take into consideration an objection interposed which shuts out the introduction of testimony. We think, therefore, that the court was correct in its charge with respect to the authority of the jury in considering all the circumstances. The jury was limited in drawing inferences unless they were justified by the evidence in the case, and the court refused to charge that the law prevented them from drawing any inference whatsoever from the situation. We think, in view of the fact that the statute is silent upon the subject, that the jury were not precluded from considering the entire attitude of the party, and drawing such inference therefrom as was fairly deducible from the situation which had been created. Carpenter *v.* Pennsylvania R. Co., 13 App. Div. 328, 43 N. Y. Supp. 203; People *v.* Hovey, 92 N. Y. 554. If, however, we should be wrong in this conclusion, we think there is another and fatal objection to the request to charge as made. The language of the request is, 'Under the law, communications from a patient to a physician are

charge that the jury might consider a refusal to waive privilege in determining the case.[32]

H. Argument From Refusal, Improper. — It has been held that it is error for the trial court to permit counsel to argue to jury that refusal to waive privilege should be taken as an admission that the physician's testimony would be unfavorable.[33]

I. No Inference From Failure to Call Physician. — No unfavorable inference can be drawn from patient's failure to call physician as witness.[34]

J. Other Protection. — Besides power to exclude testimony by sustaining objection, the courts have other means of protecting privilege.

a. *Refusal to Take Testimony. — Striking Out.* — If, in the course of taking testimony before a commissioner, a physician reveals professional secrets, the commissioner may refuse to take the testimony, or a judge of the court in which the action is pending, should, without motion, strike it out.[35]

b. *Protection of Physician's Books.* — Court will not order a physician to produce his account books containing records of knowledge acquired from patients in evidence upon a trial, or deliver them to a receiver appointed upon proceedings in aid of execution.[36]

c. *Exclusion in Court's Discretion.* — It has been held that it is

privileged, and cannot be given in testimony except that the privilege be waived.' This was too broad a statement of the law. The prohibition relates only to those matters which the statute covers. The statute only prohibits the physician from making disclosure of confidential information acquired in attending upon a patient where the relation of patient and physician is established, and when the information was necessary to enable him to act in that capacity. When that relation is established, all disclosure of matters relating thereto is privileged. It does not extend, however, to information acquired by the physician, unless such information was acquired for the purpose of enabling him to act in that capacity. Hoyt *v.* Hoyt, 9 N. Y. St. Rep. 731, *affirmed* 112 N. Y. 493, 20 N. E. 402; Brown *v.* R., W. & O. R. Co., 45 Hun 439; De Jong *v.* Erie R. Co., 43 App. Div. 427, 60 N. Y. Supp. 125. The request to charge embraced all communications had between a patient and a physician. Clearly, this is not the law, and the request was therefore too broad." Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

32. Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303; Thomas *v.* Gates, 126 Cal. 1, 58 Pac. 315.

33. Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303. See remarks of court in State *v.* Booth (Iowa), 88 N. W. 344.

34. Arnold *v.* Maryville, 110 Mo. App. 254, 85 S. W. 107. In this case the court says: "In Wentworth *v.* Loyd, 10 H. L. Cas. 589, it was held no ground for presumption against one who refused to waive the privilege as to communications made to his solicitor in a professional capacity. It must be clear that if an unfavorable presumption against one should be allowed when he refused to waive his privilege, or failed to call the physician as a witness, the privilege itself would be destroyed, and the policy of the statute thwarted."

35. Storrs *v.* Scougale, 48 Mich. 387, 12 N. W. 502.

36. Mott *v.* Consumers' Ice Co., 52 How. Pr. (N. Y.) 148; Lowenthal *v.* Leonard, 46 N. Y. Supp. 818; Kelly *v.* Levy, 8 N. Y. Supp. 849.

within the discretion of the court to exclude physicians' testimony, when its admission would blacken the memory of the dead.[37]

11. Construction of Statutes. — A. LIBERAL. — Statutes making incompetent the testimony of physicians and surgeons should be liberally construed.[38]

In Sullings *v.* Shakespeare, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166, it is said that a physician has no right to publish knowledge acquired in professional confidence, but such decision was not necessary in that case.

37. Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428.

38. Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185; Feeney *v.* Long Island R. Co., 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; Buffalo L. T. etc., Co. *v.* Knights' T. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839; People *v.* Stout, 3 Park. Crim. (N. Y.) 670; Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind. 203, 40 Am. Rep. 295.

In Edington *v.* Aetna L. Ins. Co., 77 N. Y. 564, the court, after stating that this privilege did not exist at common law, says: "It should not, therefore, be made broader by construction than the language of the statute plainly requires; and in applying the statute, the purpose of its enactment should be kept in view; and that was tersely expressed by the revisers, in a note to the section, as follows: 'The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defense or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.'"

On question of so construing statute as to prevent its becoming a means of shielding a criminal, see State *v.* Grimmell, 116 Iowa 596, 88 N. W. 342. See quotation in note *27 ante,* under I, 7, B, k.

In Boyle *v.* Northwestern M. R. Assn., 95 Wis. 312, 322, 70 N. W. 351, a statute providing that physician could not be "compelled" to disclose information acquired in his professional capacity was construed to mean that he would not be "allowed" to testify as to such matters. The court says: "Under statutes providing that a professional witness 'shall not be *allowed* to disclose' information so acquired, it has been held in a great number of cases, and with entire uniformity so far as we have been able to discover, that the privilege is that of the patient, client, etc., and the information or disclosure cannot be given in evidence against him, or persons claiming under him, unless waived. 'After one has gone to his grave, the living are not permitted to impair his fame or disgrace his memory by dragging to light communications and disclosures made under the seal of the statute.' Westover *v.* Aetna L. Ins. Co., 99 N. Y. 56, 60; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 282; Edington *v.* Mut. L. Ins. Co., 67 N. Y. 185. The disclosure by a physician of information acquired in his professional character, in attending on a patient, where not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse. The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpreta-

B. Strict. — But the contrary has been held by one court.[39]

C. Strict Construction in Favor of Claimant. — It has been said that statute should be construed with great strictness in favor of the person against whom the testimony is offered.[40]

II. HUSBAND AND WIFE.

1. General Rule. — Neither husband nor wife can testify as to any communications between them made during the existence of the marriage relation.[41]

tion, in order to carry out its evident beneficial purposes. It provides that the physician shall not be *compelled* to disclose any information, etc., acquired in his confidential relations with his patient. For whose benefit was this provision intended? Clearly, for the benefit of the patient, whose interests, reputation, and sensibilities may be injured and grossly outraged by its disclosure. The fact that the physician acquired the information in order to prescribe for or treat the patient cannot affect the physician in the least degree unfavorably, nor that he should be compelled to disclose as a witness the information or knowledge thus acquired. The object of the section, therefore, was to protect the patient, to whom protection was so important, and not the physician, to whom it was quite unimportant, from the consequences of such disclosure, and shows that the provision that the physician shall not be *compelled* to make the disclosure as a witness renders the statement of the patient privileged as to him, and that this was within the intention of the makers of the statute clearly implied from its language, and that it should not be disclosed by the physician without his consent. . . We think that it is a clear and justifiable inference from the section under consideration, and the cause and apparent necessity of making the statute, that the information of the physician, so acquired, is privileged as to the patient, and that the physician can neither be compelled nor allowed to disclose it, as a witness, against the will or without the consent of the patient. This interpretation gives the law the beneficial effect it was evidently designed to have, while by the literal meaning of its language it would be rendered of little or no practical effect. We think that the court erred in admitting the testimony of the physician thus objected to." To same effect, see *In re* Will of Bruendl, 102 Wis. 45, 78 N. W. 169.

Statute of Iowa providing that no physician or surgeon "shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office, etc.," is construed to confer upon the patient the right to refuse to give his own testimony in regard to confidential communications to his physician. Burgess *v.* Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 54 L. R. A. 364. The court says: "Further than this, the provision of the Code extends the privilege which at common law was recognized in regard to communications between client and attorney so as to cover communications between the patient and his physician; and we have no doubt that it was intended to extend to these communications the same complete protection, not only as to physicians, but also as to the patient, which by common law was recognized in regard to communications between client and attorney. We think that there is no question but that the patient is privileged from disclosing communications made to his physician, although the statute does not so expressly provide."

39. Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363.

40. Post *v.* State, 14 Ind. App. 452, 42 N. E. 1120.

41. *England.* — Monroe *v.* Twis-

tleton, Peake Ad. C. 219; O'Connor *v.* Majoribanks, 4 Man. & G. 435, 12 L. J. C. P. 161, 7 Jur. 834.

United States. — Bassett *v.* United States, 137 U. S. 496; Hopkins *v.* Grimshaw, 165 U. S. 342.

Alabama. — Swoope *v.* State, 115 Ala. 40, 22 So. 479; Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

California. — People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

Florida. — Henderson *v.* Chaires, 25 Fla. 37, 6 So. 164; Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Georgia. — Jackson *v.* Jackson, 40 Ga. 150; Toole *v.* Toole, 107 Ga. 472, 33 S. E. 686; Castello *v.* Castello, 41 Ga. 613; McIntyre *v.* Meldrim, 40 Ga. 490.

Illinois. — Joiner *v.* Duncan, 174 Ill. 252, 51 N. E. 323; Sagar *v.* Eckert, 3 Ill. App. 412, 418.

Indiana. — Higham *v.* Vanosdol, 101 Ind. 160.

Iowa. — Shuman *v.* S. L. K. of H., 110 Iowa 480, 81 N. W. 717.

Kansas. — Van Zandt *v.* Schuyler, 2 Kan. App.. 118; Chicago K. & N. R. Co. *v.* Ellis, 52 Kan. 41, 33 Pac. 478; Anderson *v.* Anderson, 9 Kan. 112; French *v.* Wade, 35 Kan. 391, 11 Pac. 138.

Kentucky. — McGuire *v.* Maloney, 1 B. Mon. 224; New York L. Ins. Co. *v.* Johnson's Admr., 24 Ky. L. Rep. 1867, 72 S. W. 762; Howard *v.* Com., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704, Manhattan L. Ins. Co. *v.* Beard, 112 Ky. 455, 66 S. W. 35.

Maine. — Walker *v.* Sanborn, 46 Me. 470.

Massachusetts. — Raynes *v.* Bennett, 114 Mass. 424; Drew *v.* Tarbell, 117 Mass. 90; Com. *v.* Mahoney, 152 Mass. 493, 25 N. E. 833; Fuller *v.* Fuller, 177 Mass. 184, 58 N. E. 588, 83 Am. St. Rep. 273.

Michigan. — Hunt *v.* Eaton, 55 Mich. 362, 21 N. W. 429; Maynard *v.* Vinton, 59 Mich. 139, 152, 26 N. W. 401, 60 Am. Rep. 276; Rice *v.* Rice, 104 Mich. 371, 62 N. W. 833; McKenzie *v.* Lautenschlager, 113 Mich. 171, 71 N. W. 489; Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

Minnesota. — Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253; Beckett *v.* Northwestern Masonic Aid Assn., 67 Minn. 298, 69 N. W. 923.

Mississippi. — Stuhlmuller *v.* Ewing, 39 Miss. 447.

Missouri. — Moore *v.* Wingate, 53 Mo. 398, 408; Buck *v.* Ashbrook, 51 Mo. 539; Berlin *v.* Berlin, 52 Mo. 151; Dwyer *v.* Dwyer, 2 Mo. App. 17; Miller *v.* Miller, 13 Mo. App. 591; *s. c.* 14 Mo. App. 418; Schierstein *v.* Schierstein, 68 Mo. App. 205.

Nebraska. — Buckingham *v.* Roar, 45 Neb. 244, 63 N. W. 398.

New York. — Burrell *v.* Bull, 3 Sandf. Ch. 15, 26.

North Carolina. — Hester *v.* Hester, 15 N. C. (4 Dev. L.) 228; Toole *v.* Toole, 109 N. C. 615, 14 S. E. 57; State *v.* Brittain, 117 N. C. 783, 23 S. E. 433; State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

Tennessee. — Pillow *v.* Thomas, 1 Baxt. 120, 129; Orr *v.* Cox, 3 Lea 617; E. W. M. *v.* J. C. M., 2 Tenn. Chan. App. 463, 479; Insurance Co. *v.* Shoemaker, 95 Tenn. 72.

Texas. — Williams *v.* State, 40 Tex. Crim. 565, 51 S. W. 224.

Virginia. — Murphy *v.* Com., 23 Gratt. 960.

West Virginia. — Statute of West Virginia expresses rule of common law. White *v.* Perry, 14 W. Va. 66, 78.

"Communication." — As to the meaning of the word "communication" when used in this connection, the supreme court of Indiana in Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772, says: "It is not every conversation between husband and wife, nor every word or act said or done by either in the presence of the other, that is protected under the seal of secrecy, but only such communications, whether by word or deed, as pass from one to the other by virtue of the confidence resulting from their intimate relations with one another. Where the criminal, in seeking advice and consolation, lays open his heart to his wife, the law regards the sacredness of their relation, and will not permit her to make known what he has thus communicated, even as it will not ask him to disclose it himself. But if what is said or done by either

has no relation to their mutual trust and confidence as husband and wife, then the reason for secrecy ceases. Accordingly, many conversations and actions by and between husband and wife have been held not to be privileged."

In Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384, the court says: "But if the objection to the evidence had been timely, it would not have been available. The section of the Code referred to forbids not all communications between husband and wife, but only confidential communications. What are confidential communications within the meaning of the section? Clearly not all communications made between husband and wife when alone. If such had been the meaning it would have been so provided in general and simple terms. They are such communications as are expressly made confidential, or such as are of a confidential nature or induced by the marital relation."

The word "communication" should be liberally construed. Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405.

The relation of husband and wife being shown, the law absolutely prohibits testimony of the spouses concerning communications between them. Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223.

In Stein *v.* Bowman, 13 Pet. (U. S.) 209, the court says that the law makes a spouse absolutely incompetent to testify to any confidential communication made during marriage. The court uses this language: "The law does not seem to be entirely settled how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether in such a case, she may not be asked questions as to facts, that may, in some measure, tend to criminate her husband, but which afford no foundation for a prosecution. The decisions which have been made on these points, seem to be influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse.

Some colour is found in some of the elementary works for the suggestion that this rule, being founded on the confidential relations of the parties, will protect either from the necessity of a disclosure; but will not prohibit either from voluntarily making any disclosure of matters received in confidence; and the wife and the husband have been viewed, in this respect, as having a right to protection from a disclosure, on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.

The rule which protects an attorney in such a case, is founded on public policy, and may be essential in the administration of justice. But this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories."

In Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40, the supreme court of Alabama states the rule as follows: "There is a well defined rule of law, that any transaction or communication between husband and wife, which does not on its face appear to have been intended to be public, or to become so, is shielded by the sacredness of the relation from the public eye; and neither is a competent witness to testify as to such transaction or communication, when the interests of the other are involved. This rule rests on the ground of public policy, and stands unchanged, even after the marriage relation is dissolved by the death of

2. Privileged at Common Law. — Such communications were privileged at common law.[42]

3. Not Changed by Statute Removing General Incompetency. Change of common law rule by making one spouse a competent witness against the other does not affect the rule against disclosure of marital communications.[43] Nor does the statute permitting a party to an action to call his adversary as a witness.[44]

4. Founded Upon Public Policy. — The rule is founded upon public policy.[45]

one of the parties, or by judicial sentence. When, however, the conduct or transaction is in no sense traceable to their relation of husband and wife and the confidence it inspires, but in its nature is as likely to have occurred before the public as in private, there are authorities which hold that, after the marriage is dissolved, the parties, or survivor, as the case may be, are competent, in civil cases, to testify for and against each other."

In Dickerman *v.* Graves, 6 Cush. (Mass.) 308, 53 Am. Dec. 41, the rule is stated: "the proposition is no doubt fully established by the authorities, that even after the dissolution of the marriage contract, the husband and wife are not in general admissible to testify against each other, as to any matters which occurred during the existence of that relation." This language limits the rule to cases in which one spouse is called to testify against the other; but the general rule is broader, and is as stated in the text. The statute under which Dickerman *v.* Graves was decided provided that husband and wife were not competent to testify against each other as to what occurred during the marriage relation.

42. *United States.* — Hopkins *v.* Grimshaw, 165 U. S. 342.

District of Columbia. — McCartney *v.* Fletcher, 10 App. Cas. 572, 595.

Illinois. — Joiner *v.* Duncan, 174 Ill. 252, 51 N. E. 323; Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Geer *v.* Goudy, 174 Ill. 514, 51 N. E. 623.

Kentucky. — Short *v.* Tinsley, 1 Met. 397, 401.

Massachusetts. — Dexter *v.* Booth, 2 Allen 559; Raynes *v.* Bennett, 114 Mass. 424, 427; Hyde *v.* Gannett, 175 Mass. 177, 55 N. E. 991.

Minnesota. — Leppla *v.* Minnesota Tribune Co., 35 Minn. 310, 29 N. W. 127.

Mississippi. — Stuhlmuller *v.* Ewing, 39 Miss. 447, 461.

Missouri. — Shanklin *v.* McCracken, 140 Mo. 348, 357, 41 S. W. 898; Moore *v.* Wingate, 53 Mo. 398, 409; Miller *v.* Miller, 14 Mo. App. 418.

In Mercer *v.* Patterson, 41 Ind. 440, it is said that the statute of Indiana which excludes from evidence communications between husband and wife during coverture creates no new law, but is a re-enactment of the common law. The same is said of Michigan statute on the subject. Hagerman *v.* Wigent, 108 Mich. 192, 65 N. W. 756.

43. **Not Affected by Change of Common Law.** — Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; Gee *v.* Scott, 48 Tex. 510, 26 Am. Rep. 331.

44. National German-American Bank *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016; *s. c.* on rehearing, 80 N. W. 363. See Strode *v.* Frommeyer, 115 Mo. App. 220, 91 S. W. 167.

45. *Georgia.* — Goodrum *v.* State, 60 Ga. 509; Wilkerson *v.* State, 91 Ga. 729, 738, 17 S. E. 990, 44 Am. St. Rep. 63.

Illinois. — Reeves *v.* Herr, 59 Ill. 81, Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756; Munford *v.* Miller, 7 Ill. App. 62.

Kentucky. — McGuire *v.* Maloney, 1 B. Mon. 224.

Michigan. — Maynard *v.* Vinton, 59 Mich. 139, 152, 26 N. W. 401, 60 Am. Rep. 276.

Missouri. — State *v.* Kodat, 158 Mo. 125, 59 S. W. 73, 81 Am. St. Rep. 292, 51 L. R. A. 509.

Ohio. — Sessions *v.* Trevitt, 39 Ohio St. 259, 267.

Pennsylvania. — Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578.

5. Reason for Rule. — The rule is not based upon the common law fiction of the identity of husband and wife;[46] nor upon an actual, voluntary confidence reposed in one spouse by the other,[47] but upon the peculiarly confidential nature of the marriage relation.[48]

6. Nature of Privilege. — A. Spouse Not Disqualified as Witness. — The rule against the disclosure of confidential communications between husband and wife does not disqualify one spouse as a witness against the other.[49]

B. Matter Communicated Not Necessarily Incompetent. Nor does the rule declare the communicated matter to be incompetent in evidence.[50]

C. Spouse Prohibited to Testify Concerning Communication. — The rule prohibits either spouse to give in evidence, matter confidentially communicated to the other during the existence of their marital relations.[51]

Spouse Making Communication Permitted, But Not Compelled, to Testify. It has been held that the privilege belongs to the spouse making

46. Not Based Upon Identity. — Dunlap *v.* Hearn, 37 Miss. 471.

47. Nor Actual Confidence. — State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

48. Founded Upon Relation. — In Walker, Exr. *v.* Sanborn, 46 Me. 470, the court says that communications between husband and wife are sacred, and adds: "The exclusion, on this latter ground, rests not upon the nature of the evidence, but upon the source or mode in which the knowledge is obtained by the husband or wife."

In State *v.* Jolly, 20 N. C., (3 Dev. & B. L.) 110, 32 Am. Dec. 656, the court says: "But moreover the rule is not founded exclusively upon an actual voluntary confidence reposed by one of the married pair in the other—but also upon the unavoidable confidence which the intimacy of the marriage state necessarily produces."

49. Munford *v.* Miller, 7 Ill. App. 62. See also Palmer *v.* Henderson, 20 Ind. 297.

An Ohio statute (2d. subd.) provided that husband and wife should be incompetent to testify "for or against each other or concerning any communication made by one to the other during coverture, whether called as a witness while that relation subsists or afterwards." Under this statute it was held: "The second (referring to quoted provision) does not preclude them from being witnesses in any case, but renders them incompetent to give testimony upon a particular subject, and with respect to that is of general application." Robinson *v.* Chadwick, 22 Ohio St. 527.

50. State *v.* Gray, 55 Kan. 135, 143, 39 Pac. 1050; Southwick *v.* Southwick, 2 Sweeny (N. Y.) 234.

51. Stem *v.* Bowman, 13 Pet. (U. S. 209; People *v.* Wood, 126 N. Y. 249, 27 N. E. 362; State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110; 32 Am. Dec. 650; Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223; Owen *v.* State, 78 Ala. 425; 56 Am. Rep. 40; Robinson *v.* Chadwick, 22 Ohio St. 527.

Where statute makes husband or wife of a person indicted for a crime a competent witness in all cases, and provides neither a husband nor wife can be compelled to disclose a confidential communication made by one to the other during their marriage, it is held that "this section does not leave the matter entirely to the discretion of the witness, but that the other party interested may object to any such communication, and that upon such objection being made the witness not only cannot be compelled, but that he or she has no right to make the disclosure." People *v.* Wood, 126 N. Y. 249, 27 N. E. 362.

the communication, and that he or she may be permitted to give it in evidence, but cannot be compelled to do so.[52]

It is also held that neither spouse shall, without the consent of the other, testify to confidential communications.[53] Also, that matter confidentially communicated between spouses cannot be disclosed without the consent of the one against whom the disclosure is sought.[54]

D. NOT DEPENDENT UPON. — a. *Method of Communicating.* It is immaterial that evidence of confidential communication attempted to be elicited was stated in a negative form.[55]

b. *Spouse's Relation to Case in Which Testimony is Offered.* It has been held that the privilege may be claimed irrespective of the fact that the spouse making the communication in question, was not a party to the action in which the testimony was offered.[56]

52. To Whom Belongs. — Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401; 60 Am. Rep. 276. But see People *v.* Wood, 126 N. Y. 249, 27 N. E. 362.

In Stickney *v.* Stickney, 131 U. S. 227, a contest arose between a married woman and her husband's heirs concerning her separate property. The wife offered to testify as to certain directions which she had given the husband concerning the disposition of her money in his possession. Her testimony was objected to as calling for privileged communication. *Held,* that the testimony was admissible. The controlling statute, Rev. Stat. U. S., §§ 876, 877, relating to evidence in the District of Columbia, provided: "Nor shall a husband be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication, made to her by her husband during the marriage." The court held that, under this statute, the wife was at liberty, though not compellable, to testify to the directions which she had given her husband. But in Hopkins *v.* Grimshaw, 165 U. S. 342, it was held that under act of July 2, 1864 (13 Stat. at large 374) a wife was incompetent to testify to conversations between herself and her husband when she was not a party nor interested in the suit in which her testimony was offered. In this case action was brought by heirs of a deceased person against other heirs, to enforce a resulting trust in certain real property. Decedent's widow, who was not a party to the action, testified to statements and acts of her husband which tended to show that he proposed purchasing the land in question. The controlling statute (13 Rev. Stat. 374), provided "nor shall any husband be compellable to disclose any communication made to him by his wife during the marriage nor shall any wife be compellable to disclose any communication made to her by her husband during the marriage." *Held,* that the widow's testimony was incompetent.

In Southwick *v.* Southwick, 2 Sweeny (N. Y.) 234, it is held that a statute which provides that neither spouse shall be "compellable" to testify to confidential communications, did not prevent voluntary disclosure of such communications.

53. Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223. Same opinion expressed, though not necessary to decision in People *v.* Wood, 126 N. Y. 249, 270, 27 N. E. 362. Maynard *v.* Vinton, 59 Mich. 139; 26 N. W. 401, 60 Am. Rep. 276.

54. People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

55. Moore *v.* Wingate, 53 Mo. 398, 410; State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656; Stanford *v.* Murphy, Admr., 63 Ga. 410; Perry *v.* Randall, 83 Ind. 143.

56. Moore *v.* Wingate, 53 Mo. 398, 409, decided under Missouri statute, which, after removing the common law disqualification of married

7. Essentials. — A. Relation. — It is essential to a claim of privilege, that at the time the communication in question was made, the actual, legal relation of husband and wife existed between the parties between whom it was made.[57]

Not Affected by Separate Domicil. — The rule is not affected by the fact that the spouses are living apart.[58]

B. Confidential. — It is also essential that the communication be made by reason of the confidence necessarily incidental to the marriage relation.[59]

Test. — Whether a communication is to be considered as confidential depends upon its character, as well as upon the relation of

women as witnesses, states: "Provided that nothing in this section shall be so construed as to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admissions or conversations of her husband, whether made to herself or third persons."

57. Wells *v.* Fletcher, 5 Car. & P. (Eng.) 12.

Cole *v.* Cole, 153 Ill. 585, 38 N. E. 703, was an action for assignment of dower and partition of real estate between two women, each claiming to be the widow of deceased, who had gone through a marriage ceremony with each. It was sought to be shown that deceased had admitted to the second wife that he had never been divorced from the first. This testimony was objected to as calling for privileged communication. The testimony was admitted. In affirming this judgment the supreme court uses this language: "It was, however, also shown by the testimony of the Illinois wife, Amelia Hahn, and by one of his brothers, that George Cole admitted that he was not divorced from his wife Emma. But it is contended neither of these witnesses was competent to prove the fact—the former because she testified to conversations or admissions between herself and Cole during the continuance of the marriage relation between them, and the brother because he was a party in interest. The position as to Amelia Hahn is, that she was only competent to testify to conversations and admissions upon clear proof that she never was his wife, and that to admit her testimony is assuming the very fact sought to be proved. Positive proof that the wife of a former valid marriage was living was made by other testimony. 'Prima facie, every person is competent to testify on all issues. If he is to be excluded by the policy of the law, the burden is on the party objecting to him to show the reason for such exclusion. . . . Where a man and woman lived, as they supposed, as husband and wife, but separated in consequence of the woman discovering a former husband believed to be dead was still alive, it was held that the woman was a competent witness against such a man with whom she thus lived as a second husband, even as to facts she learned from him during their cohabitation, for when a former existing marriage is conceded, no subsequent marriage, no matter how solemn, can operate to invest witnesses with incapacities which a valid marriage alone can establish." Wharton on Evidence, (2d ed.) sec. 421. Greenleaf on Evidence lays down the rule in the following language: 'On the other hand, upon a trial for polygamy, the marriage being proven and not controverted, the woman with whom the second marriage was had is a competent witness, for the second marriage was void.' 1 Greenleaf, sec. 339."

58. Parties Living Apart. Murphy *v.* Com., 23 Gratt. (Va.) 960.

59. *Alabama.* — Gordon, Rankin & Co. *v.* Tweedy, 71 Ala. 202, 210; Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

Indiana. — Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720; Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31.

Kentucky. — McGuire *v.* Moloney,

1 B. Mon. 224; Elswick *v.* Com., 13 Bush 155; English's Admr. *v.* Cropper, 8 Bush 292.

New York. — Babcock *v.* Booth, 2 Hill 181, 38 Am. Dec. 578.

Ohio. — Stober *v.* McCarter, 4 Ohio St. 513.

Pennsylvania. — Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578.

Texas. — Edwards *v.* Dismukes, 53 Tex. 611; Eddy *v.* Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565.

Vermont. — *In re* Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930.

In Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772, the court says: "It is not every conversation between husband and wife, nor every word or act said or done by either in the presence of the other, that is protected under the seal of secrecy, but only such communications, whether by word or deed, as pass from one to the other by virtue of the confidence resulting from their intimate relations with one another. Where the criminal, in seeking advice and consolation, lays open his heart to his wife, the law regards the sacredness of their relation, and will not permit her to make known what he has thus communicated, even as it will not ask him to disclose it himself. But if what is said or done by either has no relation to their mutual trust and confidence as husband and wife, then the reason for secrecy ceases. Accordingly, many conversations and actions by and between husband and wife have been held not to be privileged."

In French *v.* Ware, 65 Vt. 338, 26 Atl. 1096, the court says: "It may be difficult to frame a definition which will be applicable to all the varying circumstances of the married life. Doubtless some latitude must be given to the trial court, in determining whether the offered testimony, under the existing circumstances of the case, involves the disclosure of matters of confidence. In New Hampshire, by statute, the husband and wife are made competent witnesses for or against each other on all matters except such as would be a violation of marital confidence. In Clements *v.* Marston, 52 N. H. 38, Judge Sargent says: 'And this violation must be something confided by one to the other, simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances.' In Parkhurst *v.* Berdell, 110 N. Y. 386, (6 Am. St. R. 384), it is said: 'The section of the code referred to forbids not all communications between husband and wife, but only confidential communications. What are confidential communications? . . . They are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relation. Ordinary conversations relating to matters of business, which there is no reason to suppose he would have been unwilling to hold in the presence of any person, are not confidential.' In these decisions we have carefully guarded statements, both positive and negative, of what are, and what are not, confidential communications. Their nature is so dependent upon the existing circumstances of each case that it would be difficult to enlarge or limit these statements."

In Sackman *v.* Thomas, 24 Wash. 600, 64 Pac. 819, a woman was permitted to testify that certain property in controversy between her husband and a third person, was purchased in part with money given by her to him. To same effect, see In *re* Van Alstine's Estate, 26 Utah 193, 72 Pac. 942.

What Communications Confidential. — In Millspaugh *v.* Potter, 62 App. Div. 521, 71 N. Y. Supp. 134, the court says: "In Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, Judge Earl assumes to define what class of communications is by this section protected. He says: 'What are confidential communications, within the meaning of this section? Clearly, not all communications made between husband and wife when alone. . . . They are such communications as are expressly made confidential, or such as are of a confidential nature or induced by the marital relation.' This definition is not wholly satisfactory, because it does not define what are communications of a confidential nature. It is probably impossible to give an ex-

the parties.[60] If a topic is such as would not have been discussed by husband and wife but for the relation between them, communication on the subject is privileged.[61]

a. *Privileged Though Not Confidential.* — But it has been held that all communications between husband and wife are privileged, and the rule is not limited to communications concerning subjects which are confidential in their nature.[62]

act and comprehensive definition of the term 'confidential communications.' Defining by exclusion, however, we think it may be safely said that unfounded charges of immorality, abusive language, profanity towards a wife, are not such communications as the legislature intended to protect; and, when the plaintiff would charge another with alienating the affections of his wife, he cannot shield himself behind this statute from proof by the wife of such acts as were in this action properly pleaded and sought to be proven."

In Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384, action was brought to compel defendant to account for certain securities of plaintiff's appropriated by him. During the progress of the trial, defendant's wife, upon examination by plaintiff's counsel, gave evidence of conversations with her husband, when alone, concerning plaintiff's securities taken by him, his obligation to plaintiff therefor, and his promise to give plaintiff security. She was cross-examined as to the same conversations. After deciding that defendant waived his privilege by failing to object when questions were asked, the court says: "But it the objection to the evidence had been timely, it would not have been available. The section of the Code referred to forbids not all communications between husband and wife, but only confidential communications. What are confidential communications within the meaning of the section? Clearly not all communications made between husband and wife when alone. If such had been the meaning it would have been so provided in general and simple terms. They are such communications as are expressly made confidential, or such as are of a confidential nature or induced by the marital relation."

In Ward *v.* Oliver, 129 Mich. 300, 88 N. W. 631, the Michigan statute in question provided that "a husband shall not be examined as a witness for or against his wife without her consent." The statute provided further: "Nor shall either (husband or wife), during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage." *Held,* that under this statute such communications only as were confidential were privileged.

60. Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578.

Privilege extends to such acts only as are confidential in their nature. Eddy *v.* Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565; Edwards *v.* Dismukes, 53 Tex. 611; Rudd *v.* Rounds, 64 Vt. 432, 25 Atl. 438; Davis *v.* Weaver, 46 Ga. 626; Sackman *v.* Thomas, 24 Wash. 600, 64 Pac. 819; Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384.

61. Warner *v.* Press Pub. Co., 132 N. Y. 181, 30 N. E. 393.

62. Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253; People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Sutcliffe *v.* Iowa Traveling Men's Assn., 119 Iowa 220, 93 N. W. 90, 97 Am. St. Rep. 298; Estate of Low, Myrick (Cal.) 143; Com. *v.* Hayes, 145 Mass. 289, 14 N. E. 151.

In Leppla *v.* Minnesota Tribune Co., 35 Minn. 310, 29 N. W. 127, the statute applied provided that neither husband nor wife could "during the marriage or afterward, be, without

the consent of the other, examined as to *any communication* made by one to the other during the marriage." (Gen. Stat. Minn., c. 73, § 10). The court says: "The respondent contends that the statute only applies to communications of a confidential nature, and that those testified to were not of that kind. The language of the statute will not admit of such limitations. The word 'communication' is used without qualification, and any such limitation as that suggested would be extremely difficult of application. It would introduce a separated issue in each case as to whether or not the communication was of a confidential character. To enable the court to judge as to its character, the communication would have to be disclosed, and so the very mischief committed which was designed to be prevented. There was formerly some question as to whether, at common law, the rule included communications between husband and wife which in their nature did not seem to be confidential, though made in private conversation; but it was finally quite generally held that it included all conversations between husband and wife, though on subjects not confidential in their nature. O'Connor *v.* Majoribanks, 4 Man. & G. (Eng.) 435; Dexter *v.* Booth, 2 Allen (Mass.) 559.

By using the word 'communication' without qualification or limitation, in our statute, we think it was the intention to adopt this rule." Same ruling was made in Campbell *v.* Chace, 12 R. I. 333, under a statute, which, after making husband and wife competent as witnesses, provided "neither shall be permitted to give any testimony tending to criminate the other, or to disclose any communication made to him or her, by the other, during their marriage." But see Michigan statute of similar purport construed in case of Ward *v.* Oliver, quoted in note 59, under II, 7, B.

In Scroggin *v.* Holland, 16 Mo. 419, the court cites O'Connor *v.* Majoribanks, 4 Man. & G. (Eng.) 435, 442, and states that in that case the court rejected the distinction between communications which are of a confidential nature, and those which are not. The Missouri court says: "And it was held, that in an action of trover by the personal representatives of a deceased husband, his widow was not a competent witness for the defendant, to prove that with her husband's authority she pledged the goods with him. We concur in the views above expressed, and see the difficulty of distinguishing between communications which are confidential, and those which are not so. It is obvious too, that if husband and wife were conscious that information derived from other sources than those of trust and confidence, could be evidence against each other, means would be resorted to, with a view to prevent, in many instances, information from being so acquired, which would be a source of endless broils and difficulties. The husband would not be willing that the wife should be in a situation to acquire this information. He might use means to prevent her obtaining it, and thus impose restraints which would fill her with mistrust and anxiety. This opinion is sustained by a great weight of authority in the American courts. Stein *v.* Bowman, 13 Pet. 219; Robbins *v.* King, 2 Leigh, 142; Brewer *v.* Ferguson, 11 Humphreys, 565." Scroggin *v.* Holland was not decided upon the ground of privileged communications, the court holding that a widow is a competent witness for the personal representative of her deceased husband.

"It is safest we think to hold that whatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and that neither should be allowed to divulge it to the danger or disgrace of the other." State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

In Reeves *v.* Herr, 59 Ill. 81, the court says: "What was sought to be proved by the witness here, was a conversation between the defendant and the husband, before and in the presence of the witness, his wife, which is claimed to have amounted to an admission, by the defendant, of the account sued upon, and a prom-

Rule Applies, Though Spouse Called by Representative of the Other. It has been held that this rule applies, even when one spouse is called as a witness by the personal representative of the other.[63]

b. *Matters Essential to Confidence.* — Before a communication can be considered as confidential it must appear that it was (1) Private and intended to be kept so. (2) Induced by the marriage relation.

(1.) Private. — No communication between husband and wife is privileged unless it was private.[64]

(A.) CONTRA. — PRIVILEGED THOUGH NOT PRIVATE. — But it is held under Rhode Island statute referred to in note 62 *ante* that communications between husband and wife are privileged, although made in presence of third persons,[65] and a similar ruling has been made in Illinois.[66] The supreme court of Kansas has indicated a similar opinion, although not so deciding.[67]

(B.) PRIVATE, ALTHOUGH IN PRESENCE OF CHILD OF PARTIES. — It has been held that a conversation between husband and wife is private, although held in presence of their child, who is too young to comprehend it;[68] also if held in presence of child who takes no part in it.[69]

Remark Addressed to Child. — Also that a remark addressed to their child by one spouse in presence of the other is privileged.[70]

ise on his part, within the period fixed by the statute of limitations, to pay it. We do not find from the authorities, that this rule of exclusion is confined to subjects which are confidential in their nature, and we think it should apply whenever the wife is called upon to disclose any matter, which came to her knowledge in consequence of the marriage relation."

63. Called by Representative. Reeves *v.* Herr, 59 Ill. 81.

64. Mainerd *v.* Reider, 2 Ind. App. 115, 28 N. E. 196; Queener *v.* Morrow, 1 Cold. (Tenn.) 123; Allison *v.* Barrow, 3 Cold. (Tenn.) 414; Cole *v.* State (Tex. Crim.), 88 S. W. 341.

"Confidential communications between husband and wife are such as pass between them when they are alone." Long *v.* Martin, 152 Mo. 668, 54 S. W. 473.

65. Campbell *v.* Chace, 12 R. I. 333.

66. Reeves *v.* Herr, 59 Ill. 81. In this case the court says: "The conversation in question, though not between the witness and her husband, but between him and the defendant, yet, as it occurred between them in the presence and hearing of the wife, we must regard that she came to the knowledge of it by means of her situation as wife, that she could not properly be admitted to testify concerning it against the representative of her husband, nor should she be admitted to testify in his favor."

67. Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942.

68. Presence of Young Child. Schierstein *v.* Schierstein, 68 Mo. App. 205.

69. Presence of Child Who Takes No Part. — Hopkins *v.* Grinshaw, 165 U. S. 342; Jacobs *v.* Hesler, 113 Mass. 157.

But in Lyon *v.* Prouty, 154 Mass. 488, 28 N. E. 908, it was held that a husband might testify to conversations between himself and wife in presence of their daughter, aged fourteen. The court said that the subject of the conversation was a matter the daughter would naturally be interested in and would attract her attention.

70. In Schierstein *v.* Schierstein, 68 Mo. App. 205, a husband, in the

(C.) Third Persons.— Communications in presence of third person are not privileged.[71]

(2.) Intended To Be Kept Private.— A communication made by one spouse to the other, which was intended to be made known, is not privileged.[72]

Dying Declaration.— A widow may give her husband's dying declaration in evidence.[73] This ruling has been based upon the the-

presence of his wife, addressed a remark to their nine months' old child, indicating that he feared his wife would poison him. *Held*, that this remark was privileged.

71. See II, 8, B, i (1.), *Post.*

72. Crook *v.* Henry, 25 Wis. 569; Caldwell *v.* Stuart's Exrs., 2 Bailey (S. C.) 574.

In McGuire *v.* Maloney, 1 B. Mon. (Ky.) 224, it was held that a wife was competent to testify concerning the execution of her husband's will, and that, after execution, he handed it to her. The court cites Allison's Devisees *v.* Allison's Heirs, 7 Dana (Ky.) 90, and Singleton's Devisees *v.* Singleton's Heirs, 8 Dana (Ky.) 315, as authorities, but it does not appear that the question of competency was raised in either of those cases.

A letter found among the papers of a deceased person, in the handwriting of his wife, addressed "To whom it may concern," and referring to the cause of their separation, and speaking of him in the third person, is not privileged. Hoyt *v.* Davis, 21 Mo. App. 235. The court says that the paper was not privileged, as it was evidently intended to be communicated to all "concerned" in knowing the cause of their separation.

In Hester *v.* Hester, 15 N. C. (4 Dev. L.), 228, the court says: "The rule upon the subject of confidential communications is not denied; the sanctity of such communications will be protected. Persons connected by the marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the question remains, what communications are to be deemed confidential? Not those, we think, which are made to the wife, to be by her communicated to others; nor those which the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband, that the operation should be according to the truth of the fact, as established by his declaration. Suppose a husband to disclose to his wife that he had given to one of their children a horse, can she not after his death prove that as against the executor? Suppose also that the declaration to which the wife was called had been made to her and another, there is no reason why she, if she will, may not testify to it, as well as the other. Why? Because it is then apparent that it was not confidential between the husband and wife, in the sense of the rule. The same reason equally applies, when from the subject of the conversation, it is obvious he did not wish it concealed, but on the contrary must have desired to make it known, and through her, if he found no other means of doing so."

In Hagerman *v.* Wigent, 108 Mich. 192, 65 N. W. 756, a wife entrusted certain property to her husband to be delivered after her death. *Held*, that he could testify as to the delivery of a mortgage included among such property, and as to instructions accompanying delivery, the court stating that the circumstances indicated an expectation that the communication be disclosed.

In Weston *v.* Weston, 86 App. Div. 159, 83 N. Y. Supp. 528, held that letter written by wife to third person and given by her to her husband to be posted, is not a confidential communication.

73. State *v.* Ryan, 30 La. Ann. 1176; Arnett *v.* Com., 114 Ky. 593, 71 S. W. 635; Bright *v.* Com., 27 Ky. L. Rep. 677, 86 S. W. 527; Hilbert *v.* Com., 21 Ky. L. Rep. 537, 51 S. W. 817.

ory that the husband intended his declaration to be made known in the interests of justice.[74]

(3.) Induced by Relation. — Communications which are not induced by the relation are non-privileged.[75]

C. KNOWLEDGE ACQUIRED DURING RELATION. — But the privilege is limited to knowledge obtained while the relation existed, and either spouse may testify concerning matters, knowledge of which was acquired prior or subsequent to marriage.[76]

8. Extent of Privilege. — A. WHAT MATTERS PRIVILEGED. — a. *All Knowledge.* — The privilege extends to all knowledge acquired by one spouse from the other during the existence of the marriage relation, and by reason of the confidence arising therefrom, irrespective of the means by which it was acquired.[77]

74. Theory. — Arnett *v.* Com., 114 Ky. 593, 71 S. W. 635.

75. Warner *v.* Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Beitman *v.* Hopkins, 109 Indiana 177, 9 N. E. 720; Schmied *v.* Frank, 86 Ind. 250; Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31; People *v.* Marble, 38 Mich. 117; French *v.* Ware, 65 Vt. 338, 26 Atl. 1096; Renshaw *v.* First Nat. Bank (Tenn. Ch. App.), 63 S. W. 194.

A wife may be compelled to testify that her husband compelled her to forge a promissory note (Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772); also that he had stated to her he had recognized a certain person as one who had committed a robbery (Reynolds *v.* State, 147 Ind. 3, 9, 46 N. E. 31).

In a divorce suit a woman may testify that her husband boasted to her that he had had intimate relations with other women. Seitz *v.* Seitz, 170 Pa. St. 71, 32 Atl. 578.

But in California it is held that in an action for alienation of husband's affections, wife cannot testify concerning husband's statements as to his relations with defendant. Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223.

Acts of Cruelty. — In E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463, it is held that in a divorce suit wife may testify concerning her husband's acts of cruelty. The court says such matters are "matters which occur not by virtue of, or in consequence of, the marital relation, but in spite of and in violation of the marital relation." In the same case a sealed letter sent by husband to wife and containing expressions of cruelty was held admissible.

Fraud Against Wife. — Wife may testify to acts showing fraud practiced against her by her husband. Edwards *v.* Dismukes, 53 Tex. 605.

76. Wife may testify concerning knowledge acquired prior to marriage. Stillwell *v.* Patton, 108 Mo. 352, 18 S. W. 1075.

Subsequent to Termination. — Wife may testify as to knowledge acquired subsequent to divorce. Crose *v.* Rutledge, 81 Ill. 266.

After death of husband wife may testify concerning information acquired after his death. Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. 305.

After divorce a spouse may testify for or against the other concerning facts which did not come to knowledge of witness during the existence of the relation. Inman *v.* State, 65 Ark. 508, 47 S. W. 558.

Confession After Divorce. — Wife may prove confession of husband made after divorce. White *v.* State, 40 Tex. Crim. 366, 50 S. W. 705.

Letter written by one spouse to another after divorce is not privileged. *In re* Van Alstine's Estate, 26 Utah 193, 72 Pac. 942.

77. All Knowledge Privileged. See cases cited under II, 1, n, 41, *ante*, also; Reeves *v.* Herr, 59 Ill. 81; Orr *v.* Miller, 98 Ind. 436, 445; Davis *v.* State, 45 Tex. Crim. 292, 77 S. W. 451.

All knowledge, verbally communicated, or acquired by exercise of

sense of sight, is privilege. State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

In Stanford *v.* Murphy, Admr., 63 Ga. 410, 416, the court says: "Any confidential communication from husband to wife may not be divulged in any court, for the reason that the fact communicated was disclosed in the privacy of the marital relation and the peace of the household might be disturbed if it were divulged. Upon precisely the same principle, any knowledge acquired by the wife on account of the trust confided to her by her husband of any fact whatever should be excluded; whether the husband told it to her out of his mouth or showed it to her in a letter, or pointed it out with his hand, or locked it up and gave to her alone access to it by entrusting her with the key. If competent to swear for him, she is competent to swear against him; and suppose that in this case she had been introduced by the complainants to show that she kept her husband's papers in that drawer, and that this note never was seen among them until the death of the testator, and she had so sworn, what a disturbance would have been produced between man and wife; and what would have been left of peace in that home! The rule must work both ways; she must not be allowed to testify about facts ascertained by reason of such confidential intercourse at all." Williams *v.* State, 40 Tex. Crim. 565, 51 S. W. 224; Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

In Perry *v.* Randall, 83 Ind. 143, the court says: "It was not necessary that the appellant's communication to his wife, the witness, in relation to the money, should be expressed in words." But see Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772, and Polson *v.* State, 137 Ind. 519, 35 N. E. 907.

Assignment of claim to wife by husband is not a "communication." Hanks *v.* VanGarder, 59 Iowa 179, 13 N. W. 103.

In Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, the court quotes Kentucky statute as follows: "Neither husband nor wife shall be competent for or against each other, *or concerning any communication made by one to the other during marriage, whether called while that relation* subsisted, or afterwards." As to this provision the court says: "The word 'communication,' therefore, as used in our statute, should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife or *vice versa*, but should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party." To same effect, see Perry *v.* Randall, 83 Ind. 143; Smith *v.* Smith, 77 Ind. 80.

Confession. — Private confession of guilt made by wife to husband is privileged in case for *crim. con.* Sanborn *v.* Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864.

Contra. — But voluntary confession of crime is not privileged. See note 78, under II, 12, G.

In Briggs *v.* Briggs (R. I.), 26 Atl. 198, one statute permitted husband or wife to testify for or against each other; and another forbade either to testify concerning confidential communications. *Held*, that the first statute was subject to the second, and that husband was incompetent to testify as to confession of crime made by his wife.

When husband and wife are jointly indicted for murder, but tried separately, the wife cannot be compelled to testify that her husband told her, before the murder, that he was going to get a pistol. Williams *v.* State, 40 Tex. Crim. 565, 51 S. W. 224.

"The matter that the law prohibits either the husband or wife from testifying to as witnesses includes any information obtained by either during the marriage, and by reason of its existence." Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Wife cannot testify concerning husband's statement to the effect that a certain deed had not been delivered. Toole *v.* Toole, 107 Ga. 472, 33 S. E. 686.

A wife cannot testify as to her husband's statements to her concerning the nature and effect of an instrument.[78] Nor can a husband give in evidence statements made by him to his wife showing whether or not he intended to abandon her.[79]

(1.) Fact or Matter of Communication. — Neither spouse can be heard to reveal the *fact* or the *matter* of a communication made by the other.[80]

(2.) Silence. — Whatever transpires between husband and wife is privileged, whether acquired positively through verbal statement, or by exercise of the sense of sight, or negatively, by way of silence.[81]

(3.) Threats. — (A.) AGAINST SPOUSE. — Thus it has been held that one spouse cannot testify to vituperative epithets addressed to him or her by the other;[82] and that such testimony cannot be admitted even

In an action by a wife against another woman to recover damages for alienation of husband's affection, plaintiff cannot testify concerning husband's statements to her as to his relations with defendant, or as to his desire to obtain a divorce from plaintiff, and his reason therefor. Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223.

A widow will not be permitted to testify concerning her husband's statements to her as to his pedigree. Brooks *v.* Francis, 3 McArthur (D. C.) 109.

78. Toole *v.* Toole, 107 Ga. 472, 33 S. E. 686.

79. Dye *v.* Davis, 65 Ind. 474.

80. Goodrum *v.* State, 60 Ga. 509; Van Zandt *v.* Schuyler, 2 Kan. App. 118.

81. State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

In Spaulding *v.* Albin, 63 Vt. 148, 21 Atl. 530, it is held that a wife may testify that a certain paper was not mentioned at a certain conversation between herself and husband.

Silence Privileged. — In Goodrum *v.* State, 60 Ga. 509, defendant was convicted of assault upon a married woman. His counsel attempted to discredit the testimony of prosecutrix by proving by her husband that she did not complain to him for some time after the outrage. It was held that the proposed testimony was incompetent. Judgment *affirmed*. The supreme court says: "She was the state's witness, and testified to the outrage and the facts attending it. Her husband was not a competent witness to prove, in behalf of the prisoner, that she delayed complaining. What transpired between her and her husband (whether positively by way of communication, or negatively by way of silence), in the privacy and confidence of the marriage relation, is sacred. Neither can be heard to reveal the *fact* or the *matter* of a communication made by the other. For the same reason, the *fact* of the other's silence ought to be, and, we think, is protected. A wife ought to feel, when alone with her husband, as free to be silent as to speak; and as secure that her silence will not be disclosed, to her detriment or disadvantage, as that what she says will not be repeated. The twain are one flesh; and when they are secluded from all the world besides, their speech and their silence should be alike under the seal of confidence, and as free and unrestrained as the most inviolable confidence can inspire. The fact that the wife did not complain to her husband in their private, confidential intercourse was known to him, if at all, by virtue of that very intercourse; and all knowledge so acquired by husband or wife is inadmissible evidence in a court of justice, notwithstanding the enlarged rule as to the competency of witnesses established by the act of 1866."

82. Anderson *v.* Anderson, 9 Kan. 78; Vogel *v.* Vogel, 13 Mo. App. 588; Ayers *v.* Ayers, 28 Mo. App. 97; Miller *v.* Miller, 14 Mo. App. 418; King *v.* King, 42 Mo. App.

when the epithets were accompanied by acts of physical violence.[83]

Contra. — As to Threats. — But the contrary has been held.[84]

(B.) Against Third Person. — A wife is not competent to prove threats made by her husband against third person.[85]

b. *Letters Privileged.* — Letters written by one spouse to the other are privileged.[86]

454; Millspaugh *v.* Potter, 71 N. Y. Supp. 134.

83. Anderson *v.* Anderson, 9 Kan. 78.

84. In French *v.* French, 14 Gray (Mass.) 186, it was held that under Massachusetts statute of 1857, c. 305, one spouse might testify as to abusive language used by the other, although no one else was present.

85. Davis *v.* State, 45 Tex. Crim. 292, 77 S. W. 451.

86. *Arkansas.* — Ward *v.* State, 70 Ark. 204, 66 S. W. 926.

Florida. — Henderson *v.* Chaires, 25 Fla. 26, 34, 6 So. 164.

Indiana. — Orr *v.* Miller, 98 Ind. 436, 445.

Kentucky. — Manhattan L. Ins. Co. *v.* Beard, 112 Ky. 455, 66 S. W. 35.

Michigan. — Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005.

Missouri. — State *v.* Ulrich, 110 Mo. 350, 364, 19 S. W. 656; Hall *v.* Hall, 77 Mo. App. 600; State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374.

Texas. — Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

Wisconsin. — Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144; Lanctot *v.* State, 98 Wis. 136, 73 N. W. 575, 67 Am. St. Rep. 800.

In Wilkerson *v.* State, 91 Ga. 729, 738, 17 S. E. 990, 44 Am. St. Rep. 63, the court says: "On the trial, the accused offered in evidence, and also offered to read as a part of his statement, a letter which had been written by Stephens to his wife, and which she had voluntarily delivered to Wilkerson some time before the homicide. This letter contained intimations that the writer knew of the relations existing between his wife and Wilkerson, and also a threat against the latter. The court rightly rejected the letter, and refused to allow it to be read to the jury. Section 3797 of the code declares that communications between husband and wife are, from public policy, excluded as evidence. Mrs. Stephens would not, for this reason, have been permitted, as a witness upon the stand, to testify to communications from her husband to herself, or to read to the jury a letter which he had written to her. We are therefore decidedly of the opinion that the same result cannot be indirectly accomplished by her voluntarily delivering a letter of this kind to another person. We are aware that there are respectable authorities holding that a privileged oral communication may be given in evidence by one who overheard it, though an eavesdropper; or that a privileged written communication, purloined from the proper custodian of it, may be received in evidence. In such instances, however, the parties to the privileged communication do not themselves successfully make and keep it private; but where this result is accomplished, the law will not permit either of the parties, directly or indirectly, to violate the confidence of the other. In respect to documents, there is a difference between those which are confidential in their own nature, such as letters between husband and wife, and those which become confidential by custody, such as papers deposited by a client with his attorney. The law, for reasons of its own, desires that all communications between husband and wife shall be absolutely free and untrammeled, and that each may say or write whatsoever he or she pleases to the other, with the absolute assurance that the one receiving the communication will neither be compelled nor permitted to disclose it. We therefore think it the better and wiser course to adhere strictly to the declared policy of our law, and to hold that this letter was properly rejected, how-

Contra. — Under Massachusetts Statute. — But in Massachusetts, letters are held not privileged, the supreme court of that state holding that the controlling statute limits the privilege to oral communication.[87]

(1.) Every Part Privileged. — Address. — Postmark. — Every part of a letter passing from one spouse to the other is privileged.[88]

ever important it may be in the determination of this case."

Sent Indirectly, Immaterial. — In Brown *v.* Brown, 53 Mo. App. 453, it was claimed that certain letters were not privileged, because not sent directly, but were, by a wife, sent to the daughter of the parties to be delivered to the husband. The court says: "It does not appear that the letters were unsealed when enclosed to the daughter and, if it did so appear, we would not assume that they were intended for her to read. Whatever doubt there may be in such case should be resolved in favor of the inviolability of the communication."

In Fowler *v.* Fowler, 11 N. Y. Supp. 419, which was a divorce suit, a letter from wife,—plaintiff—to her husband was held competent. On this subject the court says: "She herself handed to him, and he read it. It was a long letter, in which she reviewed the history of their unhappy married life. It reminded him of her struggles and sacrifices in the vain effort to gain his confidence and affection, and depicted the cruelty and injustice which she had suffered at his hands, and it disclosed a condition of mind bordering on despair. It was competent evidence, because it was a declaration, made to the defendant himself, of facts which he had the opportunity to deny or excuse. The response which the defendant made to this communication is in evidence, and it was for the trial court to attach to both their proper significance as bearing upon the issues in the action."

87. Com. *v.* Caponi, 155 Mass. 534, 30 N. E. 82. The statute in question, Pub. Stat. c. 169, § 18. Subd. 1, provides: "Neither husband nor wife shall be allowed to testify as to private conversation with each other." The court cites 1 Greenl. § 254, as authority.

88. **Every Part of Letter Privileged.** — Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144. In this case defendant was indicted for perjury, which consisted in falsely swearing, in an affidavit for publication of summons in his divorce suit, that he did not know his wife's address. The state introduced as a witness an attorney who had been employed by the wife to take steps to set aside the judgment of divorce. Witness had in his possession letters written to his client by her husband. He was asked to produce these letters. Their production was objected to, and objection overruled. The letters were produced and the state offered in evidence the date and the place from which the letters appeared to have been written, the address to the wife, the signature of defendant, together with the envelope with the address and postmark thereon, but did not otherwise offer the contents of the letters. All of which was objected to, and objection overruled. The parts of the letters were offered to show that defendant did know the address of his wife. The court held that all objections should have been sustained. 1. Because the letters were privileged as communications between attorney and client. 2. Because the letters were confidential communications between husband and wife. The court says: "But it is said that the particulars of the letters and envelopes admitted in evidence were not the letters themselves containing such confidential communications. These particulars were material parts of the letters, and pertinent to the issue. Without them, there would be no letters or envelopes, as such. He has told her by these particulars that he knows where she lives, and where she can be found, at the time he swore that he did not so know. These parts of

(2.) Letter to Spouse and Third Person. — Letter addressed by one spouse to the other jointly with a third person is privileged as to the part addressed to the spouse.[89]

(3.) To Spouse and Children. — Letter written to spouse and childrn is not privileged.[90]

(4.) Letter Written in Presence of Spouse. — A letter written by one spouse in the presence of the other, though not addressed to that other, is privileged, unless intended to be delivered to a third person.[91]

the letters and envelopes contained these material and confidential communications, and are the most objectionable of any. Both branches of this evidence are made incompetent by our statute." The statute in question forbade husband or wife to disclose confidential communications from one to the other; and forbade an attorney to disclose communications made by his client.

89. Where husband handed to his wife a written communication partly addressed to her and partly to another, so much as was addressed to her is inadmissible against him as a privileged communication; but the remainder of the writing is admissible to show the purpose for which it was written, though it was taken from the wife against her will. Ward *v.* State, 70 Ark. 204, 66 S. W. 926.

90. In State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374, a letter written by a man to his wife and children was held non-privileged, on the ground that the writer removed the privilege by joining other persons in a message to his wife.

91. Smith *v.* Merrill, 75 Wis. 461, 44 N. W. 759, was an action for criminal conversation. Plaintiff's wife wrote a certain note and retained it upon her person. Plaintiff took it from her and made a copy which he offered in evidence. It did not appear that the note was sent to defendant, or that any one besides the husband and wife ever knew of its existence. The court says: "On the plaintiff's direct examination he testified to the effect that he had an altercation with the defendant one night in the spring of 1888, in consequence of the latter's intimacy with his wife; that after that affair took place some papers were drawn; 'that a note was written by his wife the same day the paper was drawn; that he took the original from her bosom, agreed to return it, *copied it*, and gave it back to her; that he saw his wife write it, and put it in her bosom. . . . It was simply written by the wife in the presence of her husband, and then retained upon her person. There is no evidence that any one ever saw it before the trial except the wife and her husband. There is no pretense that it was connected with any matter of agency for the husband, and hence was not admissible on that ground. . . . Sec. 4072, R. S., provides that 'a husband or wife shall not be allowed to disclose a confidential communication made by one to the other, during their marriage, without the consent of the other. In an action for criminal conversation, the plaintiff's wife is a competent witness *for the defendant* as to any matter in controversy, *except as aforesaid.*' The first part of this section is confirmatory of the common law, and the last part is in contravention of it.

The note in question may not have been intended by the wife as a communication to the husband, confidential or otherwise. . . . But, whatever may have been the intentions of the wife in writing the note, it was, according to the record, written in the presence of the husband, and became a communication from her to him, and unknown to any one else, and hence necessarily was, and remained, as essentially a confidential communication between husband and wife, until disclosed by one or the other, as though the same words had been uttered by her in the presence of the husband. This being so, the

But it has been held that if wife writes a letter in her husband's presence which she intends that he shall post to a third person, such letter is not privileged.[92]

(5.) Custody of Letters, How Material.— Letters exchanged between spouses cannot be introduced in evidence so long as they remain in custody of either.[93]

(A.) Custody Lost. — Letters Non-Privileged.— But it has been held that if such letters are permitted to pass into the possession of a third person, he may produce them in evidence in an action or proceeding against the writer,[94] or against the receiver,[95] even

statute cited expressly prohibited the admission of the note, and much more a copy of it, in evidence. The rule as to the admission of such communications in evidence is very fully considered by Mr. Justice Orton in the recent case of *Selden v. State,* 74 Wis. 271."

92. Letter Written in Spouse's Presence, Non-Privileged. — In Weston *v.* Weston, 86 App. Div. 159, 83 N. Y. Supp. 528, a wife, in her husband's presence and at his dictation, wrote a letter to a person with whom she had been charged with having illicit intercouse, and delivered it to her husband to be posted. *Held,* that this letter was not a confidential communication.

93. State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193; Scott *v.* Com., 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371; State *v.* Ulrich, 110 Mo. 350, 363, 19 S. W. 656; Brown *v.* Brown, 53 Mo. App. 453.

94. State *v.* Buffington, 20 Kan. 599, 27 Am. Dec. 193; Lloyd *v.* Pennie, 50 Fed. 4; Brown *v.* Brown, 53 Mo. App. 453; DeLeon *v.* Territory (Ariz.), 80 Pac. 348, 351.

In State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89, the court says: "The State having possession of several letters written by the defendant to his wife (how obtained or whether they were ever in the wife's possession did not appear), offered them in evidence as containing admissions inconsistent with the testimony of the accused given in court and with his claim as to unsoundness of mind. They were objected to by the accused on the ground that they were confidential communications between husband and wife, but the court admitted the evidence. In this ruling the court violated no rule of evidence. The question was not whether the husband or wife could have been compelled to produce this evidence, but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not. 1 Greenl. Ev., § 254*a*. The fact that the communications in this case were written, places them on no higher ground than if they were merely oral. And as to the latter, it is well settled that conversations between husband and wife are not privileged so as to prevent a third person who overheard them from testifying. 1 Bishop's Crim. Proc., § 1155. In State *v.* Centre, 35 Verm., 378, it was decided that a conversation between the prisoner, a married woman, and her husband, tending to show an admission of her guilt to him, and overheard by a witness in an adjoining room, was not such a confidential communication as the law excludes as evidence. And in Commonwealth *v.* Griffin, 110 Mass., 181, on trial of an indictment for manslaughter, it was held that a private conversation between husband and wife, who thought no one overheard them, may be testified to by a concealed listener. See also Hendrickson *v.* The People, 1 Parker's C. C., 406; Rex *v.* Simons, 6 Car. & P., 832."

Competent to Impeach. — It has been held that a letter written by a wife to her husband containing a confession of guilt may be introduced to impeach her testimony. State *v.* Nelson, 39 Wash. 221, 81 Pac. 721.

95. Competent Against Person Receiving. — People *v.* Hayes, 140

if illegally taken from the custody of the person against whom they are offered.[96]

Letter Addressed to Spouse, But Not Delivered.— A letter addressed by one spouse to the other and placed in course of transmission, but which, before delivery, comes into possession of third person, may be introduced in evidence against the writer.[97]

N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830, *affirming s. c.* 24 N. Y. Supp. 194; Wilkerson *v.* State, 91 Ga. 729, 738, 17 S. E. 990, 44 Am. St. Rep. 63.

In Mahner *v.* Linck, 70 Mo. App. 380, 388, it is held that a letter from husband to wife could not be introduced unless it be shown that person offering it did not obtain possession of it through the agency or connivance of the wife. On the subject of such letters as evidence, the court says: "It has been held in some of the cases that the fact that the communication was written places it on no higher ground than if oral. Lloyd *v.* Pennie, 50 Fed. Rep. 4; State *v.* Bliss, 36 Cal. 508; State *v.* Buffington, 20 Kan. 599. It seems to us that these cases lose sight of the policy of the law making communications between husband and wife privileged, to wit, to secure the peace of the twain and to protect and keep inviolate that mutual confidence so essential to their happiness, and we are disposed to adopt the reasoning and ruling of Judge Miller of the United States supreme court in the case of Bowman *v.* Patrick, 32 Fed. Rep. 368, where he refused to admit letters of the husband to the wife to be read in evidence, which had come into the possession of the administrator of the wife's estate. We think the policy of the law will be best subserved, by refusing to admit written communications of this character, whenever they have come to the possession of a third party by the agency of the husband or the wife, or where such third party has gained possession of them by reason of his representative character, his agency or other fiduciary relation to the husband or wife. The letter in this case should not be admitted, unless it is first shown, that the plaintiff did not get possession of it through the agency or connivance of the wife."

Letter written by a prisoner to his wife which, under prison rules, is read by sheriff, is non-privileged as to sheriff, who may testify concerning its contents. DeLeon *v.* Territory (Ariz.), 80 Pac. 348.

96. Illegally Taken. — Letters Competent. — State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193.

In State *v.* Mathers, 64 Vt. 101, 23 Atl. 590, 33 Am. St. Rep. 921, 15 L. R. A. 268, defendant was indicted for rape. He wrote a criminating letter to his wife which he gave to one of his daughters for delivery. Before delivery it was taken from that daughter's pocket by another daughter and on the trial produced in evidence by the prosecution. Its admission was objected to by defendant on the ground that it was a confidential communication. It was held that, as the letter did not come from the possession of the wife, it was not privileged, and that the court could not take notice of the manner in which it was obtained.

97. Letter Not Delivered. — Hammons *v.* State, 73 Ark. 495, 84 S. W. 718, 68 L. R. A. 234. In this case a man was indicted for rape of his stepdaughter. While in jail he wrote to his wife a letter admitting his guilt, and urging her and the child (to whom the letter was also addressed), to save him by changing their testimony. The letter was given to a messenger, who gave it to the wife's father, who said she should never see it, but gave it to an uncle of the child's, who introduced it in evidence against the writer. *Held,* the letter was admissible. In making its decision the court seems to proceed upon the theory announced in State *v.* Ulrich, 110 Mo. 350, 19 S. W. 656, that such letters are admissible when not accompanied by proof that they had been procured by con-

(B.) CONTRA.—PRIVILEGE NOT DEPENDENT UPON CUSTODY.— But it has been held that such letters are not competent, although in the possession of third parties.[98]

Letter Voluntarily Surrendered by Wife, Not Competent. — Letter from husband to wife is not made competent by the fact that the wife voluntarily surrenders it to a third person.[99]

nivance of the person to whom they were addressed.

98. Letters in Custody of Third Person Privileged. — Letter written by husband to his wife and by her delivered to a third person cannot be introduced in evidence against the husband. Scott *v.* Com., 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371; Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St. Rep. 63.

In Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135, it is held that letter of husband or wife in possession of third party cannot be introduced against the writer, unless its possession is accounted for. The court says: "The letter from the husband to the wife here excluded, however, was not sought to be introduced directly through the wife as a witness to whom it had been written, but, in some manner, not disclosed by the record, had found its way to the possession of the attorneys for the defendants, and its offer in evidence was from their immediate custody. There is a considerable array of authorities to the effect that when confidential communication between husband and wife, or between attorney and client get out of the possession and control of the parties to the confidence and that of their agents and attorneys, and find their way into the possession and control of third persons, regardless of the manner in which the possession thereof may be obtained by such third persons, that then such communications lose the protected privilege of the law and become competent and admissible evidence. To this effect, see 1 Greenleaf on Evidence, § 254*a* and the cases there cited; also the cases cited in the notes to Com. *v.* Sapp, 29 Am. St. Rep. 415 *et seq.* We cannot agree to the correctness of this rule thus broadly laid down by these and other authorities, but think the policy of the law, that forms the foundation of the general rule, is far more strongly upheld and subserved by those authorities that recognize and declare certain classes of communications to be privileged from the *inherent character of the communication itself,* and that in such cases the privilege attaches to the *communication itself* and protects it from exposure in evidence wheresoever or in whosesoever hands it may be. Judge Shiras, now of the Supreme court of the United States, in the case of Liggett *v.* Glenn, 2 C. C. A. 286, 51 Fed. 381, with great force and clearness explains what we conceive to be the correct rule. . . The same reasoning applies with equal, if not greater, force to the communications between husband and wife, upon the inviolacy of which depends that perfect confidence between the twain so necessary to maintain the sacred institution of marriage up to that standard demanded by every well ordered and civilized society. And the same reasoning and rule was applied in the exclusion of a letter from husband to wife in the case of Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990; Bowman *v.* Patrick, 32 Fed. 368; Scott *v.* Com., 94 Ky. 511, 23 S. W. 219; Reg. *v.* Pamenter, 12 Cox's Crim. Cas. 177; Dreier *v.* Continental Life Ins. Co., 24 Fed. 670; Mahner *v.* Linck, 70 Mo. App. 380; Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705. We think the letter offered in evidence here from the witness Brock to his wife was inherently a confidential communication, and that it was privileged from exposure in evidence, in and of itself, regardless of the custody from which it was produced at the trial, and that its admission in evidence was properly refused."

99. Letter Voluntarily Surrendered. — Wilkerson *v.* State, 91 Ga. 729, 17 S. E. 990, 44 Am. St.

(C.) In Custody of Agent or Attorney of Spouse, Privileged. — But if such letters are in possession of the personal representative of the receiver, they are privileged.[1]

Contra. — But the contrary has been held.[2]

Rep. 63. In this case the court says: "On the trial, the accused offered in evidence, and also offered to read as a part of his statement, a letter which had been written by Stephens to his wife, and which she had voluntarily delivered to Wilkerson some time before the homicide. This letter contained intimations that the writer knew of the relations existing between his wife and Wilkerson, and also a threat against the latter. The court rightly rejected the letter, and refused to allow it to be read to the jury. Section 3797 of the Code declares that communications between husband and wife are, from public policy, excluded as evidence. Mrs. Stephens would not, for this reason, have been permitted, as a witness upon the stand, to testify to communications from her husband to herself, or to read to the jury a letter which he had written to her. We are therefore decidedly of the opinion that the same result cannot be indirectly accomplished by her voluntarily delivering a letter of this kind to another person. We are aware that there are respectable authorities holding that a privileged oral communication may be given in evidence by one who overheard it, though an eavesdropper; or that a privileged written communication, purloined from the proper custodian of it, may be received in evidence. In such instances, however, the parties to the privileged communication do not themselves successfully make and keep it private; but, where this result is accomplished, the law will not permit either of the parties, directly or indirectly, to violate the confidence of the other. In respect to documents, there is a difference between those which are confidential in their own nature, such as letters between husband and wife, and those which become confidential by custody, such as papers deposited by a client with his attorney. The law, for reasons of its own, desires that all communications between husband and wife shall be absolutely free and untrammeled, and that each may say or write whatsoever he or she pleases to the other, with the absolute assurance that the one receiving the communication will neither be compelled nor permitted to disclose it. We therefore think it the wiser and better course to adhere strictly to the declared policy of our law, and to hold that this letter was properly rejected, however important it may be in the determination of this case."

1. **Representative. — Administrator.** — Letters written to a wife and in the possession of her administrator in his fiduciary capacity can not be introduced in evidence against the husband. Bowman *v.* Patrick, 32 Fed. 368; Mahner *v.* Linck, 70 Mo. App. 380, 388.

2. *Contra.* — Lloyd *v.* Pennie, 50 Fed. 4. In this case it was held that letters written by a man to his wife, and in the hands of her administrator, are admissible against her husband. In this case the question arose upon an order to show cause why the wife's administrator should not be punished for contempt for refusing to produce before an examiner letters written to his intestate by her husband. The court held that the letters should be produced in pursuance of rules of practice in federal courts which require that rejected testimony be incorporated in the record on appeal. But the court held that letters from husband to wife, in the custody of a third person, are admissible. The case arose in California, and the court held that the protection of Cal. Code of Civ. Proc., § 1881, Sub. § 1, does not extend to such letters, that that statute does not protect the communications, but simply renders either spouse incompetent to give them in evidence. The court states that Bowman *v.* Patrick, 32 Fed. 368 (see preceding note) could not be considered an authority upon the question under considera-

Attorney. — Letters written by husband to wife and by her intrusted to her attorney in the course of professional employment cannot be produced in evidence by the attorney.[3]

(6.) Letters Competent for Certain Purposes. — (A.) MEASURE OF DAMAGE IN CRIMINAL CONVERSATION.— But it has been held that in an action of criminal conversation letters written by wife to husband, showing her affection for him, are competent on the measure of damages.[4]

(B.) TO SHOW RELATION.— It has also been held that letters containing no private or confidential matter which are offered to show that husband signed his name as such, are competent as tending to show existence of relation.[5]

(C.) TO SHOW CRUELTY.— It has also been held that letter from husband to wife, containing expressions of cruelty, is competent against husband in divorce suit.[6]

c. *Acts of Spouse Privileged.* — Knowledge of the acts of one spouse, acquired by the other by reason of their relation, is privileged.[7]

Act in Connection With Statement.— But if an act of a spouse open to ordinary observation is so connected with a statement made by him or her that the conversation might explain or attach a significance to the act, the other spouse cannot testify concerning the act.[8]

tion. The court seems to attach some importance to the circumstance that in Bowman *v.* Patrick the letters in question had been delivered by the wife's administrator to the husband's adversary in a spirit of hostility.

3. Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144. See note under II, 8, b. (1.) n. 88.

4. **Letter Competent on Measure of Damages.** — Horner *v.* Yance, 93 Wis. 352, 67 N. W. 720. Competent to show feelings of wife toward husband. Willis *v.* Bernard, 8 Bingham (Eng.) 376, 1 M. & Scott 584, 5 Car. & P. 342, 1 L. J. C. P. 118.

5. Caldwell *v.* State (Ala.), 41 So. 473.

6. E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463.

7. **Acts of Spouse.** — Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40; State *v.* Jolly, 20 N. C., (3 Dev. & B. L.) 110, 32 Am. Dec. 656; Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405; Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772.

In Perry *v.* Randall, 83 Ind. 143, defendant was sued for money which plaintiff claimed defendant converted to his own use. Defendant's wife was permitted to testify as to defendant's actions in regard to the money. The supreme court held that the admission of her testimony constituted reversible error. The court uses this language: "We are of the opinion, however, that the appellant's acts in relation to the appellee's lost money, done in the presence of the witness Henrietta, during the marriage and in response to her questions or suggestions, were 'confidential communications' to her by her husband, the appellant, within the meaning of the statute. It was not necessary that the appellant's communication to his wife, the witness, in relation to the money, should be expressed in words. Their interview was private and confidential; and the actions of the appellant, in the presence of his wife, in relation to appellee's lost money, were such a communication by him to her, that she was not a competent witness, under the statute, to testify in regard to his actions, without his consent."

8. See Holman *v.* Bachus, 73 Mo.

And the fact that a private conversation between spouses accompanies and explains an act of one of them, is not sufficient to entitle the conversation to be given in evidence.[9]

B. What Matters Non-Privileged. — a. *Ordinary Observation.* — But acts, the knowledge of which a spouse might have acquired by the exercise of ordinary observation, and to the acquirement of which the opportunities afforded by the marital relation were not necessary, are not privileged.[10] Nor are acts privileged

49; Hoffman *v.* Parry, 23 Mo. App. 20, 30; Wright *v.* Wright, 114 Iowa 748, 87 N. W. 709, 55 L. R. A. 261. This latter case involved an action by a wife against her husband's father to enforce agreement made to support her in case of abandonment by her husband. After holding that she might testify as to husband's treatment to show abandonment and necessity for relying upon defendant's agreement, the court says, quoting language of trial court in ruling upon objections, "The court holds that the remarks or statements as between the parties, husband and wife, which they had, in connection with the conduct of the party and as explanatory of it simply, are not such communications as are excluded under sec. 4607 of the statutes, and holds them strictly to those that are simply explanatory of facts and transactions that bear upon the treatment of the husband to the wife."

9. Fuller *v.* Fuller, 177 Mass. 184, 58 N. E. 588, 83 Am. St. Rep. 273.

10. **Ordinary Observation.**

Alabama. — Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40.

Arkansas. — Inman *v.* State, 65 Ark. 508, 47 S. W. 558.

Indiana. — Stanley *v.* Stanley, 112 Ind. 143, 13 N. E. 261.

Iowa. — Romans *v.* Hay's Admr., 12 Iowa 270.

Kentucky. — Short *v.* Tinsley, 1 Met. 397. 71 Am. Dec. 482.

Utah. — In re Van Alstine's Estate, 26 Utah 193, 72 Pac. 942.

Vermont. — Williams *v.* Baldwin, 7 Vt. 503; French *v.* Ware, 65 Vt. 338, 26 Atl. 1096.

Physical Condition.— Wife who in case of injury to her husband acts as his nurse and attendant, may testify concerning knowledge thus acquired of his physical condition (Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 780, 51 S. E. 569); also concerning his statements of pain and suffering (Stack *v.* Portsmouth, 52 N. H. 221).

Husband Competent as to Wife's Health. — Supreme Lodge M. W. of W. *v.* Jones, 113 Ill. App. 241.

Act of One Spouse in Delivering a Deed to the other is not privileged. Poulson *v.* Stanley, 122 Cal. 655, 55 Pac. 605, 68 Am. St. Rep. 73.

Facts as to Bond, Its Contents. In Carpenter *v.* Dame, 10 Ind. 125, it was held that in an action against the widow and heirs of a deceased person to compel specific performance of a bond executed by decedent, the widow was a competent witness to prove the execution, delivery and subsequent destruction of the bond, and then its contents.

In Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405, defendant was indicted for attempting to poison his wife. The state offered to prove by the wife that she had seen the accused sprinkle a substance upon a piece of watermelon intended for her, and that the portion of it produced at the examination, and then shown to contain arsenic, was a part of the piece prepared for her, and was, when produced, in the same condition as when she received it from him. The trial court excluded her testimony. The court of appeals in its opinion, certified to the trial court as the law of the case, *held,* that her testimony was admissible. After using the language quoted in note 77, under II, 8, A, a, the court continues: "The reason of this rule does not apply, however, to facts known to a surviving or divorced husband or wife, independent of the existence of the former marriage, although the knowledge was derived

which do not in any way involve the elements of confidence.[11]

b. *Non-Confidential Source.* — One spouse may testify concerning information relating to the other obtained in some other way than from the spouse.[12]

c. *Own Acts.* — Either spouse may testify concerning his or her own acts.[13]

d. *Reasons for Conduct,* or concerning reasons for taking a certain action.[14]

during its existence, and relates to the transactions of the one or the other; therefore, the rule should not be applied in such a case. What the State proposed to prove by the divorced wife in this case was not any communication or knowledge which can fairly be considered as having come to her by reason of her being then the wife of the accused. If she had not then been his wife, ordinary observation would have enabled her to know all that it was proposed to prove by her." See Stober *v.* McCarter, 4 Ohio St. 513.

Killing of Husband in Wife's Presence. — Wife may testify of killing of her husband which takes place in her presence. Hale *v.* Kearly, 8 Baxt. (Tenn.) 49.

In Shanklin *v* McCracken, 140 Mo. 348, 41 S. W. 898, a wife was permitted to testify that a third person, in her presence handed a package of papers to her husband, who opened it, that the package contained deeds of some sort, and that husband handed back the package. The court says: "The evidence offered was simply an act of the husband unconnected with any 'admission or conversation' with him, a knowledge of which the witness derived not from her husband, but from the exercise of her own sense of sight, and we think the court committed error in rejecting it." The court is careful to discriminate between acts and statements, and cites Holman *v.* Bachus, 73 Mo. 49, to the effect that if an act of one spouse is so connected with a statement made by him that the conversation might explain or attach a significance to the act, the other spouse cannot testify to the act. See also Cannon *v.* Moore, 17 Mo. App. 92, 100; Hoffman *v.* Parry, 23 Mo. App. 20, 30.

Own Knowledge. — In Smith *v.* Potter, 27 Vt. 304, 65 Am. Dec. 198, it is held that a wife may, after death of her husband, give in evidence facts known of her own knowledge; and may testify in regard to any transaction affecting her husband's interest, unless her testifying result in the disclosure of matters of confidence between husband and wife.

11. The act of a husband in giving his wife certain letters to mail, it not appearing that she was aware of their contents, is not confidential communication. People *v.* Truck, 170 N. Y. 203, 212, 63 N. E. 281.

Receipt of Letter. — Wife may testify that her husband received a certain letter. Williams *v.* Baldwin, 7 Vt. 503.

12. Patton *v.* Wilson, 2 Lea (Tenn.) 101, 113; Bigelow *v.* Sickles, 75 Wis. 427, 44 N. W. 761; Brown *v.* Johnson, 101 Wis. 661, 77 N. W. 900; White *v.* Perry, 14 W. Va. 66, 78; Cannon *v.* Moore, 17 Mo. App. 92, 100.

13. Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255.

Dickerman *v.* Graves, 6 Cush. (Mass.) 308, 53 Am. Dec. 41, was an action for *crim con.* It was held that the wife might, when called as a witness by her husband, testify to the act charged. The court announced the rule to be that neither husband nor wife was competent to testify against the other as to what occurred during the marriage relation, and held that in the case at bar, the wife did not testify against her husband.

14. Yowell *v.* Vaughn, 85 Mo. App. 206. This was an action by husband for damages caused by alienation of his wife's affections. It was held that the wife might prove that her reasons for leaving him

e. *Business Communications.* — **(1.) Between Spouses.** — Communications from one spouse to the other concerning business transactions between them are not privileged.[15]

Gift. — But husband and wife are incompetent as to private conversation concerning gift from him to her of money and chattels.[16]

Contra. — But the contrary has been held.[17]

(2.) Spouse as Agent. — Communications between spouses concerning matter wherein one acts as agent for the other, are not privileged.[18]

were his misconduct and ill-treatment, as questions as to her reasons did not call for disclosure of confidential communications.

15. Hannaford *v.* Dowdle, 75 Ark. 127, 86 S. W. 818; Sedgwick, Admr. *v.* Tucker, 90 Ind. 271, 281; Beitman *v.* Hopkins, 109 Ind. 177, 9 N. E. 720; Assignment of Rea, 82 Iowa 231; Dowling *v.* Dowling, 116 Mich. 346, 74 N. W. 523. *In re* Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930.

Wife may testify that husband delivered a certain deed to her. Hutchinson *v.* Hutchinson, 16 Colo. 349, 26 Pac. 814.

On trial of wife's claim against estate of insolvent husband, her husband may be examined as to the details of a transaction between them, the question being whether or not he had borrowed a certain sum from her. Rea *v.* Jaffray, 82 Iowa 231, 48 N. W. 78.

But a wife cannot be compelled to testify concerning all special circumstances attending the receipt of any and all property received from her husband during marriage. McCartney *v.* Fletcher, 10 App. Cas. (D. C.) 572, 595.

In prosecution of a claim presented by a wife against her husband's estate, his promises and representations made to induce her to advance to him the money represented by her claim are not privileged. Spitz's Appeal, 56 Conn. 184, 14 Atl. 776, 7 Am. St. Rep. 303.

Transfer of Chose in Action by a man to his wife, is not privileged. Kanks' Admr. *v.* Van Garder, 59 Iowa 179, 13 N. W. 103.

But in Brown *v.* Wood, 121 Mass. 137, it is held that a married woman cannot testify concerning business transactions had between herself and husband in the absence of other persons.

Letter as to Business, Privileged. It has been held that letter from husband to wife, stating that joint business is unprofitable, is privileged. Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705.

Privileged Under Kansas Statute. Under Kansas statute a woman cannot testify concerning communications between her husband and herself in regard to business in which they are jointly interested. Marshall *v.* Marshall, 71 Kan. 313, 80 Pac. 629; VanZandt *v.* Shuyler, 2 Kan. App. 118, 43 Pac. 295. But wife may testify concerning her husband's statements made in creating her his agent. McAdow *v.* Hassard, 58 Kan. 171, 48 Pac. 846.

Wife cannot testify concerning husband's declaration made at time of conveying certain real property to her of his purpose in so doing. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303.

16. Young *v.* Hurst (Tenn. Ch. App.), 48 S. W. 355, *citing* Insurance Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270. See note 28, under II, 8, B, h.

17. German-American Ins. Co. *v.* Paul, 2 Ind. Ter. 625, 53 S. W. 442.

18. Husband Agent for Wife. Brown *v.* Thomas, 14 Ill. App. 428; Schmied *v.* Frank, 86 Ind. 250; Pierce *v.* Bradford, 64 Vt. 219, 23 Atl. 637.

Wife may testify that she instructed her husband to deliver a certain deed to her attorneys, instead of to the person to whom it was delivered. Edwards *v.* Dismukes, 53 Tex. 605.

But in Com. *v.* Hayes, 145 Mass.

(3.) Communications Concerning Separate Property. — Nor are communications from one to the other concerning the separate property of either.[19]

(4.) Communications Concerning Joint Trusteeship. — Nor communications concerning subject of a joint trusteeship.[20]

289, 14 N. E. 151, it is held that upon trial of a woman for illegally selling liquor, she could not testify as to private directions given by her to her husband, as her agent, the court holding that the statute applicable included all communications whether confidential or not.

Wife as Agent for Husband. Bell *v.* Day, 9 Kan. App. 111; Darrier *v.* Darrier, 58 Mo. 222; Degenhart *v.* Schmidt, 7 Mo. App. 117; Clements *v.* Marston, 52 N. H. 31; Schwantes *v.* State (Wis.), 106 N. W. 237, 246.

When statute permits wife to testify concerning transactions in which she acted as her husband's agent, she cannot on behalf of her husband, prove payment of money made by her in his presence, or by his direction, as such transaction must be regarded as done by him and not by her. Pingree *v.* Johnson, 69 Vt. 225, 39 Atl. 202; Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

Statements Concerning Subject of Agency. — Wife who acts as her husband's agent may testify as to his statements concerning subject of agency. Clements *v.* Marston, 52 N. H. 31.

Wife may prove statements of her husband made in appointing her his agent. Crook *v.* Henry, 25 Wis. 569; McAdow *v.* Hassard, 58 Kan. 171, 48 Pac. 846.

Husband is competent to prove the fact that he is his wife's agent. American Express Co. *v.* Lankford, 1 Ind. Ter. 233, 39 S. W. 817.

19. Stickney *v.* Stickney, 131 U. S. 227.

So if husband and wife are joined as parties in an action relating to property in which the wife claims an interest, she may testify in her own behalf. Biggins *v.* Brockman, 63 Ill. 316.

In an action by a widow to compel trustees of her husband's estate to indemnify her for her separate funds used in paying her husband's debts, it was held that she might testify concerning directions given by her to her husband respecting investment of her separate estate. Shea *v.* McMahon, 16 App. Cas. (D. C.) 65, 83.

In Hunt *v.* Eaton, 55 Mich. 362, 21 N. W. 429, the statute relied upon provided that during the marriage or afterwards neither spouse should, without the consent of both, be examined as to any communication made by one to the other during the marriage (How. Stat. § 7546). The court held that this provision should be construed in connection with § 6297, which provided: "Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried." Construing these provisions together, the court held that communications between the spouses relating to the wife's separate property were not privileged.

20. Wood *v.* Chetwood, 27 N. J. Eq. 311. In this case it is held that when husband and wife are joint trustees of an estate or fund, and an action is brought by a beneficiary of the trust to compel an accounting, the wife is competent to testify concerning conversations between herself and husband respecting the trust property.

Bound to Produce Documents. In Wood *v.* Chetwood, 27 N. J. Eq. 311, it was held that the wife could be compelled to produce documents found among her husband's papers. The court says: "It appears part of the documents offered in evidence were found by the wife among the papers of her husband. They are not before me. . . . It is insisted their production by the wife is a breach of duty and a betrayal of confidence, which the court cannot permit without endangering the institution of marriage. If they relate to the trust

(5.) Knowledge of Business of Spouse. — One spouse may testify concerning the business affairs of the other, provided knowledge of the matter given in evidence was not acquired through the medium of a confidential communication.[21]

Not Competent as to Statements. — It has been held that a wife is not competent to testify concerning her husband's statements in regard to his business affairs;[22] or as to knowledge of business matters confided to her alone.[23]

Bankruptcy Act. — Thus it has been held that in a proceeding under the Bankruptcy Act of 1898, a wife cannot be questioned by creditors of her husband concerning his statements to her regarding his business affairs.[24]

f. *Statement of Third Person Repeated.* — Repetition by one spouse to the other of statement of third person is not privileged.[25]

g. *Criminal Acts.* — The wife may testify to the act of her hus-

property, the husband is bound to produce them. Besides, the court will not stop to consider how papers material to the issue were obtained by the party offering them, whether lawfully or unlawfully; if they tend to elucidate the point in dispute, the court is bound to receive the light they give. . . . However, I confess I am unable to see how the wife commits a breach of duty or a betrayal of confidence, in doing that which the husband would be compelled to do if he were within the reach of the process of the court."

21. Spivey *v.* Platon, Admr. 29 Ark. 603; Cannon *v.* Moore, 17 Mo. App. 92, 100; Pike *v* Hays, 14 N. H. 19, 40 Am. Dec. 171; Ryan *v.* Follansbee, Extrx. 47 N. H. 100; Jackson *v.* Barron, 37 N. H. 494, 501; Robb's Appeal, 98 Pa. St. 501; Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 374.

Wife may testify concerning husband's admission of promise to pay money to a third person. Beveridge *v.* Minter, 1 Car. & P. (Eng.) 364.

In Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384, the court, after using the language quoted in note 59, under II, 7, B, continues: "The conversations with her husband, testified to by Mrs. Berdell, cannot be excluded by the application of any of these tests. They were ordinary conversations relating to matters of business which there is no reason to suppose he would have been unwilling to hold in the presence of any person. There was, therefore, no violation of the section of the Code cited."

In Peiffer *v.* Lytle, 58 Pa. St. 386, it is held that a husband might testify concerning transactions between himself and wife as to certain advancements made to her by her parents. Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 374, is cited. *Compare* Patton *v.* Wilson, 2 Lea (Tenn.) 101, 112.

Wife is incompetent as to her husband's business affairs, if, in the matter to which her testimony is directed, she simply acted as copyist or amanuensis. Eastabrooks *v.* Prentiss, 34 Vt. 457.

22. Incompetent as to Statements. Babcock *v.* Booth, 2 Hill (N. Y.) 181, 38 Am. Dec. 578.

23. Confidential Business Matter. Stanford *v.* Murphy, Admr., 63 Ga. 410; Brown *v.* Wood, 121 Mass. 137. In this case it is held that a wife cannot testify as to the circumstances attending her husband's possession of a certain note, or as to its deposit with her by him, it appearing that she kept all his papers in a certain place accessible to him and herself alone.

24. Under Bankruptcy Act. — *In re* Jefferson, 96 Fed. 826.

25. Repeating Statement. — Giddings *v.* Iowa Sav. Bank, 104 Iowa 676, 74 N. W. 21.

band in compelling her to forge a name to a promissory note.[26]

h. *Fraudulent Acts.* — Wife may be compelled to testify concerning gifts made to her by her husband in fraud of his creditors.[27]

But it has been held that in an action to set aside as fraudulent a deed from husband to wife, the testimony of either as to private conversations concerning method of purchase and holding of title is incompetent.[28]

i. *Communications in Presence of Third Persons.* — (1.) **Spouse Competent.** — Either spouse may testify concerning communications between the spouses made in the presence of third person.[29]

(A.) That Third Person Dead, Immaterial. — Statement made by one spouse to another in presence of third person is non-privileged, although such person die prior to time of trial in which the testimony is offered.[30]

(B.) Private Conversation in Connection with Overt Acts. — Where the testimony of a wife shows overt acts on her part, the effect of which would be to confer certain authority upon her husband, it is not error to refuse to strike out her testimony on the subject of his authority, on the ground that such authority was conferred during a private conversation.[31]

26. Beyerline *v.* State, 147 Ind. 147 Ind. 3, 46 N. E. 31.

In Polson *v.* State, 137 Ind. 519, 35 N. E. 907, the following language is used: "The court did not err, in our opinion, in permitting the wife of the appellant to testify that he had communicated to her a loathsome venereal disease, on the ground that such testimony was a breach of the confidential relations existing between husband and wife. Such conduct on his part was a gross breach of his duty as a husband, and he could not, therefore, shield himself from exposure in a court of justice, where such fact became material evidence in a cause, on the ground that it was a confidential communication."

California Statute. — California statute, C. C. P., sec. 1881, Sub § 1, applies in criminal cases. People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223.

27. Wiley *v.* McBride, 74 Ark. 34, 85 S. W. 84.

"It is not believed that it is the spirit of the law to regard a communication of the husband to the wife of the existence of a right of third parties which he is attempting to convey to her, and which, if accomplished, would operate as a fraud upon such parties, as privileged, on the ground that such communication is confidential." Eddy *v.* Bosley, 34 Tex. Civ. App. 116, 78 S. W. 565; *citing* Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580. See note 72, under II, 12.

28. *Contra,* Phoenix F. & M. Ins. Co. *v.* Shoemaker, 95 Tenn. 72, 31 S. W. 270.

29. Conversations in Presence of Third Persons Non-Privileged. Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31; Long *v.* Martin, 152 Mo. 668, 54 S. W. 473; Sessions *v.* Trevitt, 39 Ohio St. 259, 267; Lyon *v.* Prouty, 154 Mass. 488, 28 N. E. 908; Reed *v.* Reed (Mo. App.), 70 S. W. 505. *In re* Buckman's Will, 64 Vt. 313, 24 Atl. 252, 33 Am. St. Rep. 930; Cole *v.* State (Tex. Crim.), 88 S. W. 341.

30. Sessions *v.* Trevitt, 39 Ohio St. 259, 267.

31. Private Conversation—Overt Acts. — Nichols *v.* Rosenfeld, 181 Mass. 525, 63 N. E. 1063. In this case it was sought to be shown by a woman's testimony that she had au-

(C.) Statements of Other Spouse to Third Persons. — The rule of privilege does not prevent one spouse from testifying concerning statements made by the other to third persons in presence of witness.[32]

But it has been held that wife cannot testify concerning conversations between her husband and third persons.[33]

(2.) Third Person May Testify. — Statements of one spouse to the

thorized her husband to make a certain alteration in an instrument after signature. Her testimony was objected to on the ground that the authority was conferred in the course of a private conversation. The court says: "A motion then was made that the evidence as to her husband's acting for her be ruled out, and other exceptions were taken upon the same principle, which was of course that it sufficiently appeared that the husband's authority was given only in private conversation. Brown *v.* Wood, 121 Mass. 137; Com. *v.* Hays, 145 Mass. 289, 293; Com. *v.* Cleary, 152 Mass. 491. But such is not the fact. Such a conversation is not necessarily private. There is no presumption one way or the other. The judge may have disbelieved Mrs. Jeffrey's statement. But if he believed it fully, her account implied a course of overt acts which was not private, and further an assumption by her husband assented to by her without words that he was to manage the whole affair. See Anderson *v.* Ames, 151 Mass. 11; Jefferds *v.* Alvard, 151 Mass. 94; Dyer *v.* Swift, 154 Mass. 159, 162; Beston *v.* Amadon, 172 Mass. 84."

32. *Alabama.* — Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46.

Indiana. — Mercer *v.* Patterson, 41 Ind. 440; Griffin *v.* Smith, Admr., 45 Ind. 366; Denbo *v.* Wright, Admr., 53 Ind. 226; Floyd, Admr. *v.* Miller, 61 Ind. 224, 235; McConnell *v.* Hannah, 96 Ind. 102; Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. 196.

Iowa. — Pratt *v.* Delavan, 17 Iowa 307; Auchampaugh *v.* Schmidt, 77 Iowa 13, 41 N. W. 472.

Kansas. — Higbee *v.* McMillan, 18 Kan. 133.

Mississippi. — Stuhlmuller *v.* Ewing, 39 Miss. 447, 461.

New Hampshire. — Clements *v.* Marston, 52 N. H. 31, 38.

Wife competent as to transactions between husband and third person in her presence. Walker, Exr., *v.* Sanborn, 46 Me. 470; Herrick *v.* Odell, 29 Mich. 47; Graves *v.* Graves, 70 Ark. 541, 69 S. W. 544.

33. *Contra.* — Moore *v.* Wingate, 53 Mo. 398; Holman *v.* Backus, 73 Mo. 49; McFadin *v.* Catron, 120 Mo. 252, 274, 25 S. W. 506; Willis *v.* Gammill, 67 Mo. 730. In Moore *v.* Wingate, the court based its ruling upon a statute which, after removing the disqualification of married women as witnesses, stated "provided that nothing in this section shall be so construed as to authorize or permit any married women while the relation exists, or subsequently, to testify to any admissions or conversations of her husband, whether made to herself or third persons." The court says: "This provision of the statute was intended to apply to all cases, whether the husband was a party to the action or not."

In Reeves *v.* Herr, 59 Ill. 81, the court says: "What was sought to be proved by the witness here, was a conversation between the defendant and the husband, before and in the presence of the witness, his wife, which is claimed to have amounted to an admission, by the defendant, of the account sued upon, and a promise on his part, within the period fixed by the statute of limitations, to pay it.

"We do not find from the authorities, that this rule of exclusion is confined to subjects which are confidential in their nature, and we think it should apply whenever the wife is called upon to disclose any matter, which came to her knowledge in consequence of the marriage relation."

other in presence of third persons may be proved by such persons.[34]

Admission. — Statements of wife made in presence of third persons and husband, and not objected to by him, may be proved against him by such third person as admissions.[35]

If a husband is offered as a witness to prove confidential communications between himself and wife, and objection to his testimony

34. *England.* — Rex *v.* Simons, 6 Car. & P. 540.

United States. — Hopkins *v.* Grimshaw, 165 U. S. 342.

Georgia. — Knight *v.* State, 114 Ga. 48, 39 S. E. 928, 88 Am. St. Rep. 17.

Illinois. — Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

Iowa. — State *v.* Bertoch (Iowa), 79 N. W. 378; Shuman *v.* Supreme Lodge, 110 Iowa 480, 81 N. W. 717.

Kansas. — Jacquith *v.* Davidson, 21 Kan. 341 (p. 251 of reprint); Bank *v.* Hutchinson, 62 Kan. 9, 19, 61 Pac. 443; State *v.* Gray, 55 Kan. 135, 39 Pac. 1050.

Massachusetts. — Fay *v.* Guynon, 131 Mass. 31.

Missouri. — Long *v.* Martin, 152 Mo. 668, 54 S. W. 473.

New York. — People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830.

North Carolina. — Toole *v.* Toole, 109 N. C. 615, 14 S. E. 57.

Tennessee. — Allison *v.* Barrow, 3 Coldw. 414; Queener *v.* Morrow, 1 Coldw. 123.

In Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912, 34 Am. St. Rep. 479, it is said that the rule permitting a third person to testify concerning statements made by one spouse to the other in presence of third persons applies especially when such statement is offered in connection with evidence of wife's conduct tending to show disregard of her husband's wishes and unlawful intimacy with another person. This case was an action for divorce. A witness testified that plaintiff said to his wife in presence of witness that he did not wish to find a certain man in his house again. It was held that this testimony was competent, especially as it was offered in connection with other testimony of the same witness which tended to show improper conduct of the wife with the person whose presence was objected to by the husband.

Exclamation of Wife to husband, on hearing that he had killed her son by a former marriage. State *v.* Middleham, 62 Iowa 150, 17 N. W. 446.

35. People *v.* Garner, 72 N. Y. Supp. 66; *affirmed* by court of appeals, see 169 N. Y. 585, 62 N. E. 1099.

In Allison *v.* Barrow, 3 Coldw. (Tenn.) 414, 91 Am. Dec. 291, the court says: "Conversations between husband and wife, or admissions made by either to the other, in the presence of a third person, do not belong to that class of privileged communications between the husband and wife, which, upon grounds of public policy, and to preserve the happiness of the married state, are so carefully protected by the well-established rules of evidence. The declarations and acts of the husband, in the presence of the wife, may always be shown in evidence against him; yet it might, and frequently would be, impossible to show the meaning or application of the declaration or act, without proving the statement of the wife, by way of inducement or explanation of the declaration or act of the husband; and, as has been already stated, the statements of the wife, in the presence of the husband, are not admissible for any other purpose. If, in this case, the wife of the defendant stated, in the presence of her husband and the witness, that the note in question had been paid, it is competent for the plaintiff to show that the defendant responded, and, explicitly, or by his silent acquiescence, impliedly admitted the truth of the statement."

In People *v.* Garner, 72 N. Y.

is sustained, his statements made in testifying to the same matter upon a former trial of the action cannot be shown by persons present at the former trial.[36]

(A.) Concealed Witness. — A person, who, while concealed, overhears a conversation between husband and wife which they thought no one overheard, may give the same in evidence.[37]

(B.) Private Statement Repeated Under Duress, Third Person Incompetent. — If a confidential statement made by a woman to her husband is repeated by her, under his duress, to a third person, such third person cannot give it in evidence.[38]

(3.) Presence of Child of Spouses. — Communication between spouses in the presence of their child too young to participate in conversation, is privileged.[39]

(4.) Third Person Present or Not Question for Court. — Whether or not a third person was present at conversation between husband and wife, is a question for the court.[40]

(A.) Either Spouse Competent as to Presence. — Either spouse may testify whether or not third person was present.[41]

(B.) Presence Presumed, if Testimony Admitted. — If statute makes either spouse incompetent as to communications made by one to the other, and acts done by either in presence of the other, and not in the known presence of a third person, if the record on appeal does not show whether or not third person was present on a certain occasion, it will be presumed that a third person was present at a conversation to which one spouse testified.[42]

9. Duration. — Privilege continues after termination of marriage relation by death or divorce; and neither spouse can, after termination of the relation, testify concerning confidential communications made during its existence.[43]

Supp. 66, it is held that wife may testify to husband's confession made to her mother in her presence.

36. Kelly *v.* Andrews, 102 Iowa 119, 71 N. W. 251. In this case the court held that wife's failure to object to husband's testimony at former trial did not constitute a waiver of right to object at the second trial.

37. Com. *v.* Griffin, 110 Mass. 181; State *v.* Hoyt, 47 Conn. 518, 540, 36 Am. Rep. 89.

Person in Adjoining Room. State *v.* Center, 35 Vt. 378.

38. In State *v.* Brittain, 117 N. C. 783, 23 S. E. 433, under threats of desertion made by her husband the wife confessed that she had committed certain crime. Afterwards, influenced by the same threats, she repeated this confession to another person. *Held,* that the testimony of this third person was incompetent, both as against the wife and her co-defendant.

39. See note 68, under II, 7, B, b, (B.)

40. Presence, Question for Court. Westerman *v.* Westerman, 25 Ohio St. 500.

41. Spouses Competent as to Presence. — McCague *v.* Miller, 36 Ohio St. 595.

42. Presence Presumed. — Westerman *v.* Westerman, 25 Ohio St. 500. But in Nichols *v.* Rosenfeld, 181 Mass. 525, 63 N. E. 1063, it is said that where a certain communication was not necessarily private in its nature, there is no presumption either way as to whether it was private or not.

43. Duration. — Privilege Continues After Death.

England. — Doker *v.* Hasler, Ryan & M. 198; O'Connor *v.* Majoribanks.

5 Scott (N. R.) 394, 4 Man. & G. 435, 442; 12 L. J., C. P. 161, 7 Jur. 834.

United States. — Stein *v.* Bowman, 13 Pet. 209, 223.

District of Columbia. — McCartney *v.* Fletcher, 10 App. Cas. 572, 595.

Delaware. — Farmers' Bank *v.* Cole, 5 Harr. 418.

Illinois. — Fletcher *v.* Shepherd, 174 Ill. 262, 269, 51 N. E. 212; Geer *v.* Goudy, 174 Ill. 514, 522, 51 N. E. 623; Reeves *v.* Herr, 59 Ill. 81.

Indiana. — Griffin *v.* Smith, Admr. 45 Ind. 366; Denbo *v.* Wright, Admr. 53 Ind. 226; Turner *v.* Cook, 36 Ind. 129; Noble *v.* Withers, Admr., 36 Ind. 193.

Massachusetts. — Dexter *v.* Booth, 2 Allen 559.

Michigan. — Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005.

Minnesota. — Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253.

Missouri. — Willis *v.* Gammill, 67 Mo. 730.

New Hampshire. — Young, Admr. *v.* Gilman, 46 N. H. 484.

New York. — Keator *v.* Dimmick, 46 Barb. 158; Babcock, Admr. *v.* Booth, 2 Hill 181, 38 Am. Dec. 578.

Pennsylvania. — Hitner's Appeal, 54 Pa. St. 110.

Tennessee. — Brewer *v.* Ferguson; 11 Humph. 565; Kimbrough *v.* Mitchell, 1 Head 539; State *v.* McAuley, 4 Heisk. 424, 430; Wisener *v.* Maupin, 2 Baxt. 342.

Texas. — Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Brock *v.* State, 44 Tex. Crim. 335, 71 S. W. 20, 100 Am. St. Rep. 859, 60 L. R. A. 465.

Virginia. — Robin *v.* King, 2 Leigh 140.

Privilege Continues After Divorce.

Alabama. — Owen *v.* State, 78 Ala. 425, 56 Am. Rep. 40.

Illinois. — Crose *v.* Rutledge, 81 Ill. 266; Griffeth *v.* Griffeth, 162 Ill. 368, 373, 44 N. E. 820.

Indiana. — Mercer *v.* Patterson, 41 Ind. 440; Perry *v.* Randall, 83 Ind. 143.

Indian Territory. — German-American Ins. Co. *v.* Paul, 5 Ind. Ter. 703, 83 S. W. 60.

Kentucky. — Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405; Elswick *v.* Com., 13 Bush 155.

Massachusetts. — Dickerman *v.* Graves, 6 Cush. 308, 53 Am. Dec. 41.

Michigan. — Hitchcock *v.* Moore, 70 Mich. 112, 116, 37 N. W. 914, 14 Am. St. Rep. 474.

Missouri. — State *v.* Kodat, 158 Mo. 125, 59 S. W. 73, 81 Am. St. Rep. 292, 51 L. R. A. 509; Schnabel *v.* Schnabel, 12 Mo. App. 587.

New York. — Chamberlain *v.* People, 23 N. Y. 85, 80 Am. Dec. 255; Barnes *v.* Carmack, 1 Barb. 392.

North Carolina. — State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656.

Ohio. — Cook *v.* Grange, 18 Ohio 526.

Pennsylvania. — Brock *v.* Brock, 116 Pa. St. 109, 9 Atl. 486.

Rhode Island. — Robinson *v.* Robinson, 22 R. I. 121, 46 Atl. 455, 84 Am. St. Rep. 832.

South Dakota. — Clark *v.* Evans, 6 S. D. 244.

Texas. — Davis *v.* State, 45 Tex. Crim. 292, 77 S. W. 451.

In Dexter *v.* Booth, 2 Allen (Mass.) 559, it is said that at common law the character of privileged communications remains unaffected by death.

In Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276, the court says: "This statute rests upon public policy, and the seal which the law has fixed upon communications between husband and wife during marriage remains forever, unless removed by the consent of both. The death of one cannot remove the seal of secrecy. If it could, the policy of the law would be defeated. After the husband or wife has gone to the grave the survivor cannot be permitted to blacken the good name and bring disgrace upon the memory of the departed by dragging to light communications made in the confidence of marital relation, and to protect which the statute was enacted."

In People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223, the court does not discuss this question at length, but says: "The examination of defendant's divorced wife was properly stopped as soon as she was asked about communications

10. Waiver. — A. Privilege May Be Waived. — It has been held that the privilege may be waived.[44]

B. Contra. — It has also been held that the privilege, being founded upon public policy, cannot be waived.[45]

C. No Waiver Unless Permitted by Statute. — When statute protects communications between husband and wife, and also provides, in regard to attorneys, physicians and priests, that confidential communications shall not be given in evidence without the consent of the person communicating, but makes no such provision concerning marital communications, the authority to waive privilege does not exist in either spouse.[46]

D. By Whom. — a. *Joint Action Essential.* — It has been held that the concurrence of both spouses is essential to a waiver.[47]

between defendant and herself during the marriage."

The cases of Deniston *v.* Hoagland, 67 Ill. 265, and Galbraith *v.* McLain, 84 Ill. 379, referred to in Goelz *v.* Goelz, 157 Ill. 33, 41 N. E. 756, decided upon a statute which limited the privilege to cases in which either husband or wife was a party to the action in which the testimony was offered.

In Lingo *v.* State, 29 Ga. 470, 483, it was held that a wife could not testify concerning threats made by her husband, the person killed, to kill defendant.

In Hester *v.* Hester, 15 N. C. (4 Dev. L.) 228, the court indicates a view contrary to statement in the text, but the testimony there in question was held competent on another ground.

See extended discussion of this question in Stober *v.* McCarter, 4 Ohio St. 513. The court says: "It is well known that the rule that forbids husband and wife to testify for or against each other, or where either is interested, is not limited to the duration of the marital relation, but for excellent reasons whose importance can hardly be overestimated continues beyond it. 1 Greenl. Ev., sec. 337. But whether the rule does not undergo some modification upon the dissolution of the marriage, is a question upon which the language of judges is scarcely reconcilable. This is owing not so much, or at least not so often, to any real difference of opinion, as to a somewhat incautious generality of expression, and to the additional fact that, by some courts, the question of competency has been treated as one of *interest* merely, while by others, an enlarged and philosophical view of it has been taken." The court then discusses numerous English and American cases wherein this question has arisen. The decision was, that after the death of a husband his wife could testify to acts done by her husband and another person, which were not confidential in their nature, but open to the observation of any one.

44. See cases cited under II, 10, B, C, and D, *infra.*

45. Robinson *v.* Robinson, 22 R. I. 121, 46 Atl. 455, 84 Am. St. Rep. 832.

Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

46. Statutory Authority Essential. — Bevins *v.* Clines, Admr., 21 Ind. 37.

It was also held that privilege cannot be waived under statute which provides that "neither spouse shall be permitted to . . . disclose any communication made to him or her by the other, during their marriage." Campbell *v.* Chace, 12 R. I. 333; Robinson *v.* Robinson, 22 R. I. 121, 46 Atl. 455, 84 Am. St. Rep. 832.

47. Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005; Maynard *v.* Vinton, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276.

When a woman is sued jointly with her husband, and is called as a

b. *Spouse Making Communication.* — But it has been held that the spouse making a given communication may waive privilege.[48]

c. *Not by Personal Representative.* — The privilege cannot be waived by the personal representative of the spouse making the communication, even in the interest of his estate.[49]

E. How Shown. — a. *Failure to Object.* — Objection is waived unless objection is taken when testimony concerning confidential communications is called for.[50]

b. *Effect of Such Waiver on Second Trial.* — If on the first trial of an action spouse omits to object to testimony of the other concerning confidential communications, such conduct does not constitute a waiver of right to object to such testimony upon a second trial.[51]

c. *Making Spouse Witness.* — One spouse waives privilege by interrogating the other concerning confidential communication.[52]

d. *Spouse as Witness.* — Or by testifying without objection concerning such communication.[53]

e. *Voluntary Statement.* — If husband, on cross-examination, voluntarily, without having been questioned in regard thereto, gives part of a conversation between himself and wife, he can be compelled to give the whole conversation.[54]

witness under a statute permitting a party to make an adverse party a witness, her testimony concerning a private conversation between her husband and herself is incompetent against him, although it may be admissible against her. Strode *v.* Frommeyer, 115 Mo. App. 220, 91 S. W. 167.

48. Stickney *v.* Stickney, 131 M. S. 227, *recited* under statute relating to District of Columbia.

Compare Hopkins *v.* Grimshaw, 165 U. S. 342.

49. Maynard *v.* Vinton, 59 Mich., 139, 26 N. W. 401, 60 Am. Rep. 276.

50. Norris *v.* Stewart's Heirs, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917; German *v.* German, 7 Coldw. (Tenn.) 180; Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384.

Appellate Court. It has been held that an appellate court will reverse a judgment in support of which testimony concerning confidential communication was admitted, although the records show that no exception was taken. Carter *v.* Hill, 81 Mich. 275; 45 N. W. 988.

Contra. — Robinson *v.* Robinson, 22 R. I. 121, 46 Atl. 455, 84 Am. St. Rep. 832; Davis *v.* State (Tex. Crim.), 77 S. W. 451.

51. Kelley *v.* Andrews, 102 Iowa 119, 71 N. W. 251. In this case it is held that the right of a wife to object to her husband's testifying concerning communications between them, in an action against her, is not waived by failure to object to his testifying for the adverse party on the first trial of an action, if proper objection is made when it is attempted to use such testimony upon a second trial.

52. Dickerman *v.* Graves, 6 Cush. (Mass.) 308, Columbia & P. S. R. Co. *v.* Hawthorne, 3 Wash. Ter. 353, 364.

53. Dickerman *v.* Graves, 6 Cush. (Mass.) 308, 53 Am. Dec. 41.

In People *v.* Lewis, 16 N. Y. Supp. 881, it was held that when a wife voluntarily testified against her husband in an action for *crim. con.*, she may testify concerning communications made during marriage. This ruling was based on § 715, Penal Code, which provided that neither spouse could be "compelled" to testify concerning such communications.

54. State *v.* Turner, 36 S. C. 534, 15 S. E. 602.

f. *No Waiver Unless Communication Referred to.* — But privilege is not waived unless confidential communication is referred to, and if spouse who becomes a witness does not, on direct examination, testify concerning confidential communication, he or she cannot, on cross-examination, be required to testify concerning such matter.[55]

11. Protection of Privilege. — A. Duty of Nisi Prius Court. It has been held that it is the duty of the trial court to prevent a spouse testifying concerning confidential communications, although no objection be made to question calling for it.[56]

B. Duty of Commissioner. — When testimony is being taken before a commissioner, he should not permit confidential communications to be given in evidence.[57]

C. Frame of Question. — Question to spouse as to any matter occurring or communicated between spouses should be so framed as to exclude confidential conversations.[58]

D. Application of Rule. — a. *Confidential Character Must Appear.* — Unless it appear that proposed testimony of husband or wife would violate the rule against the disclosure of confidential communications, the testimony should be admitted.[59]

b. *All Privileged, or None.* — If objection to question on the ground that it calls for disclosure of confidential communications between husband and wife be waived or overruled, witness may be cross-examined as to all the particulars of the communication.[60]

c. *Testimony Not Admitted, Unless Consent Shown.* — The testimony of neither spouse concerning private, confidential communications will be admitted, unless the consent of the other is shown.[61]

d. *Divorce Suits.* — (1.) **Private Conversations** between husband

55. People *v.* Mullings, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223. In this case the court decides the question as stated in the text upon the authority of Duttenhofer *v.* State, and State *v.* White, cited in notes *post,* under "Attorney and Client."

If in criminal prosecution, on cross-examination defendant's attorney brings out confessions of defendant to his wife, defendant cannot object. People *v.* Garner, 72 N. Y. Supp. 66.

Wife cannot, on cross-examination, be questioned concerning privileged matter not referred to in direct examination. Williams *v.* State, 40 Tex. Crim. 565, 570, 51 S. W. 224.

56. Carter *v.* Hill, 81 Mich. 275, 45 N. W. 988.

57. Page *v.* Page, 51 Mich. 88, 16 N. W. 245.

58. Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92.

59. Chase *v.* Pitman, 69 N. H. 423, 43 Atl. 617; Rutland & B. R. Co. *v.* Lincoln, 29 Vt. 206; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569.

"Nothing should be excluded except something that is strictly *confidential,* and not only so, but communicated in strict *marital* confidence." Clements *v.* Marston, 52 N. H. 31.

60. Baldwin *v.* Parker, 99 Mass. 79, 96 Am. Dec. 697, 701.

61. Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223.

and wife are privileged in divorce suit, in Missouri;[62] but not in California.[63]

(2.) Acts of Cruelty. — Wife may testify concerning acts of cruelty by her husband, or may introduce husband's letter to her containing expressions of cruelty.[64]

e. *Incompetency Appearing on Cross-Examination.* — If, on direct examination witness makes a statement which is entirely competent, the fact that on cross-examination he testifies that his knowledge was acquired from one toward whom he occupied a privileged relation does not render his direct testimony incompetent.[65]

62. Moore *v.* Moore, 51 Mo. 118; Dwyer *v.* Dwyer, 2 Mo. App. 17.

63. Cal. Code of Civ. Proc., § 1881, sub. § 1. "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

64. E. W. M. *v.* J. C. M., 2 Tenn. Ch. App. 463, 484. See article "DIVORCE," Vol. IV, p. 791, n. 22.

65. Bank *v.* Hutchinson, 62 Kan. 9, 61 Pac. 443, a woman testified that she had heard that certain threats had been made against her husband. On cross-examination she testified that her information as to threats had come from her husband. The court says: "No case involving the precise point has been called to our attention by counsel for either side, nor have we, with research, been able to find a case in point. The question, therefore, appears to be one of first impression, and, in the lack of precedent, to be determined upon reason. The witness did not, upon her direct examination, testify to any communication from her husband. She testified only to a fact—a fact which might have been learned (although such was not the case) from others than her husband. What she stated was not as a communication from her husband, but as a fact, to wit, the story of the threats. The testimony thus far was unobjectionable. Could it be made objectionable by a cross-examination disclosing the sources of the wife's information? Clearly not. To do so would have withdrawn from the consideration of the jury all testimony as to the cause of the making of the homestead mortgage, and would have left the witness's testimony as to a motive for that action without any rational explanation. All that would have been left of the witness's testimony would have been that she made the mortgage, and the state of mind in which she made it. A single word beyond that, to show that her state of mind was induced by a story of threats against her husband, would be, in the theory of counsel for plaintiff in error, incompetent and objectionable, provided the story was heard from the husband. That theory is not sound; it is not supported by any fair interpretation of the statute.

"The statute forbids the testimony of husband or wife as to conversations between each other, but the bare statement of a wife that she heard that her husband was to be arrested is not the statement of a conversation. She is entitled to go that far in explanation of the inducement to her action. The substantive litigated question in the case was whether the wife heard an alarming story as to her husband; not the words in which the story was told, nor that it was told to her by her husband. A litigating party cannot deprive his antagonist of the right to prove that substantive fact by showing that the information as to it came from the husband."

Abandonment of Objection by Spouse, Ineffective Against Co-Party. Incompetent testimony of one spouse is not rendered competent against co-party of the other by the fact that the spouse against whom such testimony is admitted does not appeal from the judgment rendered in the case.[66]

f. *Strict Inquiry Proper.* — As communications between husband and wife are privileged, the opportunity for fraud is great, and searching inquiry into the circumstances of each case is proper.[67]

E. Construction of Rule. — It has been held that statutes rendering husband and wife incompetent as to confidential communications should be strictly construed.[68]

It has also been held that the word "communication" should receive a liberal construction.[69]

Incompetent by One Statute, Competent by Another. — When statute makes husband and wife incompetent against one another, but another statute provides that person injured by commission of a public offense shall be competent against the offender, a husband may testify as to admission of his wife who is indicted for burning his barn.[70]

F. By What Law Determined. — In proceedings in bankruptcy under the Federal Act of 1898, a wife cannot be compelled to testify concerning communications made by her husband, if the statute of the state where the proceeding is pending makes her incompetent.[71]

12. Exceptions to Rule. — A. Exception Allowed to Prevent Fraud. — Where, from the peculiar circumstances of the case, evidence of communications between husband and wife is neces-

Wife cannot, on cross-examination, be examined as to privileged matters not referred to on examination in chief. Williams *v.* State, 40 Tex. Crim. App. 565, 51 S. W. 224.

66. State *v.* Jolly, 20 N. C. (3 Dev. & B. L.) 110, 32 Am. Dec. 656. This case involved a criminal prosecution of a man and woman for unlawfully cohabiting. The woman's divorced husband was permitted to testify concerning actions of his wife prior to divorce. The supreme court held his testimony incompetent, and held that it was not made competent against the man—the appealing defendant—by the fact that the woman did not join in the appeal.

67. Van Zandt *v.* Shuyler, 2 Kan. App. 118.

In Dresher *v.* Corson, 23 Kan. 313, Brewer, J., says: "Unless care is taken and courts are watchful, those laws which were designed for the protection of married women will become repulsive to the moral sense as mere covers for fraud."

68. Lloyd *v.* Pennie, 50 Fed. 4.

"As the tendency of the rule is to prevent a full disclosure of the truth, it must be strictly construed." Hammons *v.* State, 73 Ark. 495, 84 S. W. 718, 68 L. R. A. 234. See statutes construed in Robinson *v.* Chadwick, 22 Ohio St. 527, note 49, *ante*, under II, 6, A, and in Bevins *v.* Cline, Admr., 21 Ind. 37.

69. "Communication" Liberally Construed. — Com. *v.* Sapp, 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405.

70. Conflicting Statutes. — Jordan *v.* State, 142 Ind. 422, 41 N. E. 817; Briggs *v.* Briggs (R. I.), 26 Atl. 198.

71. *In re* Fowler, 93 Fed. 417; *In re* Jefferson, 96 Fed. 826.

sary to be introduced to show a fraud practiced against one of them, such evidence will be admitted *ex necessitate.*[72]

72. Exception. — Ex Necessitate. In Henry *v.* Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580, certain persons, by false and fraudulent statements, induced a man to agree to purchase on trial certain personal property at a sum greatly in excess of its value, the purchase price to be secured by a trust deed of his wife's real property. When the purchase price became due, default was made and the trustee under the trust deed advertised the real property for sale. The wife then brought suit to enjoin the sale and to set aside the deed on the ground of fraud. On the trial of this suit both husband and wife were permitted to testify to conversations had between themselves. This was claimed to constitute error. The supreme court of Missouri says: "Several things are, however, made very clear by the testimony: First, that the defendants Sneed, Stringer and Shobe were engaged in a most audacious scheme of fraud. Second, that the husband was used as the *conduit,* through which the *fraud-feasors* operated to induce the wife reluctantly to sign and acknowledge the deed of trust, which would have accomplished the end desired and designed by the conspirators, but for the timely interposition of a court of equity. The conversations then between the husband and wife, which brought about, and were intended to bring about, the result had in view, were clearly a part of the *res gestae,* (State *v.* Gabriel, 88 Mo. 631, and cases cited), and would, therefore, seem to occupy a different attitude from the ordinary, confidential communications between husband and wife.

On one occasion, we held that a letter written by the husband to his wife, authorizing her to take the title to certain land in his name, did not fall within the rule respecting confidential communications between husband and wife, nor did the testimony of the former, touching such letter, fall within such rule: Darrier *v.* Darrier, 58 Mo. 222, and cases cited. But that was a contest *inter sese.* We incline to the opinion, however, that the testimony of both husband and wife, as to the conversations referred to, was admissible on a much broader ground, and for a more elevated reason. At common law, parties to the record were admitted as witnesses, as a marked exception to the general rule, where fraud was charged, or embezzlement, or where, on general grounds of public policy, it was deemed essential to the purposes of justice. 1 Greenl. Ev. [14 Ed.] § 348 and cases cited. In the present case, Sneed attempted to take advantage of a legal technicality as to conversations between husband and wife to prevent the full extent of his fraud from being unearthed.

Now, in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong, and assist his own fraud by such an objection. The rule he invokes was intended to subserve a very wise, wholesome and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all of its protean manifestations. We shall, therefore, rule that the testimony of both husband and wife was, *ex necessitate,* competent as to their conversations, on two grounds: That those conversations were a part of the *res gestae,* and on the foot of the fraud."

Wife's testimony concerning husband's statements is excluded on grounds of public policy; but when the necessity for her testimony overbalances public policy, her testimony will be admitted. Maget *v.* Maget, 85 Mo. App. 6.

In Moeckel *v.* Heim, 134 Mo. 576, 36 S. W. 226, the court says: "We adhere to the ruling announced in Henry *v.* Sneed, 99 Mo. 407, that where a husband is made the conduit and mouthpiece of the fraud of others, and in furtherance of that

B. Injury of Wife by Husband, Wife Sole Witness. — Wife may testify concerning injury committed against her by her husband, when she is the only witness by whom the act in question can be proved.[73]

C. When Statement is Fact in Issue. — When the statement of one spouse is a fact in itself contributing to constitute a cause of action, it may be testified to by the other.[74]

D. Statement Made to Induce Confession, Non-Privileged. Statement made by one spouse with intent to induce the other to make a confession is non-privileged.[75]

E. Fact of Relation in Issue. — When the issues in a case involve the relations between husband and wife, communications between them are admissible in evidence as an index of such relations.[76]

fraud prevails upon his wife to sign a note and incumber her property, that there a court of equity, in the absence of other evidence, in order to unearth that fraud and to expose it in all of its details, will, *ex necessitate rei,* and upon a familiar common law principle, respecting evidence of fraud, permit both husband and wife to testify as to the conversations had between them in regard to the transaction."

73. King *v.* Sassaman (Tex. Civ. App.), 64 S. W. 937.

74. Fowler *v.* Fowler, 11 N. Y. Supp. 419. This was an action for divorce. Exceptions were taken to admission in evidence of defendant's statements, on the ground of privilege. On this subject the court says: "One was the declaration of the defendant to his young bride, on the second night after their marriage, that he did not love her, and that he had made a mistake in marrying her. If to make such a declaration at such a time was an act of cruelty, if it was the early beginning of a course of treatment persisted in throughout their married life, which was destined to destroy her happiness, to rob her of her peace of mind, to undermine her physical and mental health, and to drive her to attempts upon her own life, and thus to render it improper and unsafe for her to cohabit with him, then it was not a privileged communication. It was to be received in evidence, not as a declaration of the fact declared, but as a fact in itself contributing to constitute the plantiff's cause of action. Such acts cannot be concealed under the cloak of privilege."

75. Statement to Induce Confession. — In Fowler *v.* Fowler 11 N. Y. Supp. 419, the court says: "Another objection by the defendant, on the same ground, seems to be equally untenable. The plaintiff was permitted to prove, by her own testimony, that the defendant at one time made a statement to her, in the form of a confession, that he had had improper relations with a woman in his office. There was no charge of adultery against the defendant in the complaint, and the declaration was plainly inadmissible to prove the fact confessed. But further testimony of the plaintiff shows the true character of the so-called 'confession,' and demonstrates the admissibility of the evidence. The defendant afterwards admitted to the plaintiff that the pretended confession was false, made, as he said, out of whole cloth, and with the hope of inducing a similar confession from her in return. In other words, this 'confidential communication' from the husband to the wife was a deliberate device to entrap the wife into a confession of guilt on her own part. There is no shield of privilege for such an act as this."

76. Pettit *v.* State, 135 Ind. 393, 415, 34 N. E. 1118; Caldwell *v.* State (Ala.), 41 So. 473. In this latter case it is held that letters from husband to wife which disclose no fact of private or confidential nature,

F. When Necessary to Fix Grade of Offense. — It has been held that defendant in murder case may testify that his wife informed him of threats made against him by deceased, the decision being apparently based upon the ground that such testimony is necessary to fix the exact grade of the offense.[77]

G. Voluntary Confession of Crime is not within the rule against the disclosure of confidential communications.[78]

III. ATTORNEY AND CLIENT.

1. General Rule. — Communications between attorney[79] and client during and by reason of their relation as such, made in confidence and for the purpose of enabling the attorney to perform his professional duty in regard to the matter communicated, or made by him in performing such duty, are privilged.[80]

and which are offered to show that the husband signed his name as such, are competent. their only tendency being to show the existence of the relation.

Spouse may testify as to fact of marriage. Chase *v.* United States, 7 App. Cas. (D. C.) 149.

77. Shepherd *v.* Com., 27 Ky. L. Rep. 376, 85 S. W. 191.

78. State *v.* Mann, 39 Wash. 144, 81 Pac. 561.

79. The term "attorney" as used in this article includes solicitor, barrister, counselor, proctor and all other persons who perform legal services.

80. General Rule.

England. — Berd *v.* Lovelace, Cary 62, 21 Eng. Reprint 33; Dennis *v.* Codrington, Cary 100, 21 Eng. Reprint 53; Storey *v.* Lord George Lennox, 1 Keen 341, 48 Eng. Reprint 338; Kelway *v.* Kelway, Cary 89, 21 Eng. Reprint 47; Bulstrod *v.* Letchmere, 2 Freeman Ch. 6 (Case 4), 22 Eng. Reprint 1019; Dwyer *v.* Collins, 7 Exch. (Welsb. H. & G.) 639, 21 L. J. Ex. 235; Legard *v.* Foot, Finch 82, 23 Eng. Reprint 44; Parkhurst *v.* Lowten, 2 Swanst. 194, 216, 36 Eng. Reprint 589; Greenough *v.* Gaskell, 1 Myl. & K. 98, 39 Eng. Reprint 618; Branford *v.* Branford, 40 L. T. N. S. 659, 48 L. J., P. 40, 4 P. D. 72; Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587; Southwark & V. W. Co. *v.* Quick, 3 Q. B. Div. 315, 47 L. J., Q. B. 258. See also Austen *v.* Vesey, Cary 63, 21 Eng. Reprint 34, and Hartford *v.* Lee, Cary 63, 21 Eng. Reprint 34.

Canada. — Dederick *v.* Ashdown, 4 Manitoba 174.

United States. — Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 U. S. App. 438; Chirac *v.* Reinicker, 11 Wheat. 280, 294; Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457; Alexander *v.* United States, 138 U. S. 353.

Alabama. — Crawford *v.* McKissack, 1 Port. 433; Dickson *v.* McLarney, 97 Ala. 383, 392, 12 So. 398.

Arkansas. — Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406; Andrews' Admx. *v.* Simms, Admr., 33 Ark. 771; Casey *v.* State, 37 Ark. 67, 84; Fox *v.* Spears, 93 S. W. 560.

California. — Landsberger *v.* Gorham, 5 Cal. 450.

Connecticut. — Mills *v.* Griswold, 1 Root 383; Calkins *v.* Lee, 2 Root 363; Goddard *v.* Gardner, 28 Conn. 172.

Delaware. — Bush *v.* McComb, 2 Houst. 546.

District of Columbia. — Oliver *v.* Cameron, McArthur & M. 237.

Georgia. — Neal *v.* Patten, 47 Ga. 73; Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; Peek *v.* Boone, 90 Ga. 767, 17 S. E. 66; O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100. 66 Am. St. Rep. 202; State *v.* Minter, 111 Ga. 45; Philman *v.* Marshall, 103 Ga. 82, 29 S. E. 598.

Illinois. — Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99; People *v.*

Barker, 56 Ill. 300; Oliver *v.* McDowell, 100 Ill. App. 45.

Indiana. — Jenkinson *v.* State, 5 Blackf. 465; Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; Bigler *v.* Reyher, 43 Ind. 112; Wilson *v.* Ohio Farmers' Ins. Co., 164 Ind. 462, 73 N. E. 892.

Iowa. — Singer *v.* Sheldon, 56 Iowa 354, 9 N. W. 298; Blackman *v.* Wright, 96 Iowa 541, 549, 65 N. W. 843.

Kansas. — Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456.

Louisiana. — Holmes *v.* Barbin, 15 La. Ann. 553; Travis *v.* January, 3 Rob. 227; State *v.* Hazleton, 15 La. Ann. 72.

Maine. — Sargent *v.* Hampden, 38 Me. 581; Wade *v.* Ridley, 87 Me. 368, 32 Atl. 975.

Maryland. — Hodges *v.* Mullikin, 1 Bland's Ch. 503.

Massachusetts. — Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188.

Michigan. — Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609.

Minnesota. — Struckmeyer *v.* Lamb, 75 Minn. 366, 77 N. W. 987.

Mississippi. — Parkhurst *v.* McGraw, 2 Cushm. 134; Randel *v.* Yates, 48 Miss. 685; Lengsfield *v.* Richardson, 52 Miss. 443; Jones *v.* State, 66 Miss. 380, 6 So. 231, 14 Am. St. Rep. 570.

Missouri. — Gray *v.* Fox, 43 Mo. 570, 97 Am. Dec. 416; Sweet *v.* Owens, 109 Mo. 1, 18 S. W. 928.

Nebraska. — Nelson *v.* Becker, 32 Neb. 99, 48 N. W. 962; Basye *v.* State, 45 Neb. 261, 282, 63 N. W. 811; Sloan *v.* Wherry, 51 Neb. 703, 71 N. W. 744; Spaulding *v.* State, 61 Neb. 289, 85 N. W. 80.

Nevada. — Mitchell *v.* Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

New Hampshire. — Brown *v.* Payson, 6 N. H. 443; Sleeper *v.* Abbott, 60 N. H. 162.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Riggs *v.* Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145; Britton *v.* Lorenz, 45 N. Y. 51; Renoux *v.* Geney, 67 N. Y. Supp. 928.

North Carolina. — Hughes *v.* Boone, 102 N. C. 137, 159, 9 S. E. 286; Carey *v.* Carey, 108 N. C. 267, 12 S. E. 1038.

Ohio. — Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362; King *v.* Barrett, 11 Ohio St. 261.

Pennsylvania. — Beltzhoover *v.* Blackstock, 3 Watts 20, 28, 27 Am. Dec. 330; Moore *v.* Bray, 10 Pa. St. 519; Miller *v.* Weeks, 22 Pa. St. 89; Kaut *v.* Kessler, 114 Pa. St. 603, 7 Atl. 586.

South Dakota. — Austin T. & W. Mfg. Co. *v.* Heiser, 6 S. D. 429, 437, 61 N. W. 445.

Tennessee. — Lockhard *v.* Brodie, 1 Tenn. Ch. 384.

Texas. — Sutton *v.* State, 16 Tex. App. 490.

Utah. — People *v.* Mahon, 1 Utah 205.

Vermont. — Durkee *v.* Leland, 4 Vt. 612.

Virginia. — Clay *v.* Williams, 2 Munf. 105, 5 Am. Dec. 453; Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513.

West Virginia. — State *v.* Douglas, 20 W. Va. 770, 780.

Wisconsin. — Dudley *v.* Beck, 3 Wis. 274, 284; Koeber *v.* Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512.

"An attorney at law cannot be compelled, and will not be permitted to disclose what his client, as such, has confidentially confided to him." Rogers *v.* Dare, Wright (Ohio) 136; Morris *v.* Cain's Exrs., 39 La. Ann. 712, 726, 1 So. 797, 2 So. 418.

For collection of common law authorities on the subject of the general rule, see Hernandez *v.* State, 18 Tex. Crim. 134, 152.

"The unrestricted communication between parties and their professional advisers has been considered to be of such importance as to make it advisable to protect it, even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained." Lord Langdale in Reece *v.* Trye, 9 Beav. 316, 50 Eng. Reprint 365.

"Where the attorney is professionally employed, any communication made to him by his client with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication." Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N.

2. History. — Such communications were privileged at common law,[81] and are protected by statute in all of the states of the union.[82]

United States Courts. — Courts of the United States in determining questions of privilege apply the statute of the state wherein the trial court is held.[83]

Y.) 528, 49 Am. Dec. 189. Opinion by Chancellor Walworth.

In National Bank *v.* Delano, 177 Mass. 362, 58 N. E. 1079, 83 Am. St. Rep. 281, the court says: "The petitioner admitting the general rule that, where an attorney is professionally employed by a client, all communications between them in the course and for the purpose of that employment are so far privileged that the legal adviser, when called as a witness, cannot be permitted to disclose them, Taylor, Ev. (9th Ed.) § 911, contends that 'it is impossible to conceive how the information conveyed by the communication could have been presumed to be of any consequence in connection with the matter in hand,' especially when taken in connection with the offer to show that it was not made for the purpose of taking advice. This contention does not seem to us tenable. The insolvency of an ordinary partnership imports the insolvency of every partner, and the proceedings in insolvency in such a case may involve the marshaling of the assets and claims as between the creditors of the firm and the individual creditors of each partner. Whether the notes in dispute were provable against the firm, or only against the individual estate of George, was a matter with which Emmons in the course of his professional duty was likely to have occasion to deal, both as counsel for the firm and as counsel for Cadmus. He needed to be informed about it, and the communication made by Cadmus was in the strict line of the information needed. Indeed it is difficult to see how the attorney could have been in a situation to do his duty properly without some information on this point. It is a plain case of a communication from a client to an attorney, while such attorney, and employed to continue to act as such in a matter running into the future. The communication was of a fact about which he, as such attorney and in no other capacity, needed information. It was made to him in the course of his employment. It matters not that at that time it was not made for the express purpose of taking advice. It is enough if it was a statement of a fact made in the course of the employment and was material thereto, or believed to be such, and was made by the client to his attorney in recognition and because of the professional relation between them. The case is clearly distinguishable from Hatton *v.* Robinson, 14 Pick. 416, and similar cases upon which the petitioner relies."

The case of Anderson *v.* Bank of British Columbia, 2 Ch. Div. (Eng.) 644, 45 L. J. Ch. 449, 35 L. T. 76, contains an elaborate discussion of the law governing communications to attorneys, and a review of English authorities, although the question there decided was that correspondence between a bank and its agents is not privileged, it not appearing that the letter there in question was prepared for the purpose of being submitted to counsel.

81. 3 Black. Com. Ch. 3, p. 370; 1 Greenl. Ev. 15th Ed., § 237; 4 Wigmore Ev., § 2290; King *v.* Barrett, 11 Ohio St. 261; Struckmeyer *v.* Lamb, 75 Minn. 366, 77 N. W. 987.

82. In Peek *v.* Boone, 90 Ga. 767, 17 S. E. 66, it is said that communications of client to attorney are privileged irrespective of statute.

83. Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457. This case involved privilege of statement to physician, but announces the rule as stated in the text. It is followed, on question of state law as prescribing rule of evidence in Nashua Sav. Bank *v.* Anglo-American, L. M. & A. Co., 189 U. S. 221. To same effect is Vance *v.* Campbell, 1 Black (U. S.) 427; Witters *v.* Sowles, 32 Fed. 130.

3. Founded Upon Public Policy. — The rule forbidding the giving in evidence of such communications is founded upon public policy.[84]

4. Object of Rule. — The object of the rule is to protect the client,[85] and to enable and encourage free and unembarrassed communication between those needing advice and their legal advisers.[86]

84. *Arkansas.* — Andrews' Admx. *v.* Simms' Admr. 33 Ark. 771.

Connecticut. — State *v.* Barrows, 52 Conn. 323.

District of Columbia. — Oliver *v.* Cameron, McArthur & M. 237.

Illinois. — People *v.* Barker, 56 Ill. 300.

Kentucky. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592.

Maine. — Sargent *v.* Hampden, 38 Maine 581.

Mississippi. — Crisler *v.* Garland, 11 Smed. & M. 136, 49 Am. Dec. 49; Lengsfield *v.* Richardson, 52 Miss. 443.

Missouri. — Deuser *v.* Walkup, 43 Mo. App. 625; Hamil *v.* England, 50 Mo. App. 338.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

Ohio. — King *v.* Barrett, 11 Ohio St. 261.

South Dakota. — Austin T. & W. Mfg. Co. *v* Heiser, 6 S. D. 429, 437, 61 N. W. 445.

West Virginia. — State *v.* Douglas, 20 W. Va. 770, 780.

85. Protection of Client. — *United States.* — Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 U. S. App. 438.

California. — *In re* Mullin's Estate, 110 Cal. 252, 42 Pac. 645.

Georgia. — O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202; State *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356.

Maine. — McLellan *v.* Longfellow, 32 Me. 494, 54 Am. Dec. 599.

Massachusetts. — Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802.

Michigan. — Hamilton *v.* People, 29 Mich. 173, 183.

New Hampshire. — Sleeper *v.* Abbott, 60 N. H. 162.

"The rule is, that the solicitor must conceal the communications of his client, and that not for his own sake, but for the sake of his clients." Hutchins *v.* Hutchins, 1 Hogan (Irish) 315.

86. To Encourage Confidence. — Sleeper *v.* Abbott, 60 N. H. 162. Crosby *v.* Berger, 11 Paige (N. Y.) 377, 42 Am. Dec. 117.

"There must be the freest possible communication between solicitor and client, and it is on this ground that professional communications are entitled to privilege, which excepts them from the general rule." Southwark & V. W. Co. *v.* Quick, 47 L. J. Q. B. 258, 3 Q. B. Div. 315, *affirming* 38 L. T. 28.

In Wade *v.* Ridley, 87 Me. 368, 32 Atl. 975, the court says: "An order of men, honorable, enlightened, learned in the law and skilled in legal procedure, is essential to the beneficient administration of justice. The aid of such men is now practically indispensable to the orderly, accurate and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts, without fear that his statements may be possibly used against him. For these reasons, the rule above stated should be construed liberally in favor of those seeking legal advice. It does not apply, of course, where it is sought to find a way to violate some law."

"This privilege is essential to public justice, for did it not exist, no man would dare to consult a professional adviser, with a view to his defense, or to the enforcement of his rights." State *v.* White, 19 Kan. 445, 27 Am. Rep. 137.

5. To Whom Belongs. — The privilege belongs to the client.[87]

Client Public Official, Immaterial. — Privilege extends to communications made between public officers and their attorneys.[88]

Trustee Acting as Attorney for One Beneficiary. — If an attorney who is trustee for two beneficiaries acts as attorney for one of them in

87. *England.* — Strode *v.* Seaton, 2 Ad. & El. 171; Merle *v.* More, Ry. & M. 390; *In re* Cameron's etc. R. Co., 25 Beav. 1; 53 Eng. Reprint 535; Wright *v.* Mayer, 6 Ves. Jr. 280, 31 Eng. Reprint 1051; Gresley *v.* Mousley, 2 Kay & J. 288, 69 Eng. Reprint, 789. Intimated to the contrary in Maddox *v.* Maddox, 1 Ves. Sr. 62, 27 Eng. Reprint 892; Procter *v.* Smiles, 55 L. J. N. S. Q. B. 527, *affirming s. c. ib.* 467; Original Hartlepool Collieries Co. *v.* Moon, 30 L. T. N. S. 193; *affirmed*, 30 L. T. N. S. 585.

United States. — Chirac *v.* Reinecker, 11 Wheat. 280, 289; Hunt *v.* Blackburn, 128 U. S. 464.

California. — People *v.* Atkinson, 40 Cal. 284; Weidekind *v.* Tuolumne County Water Co., 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445. *In re* Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545. *In re* Mullin's Estate, 110 Cal. 252, 42 Pac. 645.

Georgia. — Martin *v.* Anderson, 21 Ga. 301; O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202; Stone *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356.

Illinois. — Fossler *v.* Schriber, 38 Ill. 172; Scott *v.* Harris, 113 Ill. 447; People *v.* Barker, 56 Ill. 300.

Indiana. — Bigler *v.* Reyher, 43 Ind. 112; Wilson *v.* Ohio Farmers' Ins. Co., 164 Ind. 462, 72 N. E. 892.

Kentucky. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592.

Louisiana. — Morris *v.* Cain's Exrs., 39 La. Ann. 712, 726, 1 So. 797; 2 So. 418.

Maine. — Aiken *v.* Kilburne, 27 Me. 252.

Maryland. — Chase's Case, 1 Bland's Ch. 206, 17 Am. Dec. 377; Hodges *v.* Mullikin, 1 Bland's Ch. 503. *Ex parte* Maulsby, 13 Md. 625.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415.

Michigan. — Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62; Maynard *v.* Vinton, 59 Mich. 139, 151; 26 N. W. 401, 60 Am. Rep. 276; People *v.* Gallagher, 75 Mich. 512, 42 N. W. 1063.

Minnesota. — State *v.* Tall, 43 Minn. 273, 45 N. W. 449.

Mississippi. — Perkins' Admr. *v.* Guy, 55 Miss. 153, 178, 30 Am. Rep. 510.

Missouri. — Hamil *v.* England, 50 Mo. App. 338.

New Hampshire. — Sleeper *v.* Abbott, 60 N. H. 162.

New York. — Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Benjamin *v.* Coventry, 19 Wend. 353; Britton *v.* Lorenz, 3 Daly 23, *affirmed* in 45 N. Y. 51.

Ohio. — Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362; King *v.* Barrett, 11 Ohio St. 261.

Pennsylvania. — Beltzhoover *v.* Blackstock, 3 Watts 20, 27 Am. Dec. 330; Moore *v.* Bray, 10 Pa. St. 519; Dowie's Estate (Appeal of McNulty), 135 Pa. St. 210; 19 Atl. 936.

South Carolina. — Stoney *v.* McNeil, Harp. L. 557, 18 Am. Dec. 666.

Texas. — Smith *v.* Boatman Savings Bank, 1 Tex. Civ. App. 115, 123, 20 S. W. 1119.

Virginia. — Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513; Clay *v.* Williams, 2 Munf. 105, 5 Am. Dec. 453.

In Ramsbotham *v.* Senior, L. R. 8 Eq. (Eng.) 575, the court says: "With regard to the privilege, I believe I am right in saying that the universal rule is, that the privilege of the solicitor is not his privilege, but the privilege of the client, and therefore, if the circumstances are such that the client has no privilege, the solicitor can have none, because it is only for the sake of the client that the privilege of the solicitor of not producing documents exists."

88. **Client Public Official.** — Paxton *v.* Steckel, 2 Pa. St. 93.

litigation between them, communications between himself and his client are not privileged as against the other beneficiary.[89]

Agent Cannot Claim. — If an agent communicate with his principal's attorney concerning principal's business, he cannot, on his own behalf, object to the attorney testifying concerning the matter communicated.[90]

Trustee. — Nor can a trustee, as against his beneficiary, so object to communications between himself and an attorney concerning the trust estate.[91]

Co-Trustees. — Communications between co-trustees, one of whom acts as attorney for the other, are not privileged as against a beneficiary of the trust.[92]

When Trustee May Claim. — Trustee may claim privilege as to communications between himself and attorney, had after the institution of an action by beneficiary of trust against trustee concerning the subject of the trust,[93] also as to opinions of counsel taken by trustee in reference to similar proceedings in another suit.[94]

Representatives of Deceased Trustee may, in an action by beneficiary concerning the subject of the trust, claim privilege as to communications between themselves and their attorney.[95]

Executor. — It has been held in England that a surviving executor who had not acted in testator's affairs cannot be compelled to produce cases and opinions of counsel stated and given on behalf of a deceased executor who had acted, such cases and opinions relating to a claim against deceased executor of the same nature as the claim against the surviving executor.[96]

Corporation. — Nor can a corporation, as against one of its stock-

89. Tugwell *v.* Hooper, 10 Beav. 348, 16 L. J. Ch. 171, 50 Eng. Reprint 616.

90. Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483. In this case a husband caused an attorney to prepare a paper for his wife. In an action involving this paper the attorney was questioned concerning it. To such questions the husband's administrator objected. It did not appear that the wife, who was a party to the action objected. *Held,* that the testimony was admissible, the court holding that, as the husband acted in the matter as agent for his wife, the relation of attorney and client existed between her and the attorney, and she alone could claim the privilege.

In Leyner *v.* Leyner, 123 Iowa 185, 98 N. W. 628, it is held that if the principal waive privilege as to matters communicated to his attorney by his agent, the attorney may testify against the agent concerning such matters.

See also State *v.* McChesney, 16 Mo. App. 259, 268.

91. Devaynes *v.* Robinson, 20 Beav. 42, 52 Eng. Reprint 518; Wynne *v.* Humberston, 27 Beav. 421, 54 Eng. Reprint 165; Talbot *v.* Marshfield, 2 Drew. & S. 549, 62 Eng. Reprint 728. *In re* Mason *v.* Cattley, L. R., 22 Ch. Div. 609, 52 L. J. N. S. Ch. 478; 48 L. T. 631.

92. *In re* Postlethwaite, L. R. 35 Ch. Div. 722.

93. Talbot *v.* Marshfield, 2 Drew. & S. 549, 62 Eng. Reprint 728; Bacon *v.* Bacon, 34 L. T. N. S. (Eng.) 349.

94. Underwood *v.* Secretary of State, 35 L. J. Ch. 545, 14 L. T. 385.

95. Devaynes *v.* Robinson, 20 Beav. 42, 52 Eng. Reprint 518.

96. Adams *v.* Barry, 2 Younge & C. (Eng.) 167, 63 Eng. Reprint 73.

holders, object to the proof of communications between its officers and its attorney.[97]

Attorney for Two Clients, Without Common Interest in the Same Matter, is not bound to disclose to one communication made by him to the other.[98]

6. Nature of Privilege. — A. Confers Right on Client. — Possession of this privilege confers upon the client the right to prevent confidential communications being given in evidence.[99]

a. *To Exclude Attorney's Testimony.* — **(1.) Matters Communicated by Client.** — Possessing this right, client may prevent his attorney testifying as to the matter of any statement confidentially made by client.[1]

Attorney Not Compelled or Permitted to Testify. — An attorney cannot, without the consent of his client, be compelled, and will not be permitted to disclose his client's statements.[2]

(2.) Matters Communicated by Agent. — Privilege extends to matters communicated to an attorney by client's agent in the course of transacting business for his principal.[3]

97. In Gouraud *v.* Edison Co., 59 L. T. N. S. (Eng.) 813, the decision seems to be based upon the principle that as corporate funds had been used in obtaining opinions and advice of counsel, the corporation held such information in trust for its shareholders and must disclose it to them.

As to municipal corporation and rate payer, see Mayor of Bristol *v.* Cox, L. R., 26 Ch. Div. 678, 50 L. T. N. S. 719.

98. *Ex parte* The Assignee, 27 L. T. N. S. (Eng.) 460.

99. Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456; Hamil *v.* England, 50 Mo. App. 338.

As to "Right" see Liggett *v.* Glenn, 51 Fed. 381, 396, 2 C. C. A. 286, 4 N. S. App. 438, where the court referring to the general principle of privilege, says: "It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive."

1. See cases cited in note 80 *ante*, under III, 1, and note 76 under III, 10, *post*.

2. "The courts will never compel, or even allow, an attorney to disclose facts communicated to him by his client." People *v.* Barker, 56 Ill. 300. See also Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453; Thorp *v.* Goewey, 85 Ill. 611; Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362; Rogers *v.* Daré, Wright (Ohio) 136; King *v.* Barrett, 11 Ohio St. 261; Morris *v.* Cain's Exrs. 39 La. Ann. 712, 726, 1 So. 797, 2 So. 418; Struckmeyer *v.* Lamb, 75 Minn. 366, 77 N. W. 987; State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160.

3. *England.* — Bunbury *v.* Bunbury, 2 Beav. 173, *s. c.* 1 Beav. 318, 48 Eng. Reprint 1146; Carpmael *v.* Powis, 9 Beav. 16, 1 Phil. 687; *s. c. affirmed* 15 L. J. N. S. Ch. 275, 50 Eng. Reprint 248; Walker *v.* Wildman, 6 Madd. 47, 56 Eng. Reprint 1007; Russell *v.* Jackson, 9 Hare 387; *s. c.* 21 L. J. Ch. 146, 15 Jur. 1117, 68 Eng. Reprint 558.

Canada. — Lawton *v.* Chance, 9 N. B. 411.

Indiana. — Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483; City of Indianapolis *v.* Scott, 72 Ind. 196.

New Hampshire. — Chamberlain *v.* Davis, 33 N. H. 121, 131.

Vermont. — Strong *v.* Dodds, 47 Vt. 348.

Letters sent to agent by client to be communicated to attorney are privileged. Reid *v.* Langlois, 1 Macn. & G. (Eng.) 627, see note 84, under III, 10, D. b, *post*.

Authority Must Appear. — To entitle such communications to privilege, agent's authority to make them must appear.[4]

(3.) Attorney's Statements or Advice to Client. — An attorney cannot testify concerning his statements or advice to his client.[5]

(4.) Matters Communicated Between Attorneys for Same Client. — The client may object to testimony of one of his attorneys concerning communications between witness and other attorneys for client.[6]

b. *To Refuse to Testify.* — The rule also gives client the right to refuse to give his own testimony as to the matter of confidential communications between himself and his attorneys.[7]

4. Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

5. Statements or Advice of Attorney. — Lewis *v.* State, 91 Ga. 168, 16 S. E. 986; People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484; Erickson *v.* Milwaukee L. S. & W. R. Co., 93 Mich. 414, 53 N. W. 393.

In Jenkinson *v.* State, 5 Blackf. (Ind.) 465, it is held that an attorney can not state what he informed his client as to the intent and meaning of certain papers.

6. Communications Between Attorneys. — See United States *v.* Six Lots of Ground, 1 Wood C. C. (U. S.) 234, where it is held that correspondence between attorney general of the United States and a district attorney in regard to a criminal prosecution is confidential.

In Jones *v.* Nantahala M. & T. Co., 137 N. C. 237, 49 S. E. 94, action was brought by attorneys to recover from their clients the value of services rendered. An attorney who had been associated with plaintiffs, introduced by defendants, testified that plaintiffs' charges were exorbitant. On cross-examination he was questioned in regard to a letter he had written plaintiffs, and a copy of the letter was admitted over defendants' objection. *Held,* that the letter was privileged. The court says: "The objection was hat it was a confidential communication between attorneys and client, and could not be received as evidence over the objection of the client (the defendant). The letter, upon its face, shows that the matter was of a confidential nature between lawyer and client. It contained matters directly connected with the important features of the litigation, bearing on the amount that might be recovered against the defendant, and which, if they had been known to the opposing side, might have been harmful. The matters being confidential at the time the letter was written, they remained so perpetually, unless they should be afterwards waived by the client. It makes no difference that the carbon copy of the letter was sent to the plaintiffs by the witness. It was just as much a confidential communication as if it had been sent by the client to the plaintiffs. All communications, whether by conversation or in writing, between the attorneys for a party concerning the subject-matter of the litigation, are privileged."

Letters Between Attorneys. — See note 86, under III, 10, D, d, *post.*

7. Client Not Compellable to Testify. — *England.* — Pearse *v.* Pearse, 1 De G. & S. 12; *s. c.* 16 L. J. Ch. 153, 11 Jur. 52, 63 Eng. Reprint 950.

Alabama. — Birmingham R. & E. Co. *v.* Wildman, 119 Ala. 547, 24 So. 548.

Arkansas. — Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406.

California. — Verdelli *v.* Gray's Harbor, C. Co., 115 Cal. 517, 526, 47 Pac. 364.

Indiana. — Jenkinson *v.* State, 5 Blackf. 465; George *v.* Hurst, 31 Ind. App. 660, 68 N. E. 1031; Bigler *v.* Reyher, 43 Ind. 112.

Iowa. — Barker *v.* Kuhn, 38 Iowa 392.

Kansas. — State *v.* White, 19 Kan. 445, 27 Am. Rep. 137, *cited* in Wilkins *v.* Moore, 20 Kan. 538.

Nebraska. — Basye *v.* State, 45 Neb. 261, 283, 63 N. W. 811.

New York. — Carnes *v.* Platt, 15

B. Attorney Not Incompetent as Witness. — The rule does not make the attorney incompetent as a witness for or against his client.[8] Consequently, a client cannot object to his attorney being

Abb. Pr. N. S. 337, 391; People *v.* Gilon, 9 N. Y. Supp. 243.

Ohio. — Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362.

Texas. — Herring *v.* State (Tex. Crim.), 42 S. W. 301; Fort Worth & D. C. R. Co. *v.* Lock, 30 Tex. Civ. App. 426, 70 S. W. 456.

Vermont. — Hemenway *v.* Smith, 28 Vt. 701.

Wisconsin. — Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

In Kennedy *v.* Lyell, 23 Ch. Div. 387, 48 L. T. N. S. 455, the court says: "Having regard to the way in which the solicitor was employed on behalf of his client for the purpose of protecting his interests and obtaining evidence for his defense, I am of opinion that the client is not bound to disclose any information given him by his solicitor as to the inferences drawn by him, or as to the effect on his mind of what he has seen or heard, any more than he would be bound to produce as a whole the confidential reports made to him, whether in writing or verbally, by his solicitor, as to the result of the inquiries which the solicitor has made."

Client Turning State's Evidence. Accomplice. — In Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321, it is held that if a person turn state's evidence against his accomplice in crime, he may, for purposes of impeachment, be asked on cross-examination, if he had not made certain statements to his attorney, and he will not be permitted to refuse to answer on the ground that his statements were privileged. The court says: "The witness Bush was an accomplice in the crime for which the defendants, his associates, were on trial. He had been led to give evidence for the people under an express or implied promise of pardon, or that he should not be prosecuted, on condition that he should make a full and fair confession of the truth. It is a rule of law, that no witness shall be required to answer any question that may tend to criminate himself, yet the accomplice, when he enters the witness box with a view of escaping punishment himself, by a betrayal of his co-workers in crime, yields up and leaves that privilege behind him. He contracts to make a full statement, to keep back nothing, although in doing so he may but confirm his own guilt and infamy. If he fails to do so in full, if he knowingly keeps back any portion of the history of the crime he undertakes to narrate, he forfeits his right to pardon, and may be proceeded against and convicted upon his own confession, already made: Rex *v.* Rudd, Cowper, 331; Com. *v.* Knapp, 10 Pick., 477; 2 Russell on Cr., 958, note a. We think an accomplice who makes himself a witness for the people should be required to give a full and complete statement of all that he and his associates may have done or said, relative to the crime charged, no matter when or where done, or to whom said. He should be allowed no privileged communications. These he has voluntarily surrendered. The enforcement of such a rule may be the only protection the party on trial has left—the only means remaining to him to meet, it may be, the perjury of the criminal upon the witness stand."

8. Attorney Not Made Incompetent. — *United States.* — Baldwin *v.* National Hedge & W. F. Co., 73 Fed. 574, 19 C. C. A. 575.

Arkansas. — Milan *v.* State, 24 Ark. 346.

California. — Wood *v.* Etiwanda Water Co., 147 Cal. 228, 81 Pac. 512.

District of Columbia. — Oliver *v.* Cameron, McArthur & M. 237.

Florida. — Buckmaster *v.* Kelley, 15 Fla. 180, 193.

Georgia. — Smith *v.* Wilkins, 113 Ga. 140, 38 S. E. 406; Sharman *v.* Morton, 31 Ga. 34, 45.

Missouri. — State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160; Riddles *v.* Aikin, 29 Mo. 453.

sworn as a witness;[9] and an attorney cannot refuse to be sworn.[10]

C. Matter Communicated Not Incompetent. — The effect of the rule is not to make the matter communicated incompetent.[11]

D. Privilege Relates to Communication. — The privilege applies to the communication.[12]

Character Not Changed by Fact of Payment of Fee. — Non-privileged knowledge of attorney is not rendered privileged by the fact that the person with whom he transacts business for his client pays the attorney's fee.[13]

E. Test as to Character of Communication. — Whether or not a given communication shall be held privileged, depends upon the circumstances under which the attorney acquired the knowledge, or imparted the advice in question.[14]

Pennsylvania. — Follansbee *v.* Walker, 72 Pa. St. 228, 13 Am. Rep. 671.

Texas. — Houx *v.* Blum, 9 Tex. Civ. App. 588, 29 S. W. 1135.

Attorney May Testify to communications when called as a witness by his client. Riddles *v.* Aikin, 29 Mo. 453.

"But this obligation of secrecy is the privilege of the client, not the incompetency of the solicitor." Chase's Case, 1 Bland's Ch. (Md.) 206, 17 Am. Dec. 277.

9. Oliver *v.* Cameron, McArthur & M. (D. C.) 237.

10. *In re* Woodward, 4 Ben. 102, 30 Fed. Cas. No. 17,999; Wisden *v.* Wisden, 6 Hare 549, 67 Eng. Reprint 1281.

11. In Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456, the court says: "It is not the communication itself from an attorney to his client that is incompetent; but the attorney is prevented from testifying concerning it."

12. "The privilege applies to the *communication;* and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or his attorney." Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362, *citing* Wharton on Ev. § 588, and Stephen's Ev. art. 115.

On this subject, see discussion in Liggett *v.* Glenn, 51 Fed. 381, 395, 2 C. C. A. 286, 4 U. S. App. 438.

"Such communications are not excluded on account of a privilege which an attorney may waive because it is a personal one, but on account of a privilege attached to the communication, for the better administration of justice, and which can only be separated from it, by the consent of the client." Aiken *v.* Kilbourne, 27 Me. 252.

In Hoyt *v.* Hoyt, 112 N. Y. 493, 20 N. E. 402, speaking of New York statute which embodied the rule of the common law, the court of appeals of New York says: "The rule does not prohibit the examination of such classes of witnesses; but it prohibits the evidence of the character described from being given in the face of an objection."

13. **Character Not Changed by Payment.** — Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644.

14. **Test.** — "The determination of this question (i. e. privileged or non-privileged communication) must necessarily depend upon the circumstances under which the particular 'matter or thing' claimed to be privileged came to be known to the witness. If 'by virtue of his relations as attorney,' he may not testify; otherwise, if 'he may have acquired in any other manner' knowledge thereof." O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

"The test or rule deducible from the authorities seems to be this: If the statements of fact were made to an attorney at law in good faith, for the purpose of obtaining his professional guidance or opinion, they are privileged; otherwise they are not privileged." Wade *v.* Ridley, 87 Me. 368, 32 Atl. 975.

F. Not Affected by Change of Common Law Rule. — Privilege is not affected by statute which changes the common law rule and permits parties to testify in their own behalf, or requires them to testify when called by opponent.[15]

7. Essentials. — A. Attorney. — To exclude evidence on the ground that its disclosure would violate professional confidence, it must appear that the communication in question was made to a member of the legal profession, as an attorney, barrister, counsel or solicitor.[16]

"In determining whether or not an attorney should be required or permitted to testify to a conversation between himself and another person without the consent of the latter, the test is: Had such person at the time of the conversation employed the attorney in his professional capacity in respect to the subject matter of the conversation? If yes, the testimony would not be admissible; otherwise, it would be." Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848.

"The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relation existing between client and counsel, it becomes a privileged communication, and as such it is not competent evidence against the client. Its competency is not dependant upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty." Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 N. S. App. 438. In this case it was claimed that, because a certain document had passed out of an attorney's possession, it could be introduced in evidence.

15. Brand *v.* Brand, 39 How. Pr. (N. Y.) 193, 261.

16. *Illinois.* — McLaughlin *v.* Gilmore, 1 Ill. App. 563.

Iowa. — Sample *v.* Frost, 10 Iowa 266; Charles City Plow & Mfg. Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280.

North Carolina. — State *v.* Smith, 138 N. C. 700, 50 S. E. 859.

Ohio. — Benedict *v.* State, 44 Ohio St. 679, 688, 11 N. E. 125.

Pennsylvania. — Schubkagel *v.* Dierstein, 131 Pa. St. 46, 54, 18 Atl. 1059, 6 L. R. A. 481.

Vermont. — Holman *v.* Kimball, 22 Vt. 555.

Wisconsin. — Brayton *v.* Chase, 3 Wis. 456.

See also discussion in Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415.

In Pierson *v.* Steortz, 1 Morris (Iowa) 136, it is said that: "The rule of exemption within which it is sought to include this case, has never, we believe, been extended further than to include disclosures made to practicing attorneys for the purpose of obtaining professional advice."

Record Must Show Status. — Before an Appellate Court will rule that certain testimony should have been excluded on the ground that it called for disclosure of privileged communication, it must appear that the person to whom the statement in question was made was a lawyer. Machette *v.* Wanless, 2 Colo. 169, 179.

If a person, not an attorney, is applied to and requested to draw a conveyance, and, after communication with an attorney, advises the person addressing him that he cannot make the proposed conveyance, statements made to the person originally applied to are held not privileged. Doe

a. *Solicitor of Patents.* — Communications between applicant for patent and solicitor of patents are not privileged.[17]

b. *Adviser and Conveyancer.* — Nor are communications to a person who acts as conveyancer and general adviser for people of a village, but who has not been admitted to practice.[18]

c. *Person Admitted in Inferior Courts.* — As to whether communications to persons who have been admitted to practice in inferior courts, but not in superior courts, are privileged, the authorities are conflicting. It has been held that such communications to such persons are privileged;[19] also that they are not.[20]

d. *When Admission Not Necessary.* — Under statute permitting any citizen to prosecute or defend an action by any other citizen

v. Jauncy, 8 Car. & P. (Eng.) 99.

17. Brungger *v.* Smith, 49 Fed. 124.

In England communications to a "Patent Agent" are not privileged. Moseley *v.* Victoria Rubber Co., 55 L. T. N. S. (Eng.) 482.

18. Later *v.* Haywood (Idaho), 85 Pac. 494.

19. Scales *v.* Kelley, 2 Lea (Tenn.) 706; English *v.* Ricks (Tenn.), 95 S. W. 189.

In Benedict *v.* State, 44 Ohio St. 679, 688, 11 N. E. 125, it is *held* that communications to a person who practices before Justice's courts, but not before superior courts, are privileged. So in Tennessee as to person admitted to practice before Justices of the Peace and County Courts. Scales *v.* Kelley; English *v.* Ricks, *supra.* In the case last referred to the court says: "In the court below, Mr. Bond, a witness for the contestants, was permitted to testify—over objection—that the testator offered him $1000 to assist him in obtaining a divorce from his wife. In stating the offer of this fee, the witness was permitted to detail a rather extended conversation between himself and his proposed client in respect of the relations existing between the latter and his wife. The ground of the objection was that Bond was an attorney and was consulted by Mr. English in that capacity. It appears from the testimony of Mr. Bond that he had a license only under the statute permitting him to practice before justices of the peace.

One acting under such limited license would, of course, have no power to conduct a divorce proceeding, since justices of the peace are without jurisdiction in such matters. However, the relations between an attorney of this grade and one consulting him upon legal rights would, nevertheless, be confidential. It is true, strictly speaking, all that such embryonic attorney could legally do would be to employ some lawyer having a general license and turn the fee over to him; yet, it would not be proper to permit one having such limited license to obtain confidential communications on the faith of his office as an attorney and then to divulge them on the ground that the particular kind of case was beyond his legal powers. Public policy requires that confidential communications between client and counsel shall be held sacred. We think the whole conversation was incompetent, and should have been excluded."

20. McLaughlin *v* Gilmore, 1 Ill. App. 563. In this case a man testified that a certain person had consulted with him in regard to the defense of an action pending before a justice of the peace; also that witness was not a licensed attorney, never having been admitted to practice before the supreme court, but that he did practice in justice's courts. *Held,* that the communication was not privileged, on the ground that witness was not a lawyer, as the laws of Illinois recognized as lawyers those only who were eligible to practice before the supreme court.

of good moral character, communications between a party to an action and a non-professional person who represents him in such action are privileged.[21]

e. *Active Practice Not Necessary.* — It is not necessary that the attorney be in active practice.[22]

f. *Scrivener Acting as Attorney.* — It has been held that the privilege extends to a scrivener who acts as attorney in a particular transaction.[23]

g. *Admission in Country Where Privilege Claimed, Unnecessary.* Communications to an attorney are privileged, although made to him in a country in which he has not been admitted to practice, and privilege is claimed in a court of that country.[24]

h. *Person Addressed Must be Known to be Attorney.* — It is necessary that the person to whom a professional communication is made, be known by the party communicating, to be an attorney.[25]

Belief Not Sufficient. — It has been held that it is not sufficient that the person making a given communication believes the person addressed to be a member of the legal profession.[26]

But if belief in existence of relation is caused by fraud, or mistake, communications made under the influence of such belief are privileged.[27]

21. Bean *v.* Quimby, 5 N. H. 94. In this case it was sought to exclude the testimony of a person who, not having been admitted to practice, had represented another person in an action. The court cited a statute of 1771, permitting any citizen of the state to prosecute or defend an action by any other citizen of good moral character. *Held,* that communications between such persons were privileged.

22. Charles City Plow & Mfg. Co. *v.* Jones, 71 Iowa 234, 239, 32 N. W. 280.

23. Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453.

24. Lawrence *v.* Campbell, 4 Dr. (Eng.) 485; *s. c.* 28 L. J. N. S. Ch. 780, 5 Jur. N. S. 1071, 62 Eng. Reprint 186.

25. Hawes *v.* State, 88 Ala. 37, 68, 7 So. 302; Barnes *v.* Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734; Sample *v.* Frost, 10 Iowa 266; Union Pac. R. Co. *v.* Day, 68 Kan. 726, 75 Pac. 1021.

See remarks of court in Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

26. Hawes *v.* State, 88 Ala. 37, 68, 7 So. 302; Barnes *v.* Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734; Sample *v.* Frost, 10 Iowa 266.

This principle is stated by the court in Foster *v.* Hall, 12 Pick (Mass.) 89, 22 Am. Dec. 400, in discussing the general rules governing communications between attorney and client, the court giving as authority for this proposition, Fountain *v.* Young, 6 Esp. (Eng.) 113.

27. Belief Sufficient, if Induced by Fraud. — In People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 546, 1 Am. St. Rep. 501, the court says: "The respondents then examined the witness Cross, and also the prosecuting attorney and sheriff, whose testimony did not show that any confessions were obtained from respondents by means of threats, or by promises of favor, or by holding out to the flattery of hope; but did show, conclusively, that artifice and deception were used to obtain a confession from respondents. This was accomplished through a detective agency of Chicago, by which a detective, by artifice and deception, personated, and led respondents to believe that he was a lawyer of celebrity from Chicago; and in the confidence of that supposed relation obtained from them

i. *Attorney's Clerk or Agent.* — Communications to employes or agents of an attorney are privileged, if made to or by them in the course of the performance of their duty to their employer, in regard to professional business of person making the communications.

Clerk. — Thus, communications are privileged when made to or by, or in the presence of an attorney's clerk,[28] or agent.[29]

Agent to Collect Evidence. — If an attorney employ an agent to collect evidence to be used in the conduct of his client's case, communications between such agent and the client, and between agent and attorney, are privileged.[30]

Must Be Agent in Law Business. — To entitle communications to an

a statement of their connection with the crime. Confidential communications made in reliance upon the supposed relation of attorney and client, whether party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice. Indeed, the confessions thus obtained, when offered in evidence, were promptly excluded by the court. The confessions sought to be introduced were statements to or in the hearing of other parties having no connection whatever with the pretended lawyer, and upon other and different occasions. There was no testimony showing what statements the detective made to respondents to induce them to confide in him, or to make any confessions to him, other than that of his being an attorney from Chicago, at the time the circuit judge decided to admit the testimony of the witnesses relative to the alleged confessions."

In Calley *v.* Richards, 19 Beav. 401, 52 Eng. Reprint 407, a person addressed letters to a solicitor who had ceased to practice, but whose name remained in his firm, not knowing of the cessation from business. *Held,* the letters were privileged.

The distinction between cases cited in note immediately preceding, and those cited in this note is obvious. In the former cases witness was not and had not been, a lawyer. In Richards *v.* Calley, witness had been solicitor for the person addressing him, and, so far as the record shows, there was nothing to put such person upon inquiry as to a change of *status* or relationship. In People *v.* Barker, the making of the communication in question was obtained by fraud.

28. **Clerk.** — *England.* — Taylor *v.* Forster, 2 Car. & P. 195; 12 E. C. L. 85; Rex. *v.* Upper Bodington, 8 Dowl. & Ryl. 726, 16 E. C. L. 348.

Alabama. — Hawes *v.* State, 88 Ala. 37, 68, 7 So. 302.

California. — Landsberger *v.* Gorham, 5 Cal. 450.

Illinois. — Kinney *v.* Bauer, 6 Ill. App. 267.

Indiana. — Indianapolis *v.* Scott, 72 Ind. 196, 203.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415.

New York. — Sibley *v.* Waffle, 16 N. Y. 180.

In Jackson *v.* French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699, it is said that the cases differ on the question whether or not communications made to a clerk in a lawyer's office are privileged.

29. **Agent.** — Parkins *v.* Hawkshaw, 2 Stark. 239, 3 E. C. L. 333.

Attorney Employed by Another. Communications made by a person to an attorney employed by such person's attorney are privileged. State *v.* Mewherter, 46 Iowa 88, 94.

Reports made by one solicitor to another by whom he is employed to examine and report upon records, his report to be used in conduct of litigation for his employer's client, are privileged. Churton *v.* Frewen, 2 Dr. & S. 390, 62 Eng. Reprint 669.

30. Steele *v.* Stewart, 1 Phil. 471, *affirming s. c.* 13 Sim. 533, 14 L. J. Ch. 34, 9 Jur. 121, 41 Eng. Reprint 711; Churton *v.* Frewen, 2 Dr. & S. 390, 62 Eng. Reprint 669.

agent to privilege, such agent must act for his principal in conducting his professional business.[31]

j. *Stenographer.* — Communications to an attorney in presence of his stenographer are privileged, and stenographer cannot give such communications in evidence.[32]

k. *Interpreter.* — So as to statements made to an interpreter to be translated to an attorney.[33]

l. *Student.* — Communications to a student in a lawyer's office are not privileged, unless the student was acting as a clerk.[34]

m. *Requisites of Communication to Clerk, Etc.* — Communications to clerk or agent not privileged unless it appear that they related to the business upon which their employer was engaged for his client, and were made to enable him to perform his professional duty.[35]

B. Attorney Must be Consulted Professionally. — To entitle a client to exclude his attorney's testimony on the ground of privilege, it must appear that his communication was made to the attorney professionally, the mere fact that witness was an attorney not being sufficient.[36]

31. Goddard *v.* Gardner, 28 Conn. 172. In this case client had a conversation with his attorney in the presence of the latter's son, who was his father's agent in conducting a farm and other business, but rendered no service in regard to law business. *Held*, that the son could be compelled to give such conversation in evidence.

32. In State *v.* Brown, 2 Marv. (Del.) 380, 36 Atl. 458, the statements in question were made to a stenographer in the office of the attorney-general, in preparing a case for trial.

33. Interpreter, Client's Statements to. — DuBarre *v.* Livette, 1 Peake N. P. (Eng.) 108; Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Jackson *v.* French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453.

Attorney to Interpreter. — As to attorney's statements to interpreter, see Maas *v.* Bloch, 7 Ind. 202.

34. Knight *v.* Sampson, 99 Mass. 36; Andrews *v.* Solomon, 1 Pet. C. C. (U. S.) 356.

Even if Student is Supposed by Client to be an Attorney. — In Barnes *v.* Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734, and in Hawes *v.* State, 88 Ala. 37, 68, it is held that communications made to a student in a lawyer's office are not privileged, even if the person making it supposed the student to be an attorney.

Or Employed to Assist in Litigation. — Schubkagel *v.* Dierstein, 131 Pa. St. 46, 54, 18 Atl. 1059.

Or Conduct Litigation. — Holman *v.* Kimball, 22 Vt. 555.

35. Com. *v.* Best, 180 Mass. 492, 62 N. E. 748; Morton *v.* Smith (Tex. Civ. App.), 44 S. W. 683; Vaillant *v.* Dodemead, 2 Atk. 524, 26 Eng. Reprint 715.

Attorney's clerk held to be within the rule, but testimony held competent on another ground. Lecour *v.* Importers' & T. Nat. Bank, 6 App. Div. 163, 70 N. Y. Supp. 419.

Agent or Clerk Not Known to be Such. — Communications made to a person who is in fact agent or clerk of the attorney, but who is not known by client to be such, are not privileged. Hawes *v.* State, 88 Ala. 37, 68, 7 So. 302.

36. *England.* — Bunbury *v.* Bunbury, 2 Beav. 173, 48 Eng. Reprint 1146; Wilson *v.* Rastall, 4 Term. Rep. 754, 759.

United States. — Laflin *v.* Herrington, 1 Black. 326; *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591; *In re* O'Donohoe, 18 Fed. Cas. No. 10,435.

a. *Attorney as Friend.* — Communications made to an attorney as a friend, and not for the purpose of enabling him to render professional service, are not privileged.[37]

b. *Capacity in Which Consulted. — How Determined.* — The na-

Alabama. — State *v.* Marshall, 8 Ala. 302.

California. — Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

Colorado. — Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599.

District of Columbia. — Patten *v.* Glover, 1 App. Cas. 466.

Georgia. — O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

Illinois. — Granger *v.* Warrington, 8 Ill. 299, 308; Goltra *v.* Wolcott, 14 Ill. 88; City of Rockford *v.* Falver, 27 Ill. App. 604.

Indiana. — Borum *v.* Fouts, 15 Ind. 50; McDonald *v.* McDonald, 142 Ind. 55, 74, 41 N. E. 336.

Iowa. — Sample *v.* Frost, 10 Iowa 266; Shaffer *v.* Mink, 60 Iowa 754, 14 N. W. 726.

Kansas. — State *v.* Herbert, 63 Kan. 516, 66 Pac. 235.

Louisiana. — Reeves *v.* Burton, 6 Mart. (N. S.) 283.

Michigan. — Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321.

Nebraska. — Mills *v.* State, 18 Neb. 575, 26 N. W. 354.

New Hampshire. — Brown *v.* Payson, 6 N. H. 443.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Dec. 627; Hoffman *v.* Smith, 1 Caines 157; Matter of Monroe, 2 Connolly 395; Bogert *v.* Bogert, 2 Edw. Ch. 399; Crosby *v.* Berger, 4 Edw. Ch. 254; *s. c.* on appeal, judgment *affirmed*, same ruling as to privileged communications, see Crosby *v.* Berger, 11 Paige Ch. 377; Clark *v.* Richards, 3 E. D. Smith 89, Haulenbeek *v.* McGibbon, 60 Hun. 26, 14 N. Y. Supp. 393; People *v.* Hess, 80 App. Div. 143, 40 N. Y. Supp. 486; Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. Supp. 539, *affirmed* without opinion 176 N. Y. 613, 68 N. E. 1114.

Pennsylvania. — Beeson *v.* Beeson, 9 Pa. St. 279.

Texas. — Orman *v.* State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Vermont. — Thompson *v.* Kilborne, 28 Vt. 750, 67 Am. Dec. 742; Dixon *v.* Parmelee, 2 Vt. 185; Coon *v.* Swan, 30 Vt. 6; State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429.

Virginia. — Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513.

37. *England.* — Wilson *v.* Rastall, 4 T. R. 4 Durnf. & E. 753; Greenlaw *v.* King, 1 Beav. 137; *s. c.* 8 L. J. Ch. N. S. 92, 48 Eng. Reprint 891; Smith *v.* Daniell, 44 L. J. Ch. 189, L. R. 18 Eq. 649, 654, 30 L. T. 752.

District of Columbia. — Patten *v.* Glover, 1 App. Cas. 466.

Georgia. — O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

Illinois. — Goltra *v.* Wolcott, 14 Ill. 88.

Nebraska. — Mills *v.* State, 18 Neb. 575, 26 N. W. 354.

New York. — Hoffman *v.* Smith, 1 Caines 157; Avery *v.* Mattice, 9 N. Y. Supp. 166, 29 N. Y. St. 706, *affirmed* 132 N. Y. 601, 30 N. E. 1152; Haulenbeek *v.* McGibbon, 14 N. Y. Supp. 393; *s. c.* 60 Hun 26; People *v.* Hoss, 8 App. Div. 143, 40 N. Y. Supp. 486.

Pennsylvania. — Beeson *v.* Beeson, 9 Pa. St. 279.

South Carolina. — Branden *v.* Gowing, 7 Rich. 459, 472.

Texas. — Walker *v.* State, 19 Tex. App. 176.

Vermont. — Coon *v.* Swan, 30 Vt. 6.

So where in arranging a transaction, an attorney acts as friend of both parties, and each of them contributes to his expenses. Haulenbeek *v.* McGibbon, 14 N. Y. Supp. 393. Or where he acts as attorney for both parties without compensation. Ewers *v.* White's Estate, 114 Mich. 266, 72 N. W. 184. In this case the court says: "The claimant's case was established by the testimony of William N. Brown, an attorney at law. His testimony as to statements made by Dr. White was objected to,

ture of the application to the attorney will be considered in determining whether or not he was consulted in his professional capacity.[38]

(1.) Inference From Former Employment. — The fact that witness had, both prior and subsequent to the communication sought to be given in evidence, acted as attorney for the person against whom his testimony is offered, justifies the inference that he was consulted professionally.[39]

(2.) Prior Employment Alone, Not Sufficient. — But a given communication will not be held privileged from the mere fact that, prior to its making, witness had acted as general attorney for the person communicating.[40]

(3.) Attorney's Belief as to Character, Not Conclusive. — The character of the communication is not affected by the fact that the attorney regarded it in the light of a casual conversation, if it related to matters such as are usually the subject of professional advice, and the relation of attorney and client existed between witness and the person addressing him.[41]

c. *Acts of Attorney as Business Agent.* — An attorney can be compelled to testify concerning communications relating to acts of a non-professional character which he performs for his client.[42]

Protection does not extend to cases where the attorney is employed in non-professional matters.[43]

on the ground that the relation of attorney and client existed. Mr. Brown testified that he told Dr. White in the beginning that, if there was to be any difficulty between the parties, he should refuse to have anything to do in the matter; that he acted as a friend of both parties. There was no retainer or employment. The testimony was properly admitted. Alderman *v.* People, 4 Mich. 414 (69 Am. Dec. 321)." See also State *v.* Herbert, 63 Kan. 516, 66 Pac. 235.

Letter to Friend Requesting Attorney's Opinion upon stated question, is not privileged. Rex *v.* Brewer, 6 Car. & P. (Eng.) 363.

38. Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

39. Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

40. Branden & Nethers *v.* Gowing, 7 Rich. L. (S. C.) 459, 472. See Rudd *v.* Frank, 17 Ont. Rep. (Can.) 758.

41. Attorney's Belief Not Conclusive. — Moore *v.* Bray, 10 Pa. St. 519.

42. Non-Professional Acts. — *In re* O'Donohoe, Fed. Cas. No. 3,990; Lord Walsingham *v.* Goodricke, 3 Hare 122, 67 Eng. Reprint 322; Hawkins *v.* Gathercole, 1 Sim. N. S. 150, 20 L. J. Ch. 303, 15 Jur. 186, 61 Eng. Reprint 58; Wilson *v.* Rastall, 4 T. R. 753, 759.

In *In re* O'Donohoe, 18 Fed. Cas. No. 10,435, *s. c.*, 2 Hask. 17, 7 Fed. Cas. No. 3,990, it was *held* that an attorney could be compelled to testify whether or not he had charge of an auction sale of his client's effects; also the amount and disposition of proceeds of sale.

In Toms *v.* Beebe, 90 Iowa 612, the court says: "It is held that a statement made to a lawyer by one for whom he had drawn certain releases, and made after the releases were drawn, that they belonged to the grantee in them and that said grantee wished the lawyer to keep them in his safe, is not a confidential communication within Iowa Code, section 3643, which relates to confidential communications to attorneys."

43. Non-Professional Matters Not Protected. — Walker *v.* Wildman, 6 Madd. (Eng.) 47; Lord Walsing-

d. *Attorney and Client as Co-Vendors.* — If attorney and client act together as co-vendors of property, communications between them on the subject of the sale are not privileged.[44]

C. Relation of Attorney and Client Must Exist. — It is also essential that the relation of attorney and client exist as to the subject of the communication; in other words, the attorney must be addressed as the attorney for the person making the communication in question.[45]

a. *Legatee and Executor's Attorney.* — The relation of attorney

ham *v.* Goodricke, 3 Hare 122, 67 Eng. Reprint 322; Hawkins *v.* Gathercole, 1 Sim. N. S. 150, 20 L. J. Ch. 303, 15 Jur. 186, 61 Eng. Reprint 58.

Attorney may be compelled to testify as to his receipt of rents for client. Stratford *v.* Hogan, 2 B. & B. (Irish) 164; Holmes *v.* Matthews, 3 G. Ch. N. C. (Eng.) 379, 384.

44. *In re* Postlethwaite, L. R. 35 Ch. Div. (Eng.) 722.

45. *England.* — Rex *v.* Brewer, 6 Car. & P. 363; Reg. *v.* Farley, 2 Car. & K. 313; Marsh *v.* Keith, 1 Dr. & S. 342, 62 Eng. Reprint 410; Wilson *v.* Rastall, 4 T. R. 754; Greenlaw *v.* King, 1 Beav. 137, 48 Eng. Reprint 891; Marston *v.* Downes, 6 Car. & P. 381.

Canada. — Rudd *v.* Frank, 17 Ont. Q. B. 758.

United States. — *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591; Montgomery *v.* Perkins, 94 Fed. 23.

Alabama. — Williams *v.* McKissack, 117 Ala. 441, 22 So. 489; Baker *v.* Jackson, 40 So. 348.

California. — George *v.* Silva, 68 Cal. 272, 9 Pac. 257; Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26; Carroll *v.* Sprague, 59 Cal. 655.

Georgia. — Thompson *v.* Wilson, 29 Ga. 539; McLean *v.* Clark, 47 Ga. 24; Equitable Securities Co. *v.* Green, 113 Ga. 1013, 39 S. E. 434; Harkless *v.* Smith, 115 Ga. 350, 41 S. E. 634.

Illinois. — Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Thayer *v.* McEwen, 4 Ill. App. 416; Granger *v.* Warrington, 8 Ill. 299, 309; City of Rockford *v.* Falver, 27 Ill. App. 604; Chillicothe Ferry R. & B. Co. *v.* Jameson, 48 Ill. 281.

Indiana. — Scranton *v.* Stewart, 52 Ind. 68; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, 345.

Iowa. — Shaffer *v.* Mink, 60 Iowa 754, 14 N. W. 726.

Kansas. — State *v.* Calhoun, 50 Kan. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838; State *v.* Herbert, 63 Kan. 516, 66 Pac. 235; Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245.

Massachusetts. — Lynde *v.* McGregor, 13 Allen 172; Hoar *v.* Tilden, 178 Mass. 157, 59 N. E. 641.

Michigan. — Lange *v.* Perley, 47 Mich. 352, 11 N. W. 193; Ewers *v.* White's Estate, 114 Mich. 266, 72 N. W. 184; Tucker *v.* Finch, 66 Wis. 17, 27 N. W. 817.

Missouri. — State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160; State *v.* Cummings, 189 Mo. 626, 88 S. W. 706.

Nebraska. — Clay *v.* Tyson, 19 Neb. 530, 26 N. W. 240; Basye *v.* State, 45 Neb. 261, 282, 63 N. W. 811; Home F. Ins. Co. *v.* Berg, 46 Neb. 600, 65 N. W. 780; Farley *v.* Peebles, 50 Neb. 723, 70 N. W. 231; Romberg *v.* Hughes, 18 Neb. 579, 26 N. W. 351.

New Hampshire. — Harriman *v.* Jones, 58 N. H. 328.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Kitz *v* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64; Rosseau *v.* Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578. *In re* Mellen, 18 N. Y. Supp. 515.

Tennessee. — Henry *v.* Nubert (Tenn. Ch. App.), 35 S. W. 444.

Texas. — Flack's Admr. *v.* Neill, 26 Tex. 273.

Vermont. — Coon *v.* Swan, 30 Vt. 6; Earle *v.* Grout, 46 Vt. 113, 125.

Virginia. — Hall *v.* Rixey, 84 Va. 790, 6 S. E. 215.

Nominal Party Without Interest in Litigation. — In Allen, Adams & Co. *v.* Harrison, 30 Vt. 219, 72 Am.

and client does not exist between a legatee or devisee under a will and the attorney for the executor.[46]

b. *Attorney and Person Transacting Business With Client.* — Attorney may testify concerning statements of person with whom he transacts business for his client.[47] But it has been held that if such person asks the attorney's advice, their communications are privileged.[48]

Dec. 302, action was brought on a note held by a partnership. A., one of the partners, assigned his interest in the note to his co-partners, and suit was thereafter brought on the note in the name of the partnership. Plaintiff's attorney was examined as to a conversation had with A. concerning the firm's possession of the note. This testimony was objected to as involving the disclosure of privileged communications, and objection overruled. The supreme court sustained the ruling on the ground that as A. was merely a nominal party to the action, and had no interest in or control over it, the relation of attorney and client did not exist between him and the witness.

46. Althouse *v.* Wells, 40 Hun (N. Y.) 336.

47. Marston *v.* Downes, 6 Car. & P. (Eng.) 381; Hill *v.* Elliott, 5 Car. & P. (Eng.) 436; Desborough *v.* Rawlins, 3 Myl. & Cr. (Eng.) 515, 40 Eng. Reprint 1025; State *v.* Stone, 65 N. H. 124, (*sub nom.* State *v.* Merchant, 18 Atl. 654). See also Brennan *v.* Hall, 14 N. Y. Supp. 864, *affirmed* 131 N. Y. 160, 29 N. E. 1009. In this case client and the person with whom he proposed to transact business consulted in the attorney's presence, and the attorney's knowledge of the circumstances and of the services to be rendered by him was derived from statements of the third party. It was held that he might state what was said by such third party. See Rudd *v.* Frank, 17 Ont. (Can.) 758.

48. Hartness *v.* Brown, 21 Wash. 655, 59 Pac. 491. In this case consultations were had in attorney's presence by his client and a third person concerning certain transactions between them. The attorney's advice was asked, not only by his client, but by the third person. *Held,* that he could not testify concerning the latter's statements. The court says: "In the case at bar the relation of attorney and client actually existed between Wiswell and the counsel witnesses. In the subject matter of that engagement was, at any rate, the upholding of the transfer made from Wiswell to plaintiff. In fact, it is apparent that the essence of the consultation between Wiswell and counsel witnesses and the plaintiff was the very facts which are in controversy in this case, and it is further apparent that Wiswell and the plaintiff at such consultation were each interested in the maintenance of the conveyance. The communications received at that time from Wiswell were intermingled with and supplemented by those from the plaintiff, and, as one of the counsel witnesses says, the whole matter was thoroughly gone into, and Wiswell and plaintiff each communicated unreservedly to counsel; and we think it fairly appears, also, that the plaintiff, while present, desired the advice which was given at the time by the counsel witnesses. It seems that counsel were impressed with the idea that Wiswell alone was their client, as he is the one who paid them; but the advice upon this matter in which both plaintiff and Wiswell were directly interested was given to both, though not formally at any request from the plaintiff. The information received by the counsel witnesses was attributable solely to their professional character. It was given to them for advice, and it is immaterial here to determine, under the circumstances surrounding the consultation, whether the actual relation of attorney and client existed between the plaintiff and counsel witnesses. The disclosures made to the counsel witnesses by the plaintiff, under the circumstances, are within the privilege declared by

c. *Attorney and Client's Opponent.* — Communications between an attorney and his client's opponent in litigation are not privileged.[49]

d. *Applicant for Loan, and Agent of Lender.* — The relation of attorney and client does not exist between a person who applies to an attorney, who is agent of a loan company, for a loan, and the agent making the loan, it appearing that the latter in consummating the loan simply acted as agent, and that such legal services as he performed were rather as attorney for the lender than the borrower.[50]

e. *Attorney as Money Lender.* — Nor does the relation exist between applicant for loan and an attorney who is requested to make loan, although applicant presents to the attorney a document showing the nature of security offered.[51] But where attorney examines abstract of title furnished by applicant, and passes upon it, the relation exists.[52]

f. *Prosecuting Attorney and Witness.* — On the question as to the privileged character of communications relating to prosecution or trial of a criminal case held between prosecuting attorney and prosecuting witness the authorities are conflicting.

(1.) Communications Privileged. — It has been held that such communications are privileged.[53]

the statute. The authorities usually state that this privilege is for the benefit of the client, and that he alone can waive it. This is unquestionably correct. But, as observed in Bacon *v.* Frisbie, *supra,* the objection can be made by any one against whom the evidence is offered, in the interest of sound public policy. The rule should be fairly construed, so that the freest communication may be made between counsel and client, and that communications thus made, involving the necessary and useful intervention of others, may be equally protected."

49. Statements by Opposite Party. — Thompson *v.* Wilson, 29 Ga. 539; McLean *v.* Clark, 47 Ga. 24; Henry *v.* Nubert (Tenn. Ch. App.), 35 S. W. 444; Thayer *v.* McEwen, 4 Ill. App. 416; Spenceley *v.* Schulenberg, 7 East (Eng.) 357; Shore *v.* Bedford, 5 Man & G. (Eng.) 271, 44 E. C. L. 149, 12 L. J. C. P. 138.

Attorney may testify concerning paper delivered to him by his client's opponent in an action. Spenceley *v.* Schulenberg, 7 East (Eng.) 357, 3 Smith 325; also that he wrote a certain letter upon request of client's opponent (Shore *v.* Bedford, 5 Man. & G. (Eng.) 271, 12 L. J. C. P. 138.

50. Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 79; Jackson *v.* Bennett, 98 Ga. 106, 26 S. E. 53. See Reg. *v.* Avery, 8 Car. & P. (Eng.) 596, where attorney for person lending money was compelled to testify as to statements made to him by person seeking loan, and to produce in evidence a forged will delivered to him by applicant to show title to land offered as security, the attorney's testimony being offered in prosecution of applicant for forgery of such will.

51. Attorney Applied to for Loan. Reg. *v.* Farley, 2 Car. & K. (Eng.) 313.

52. Abstract Examined. — Doe d. Peter *v.* Watkins, 6 L. J. C. P. (Eng.) 107; *s. c.* 4 Scott 155; 3 Hodges 25, 1 Jur. 42. This case follows Taylor *v.* Blacklow, 3 Bing. N. C. (Eng.) 235, 3 Scott 614, 2 Hodges 224, 6 L. J. C. P. 14.

53. Statements to Prosecuting Attorney Privileged. — Vogel *v.* Gruaz, 110 U. S. 311; Oliver *v.* Pate, 43 Ind. 132, 141; State *v.* Phelps Kirby (Conn.) 282; Gabriel *v.* McMullin, 127 Iowa 426, 103 N. W. 355; Bowers *v.* State, 29 Ohio St. 542.

In State *v.* Houseworth, 91 Iowa 740, 60 N. W. 221, the court says:

"The statute under which the exemption is claimed is as follows: 'No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same are made waives the rights conferred.' We do not understand it to be questioned but that the statements by the prosecuting witness to the county attorney were confidential, intrusted to him in his professional capacity, and were necessary and proper to enable him to discharge the functions of his office according to the usual course of practice. This being true, it becomes a question whether or not statements of a prosecuting witness in a criminal case can come within the purview of the statute. Because of remarks by the district court while the question was pending before it, we are led to understand that much, if not controlling, importance was given to the fact of whether or not the relation of attorney and client existed between the prosecuting witness and the county attorney; the court thinking that it did not exist, for it said: 'So far as the relation of attorney and client is concerned, none existed in the world.' While it is true that, as to attorneys, such communications are oftener made by clients than by others, we do not think there is any such limitation upon the operation of the statute, but that it matters not from whom the communication is received, if it be to a practicing attorney in his professional capacity, and necessary for him to discharge the functions of his office. Mr. Ranck was attorney for the state. What transpired at the time of the alleged offense was necessary and proper to enable him to discharge the duties of his office. His client could not communicate with him, and all communications must be from third parties. But the statute nowhere fixes the communication to be privileged as between attorney and client, nor is it there by legal inference. The design of the law is to better enable attorneys, ministers, physicians, and others to discharge the duties of their respective offices; and it matters not from whom the communication comes, the question being, at all times, was it properly intrusted, and necessary for that purpose? We do not think it necessary to consider the question from the standpoint of public policy, which has received some attention in argument, as we think, under the provisions of the statute, the objection should have been sustained."

In State *v.* Brown, 2 Marv. (Del.) 380, 36 Atl. 458, the court says: "The attorney general could not be required to disclose facts coming to his knowledge for the use of the state in its prosecution of the accused; nor can his private amanuensis, or clerk, as Mr. Hardesty then was. To do so would be prejudicial to the public interest, and would in many cases defeat the ends of public justice. When the witness Thomas Oakes, against objection by the state, was permitted, for the purpose of laying a ground for contradicting him, to state what he had said on this occasion to the attorney general, in order to aid him in preparing for the prosecution of this case, I considered that the ruling of the court was erroneous. In public prosecutions, witnesses for the state, and those who give information to the prosecuting officer, will not be permitted to disclose whether or not they have given information to such officer. Such communications are regarded as secrets of state, or matters the disclosure of which would be prejudicial to the public interests. They are therefore protected, and all evidence thereof excluded, from motives of public policy. To allow the said witness to state that he had made a communication to the attorney general respecting this prosecution, for the purpose of laying a ground for his subsequent contradiction by now calling Mr. Hardesty to the stand, was then as improper as it is now futile."

(2.) **Contra.** — Several courts hold that they are not privileged.[54]

g. *County Attorney* — Knowledge of county attorney acquired in the discharge of a duty not appertaining to his office is not privileged.[55]

h. *Municipal Officer to Municipal Attorney.* — Nor are communications made to a city attorney by street commissioner in regard to the condition of a street.[56] But the advice of corporation counsel to a municipal board has been held to be privileged.[57]

i. *Judge of Court.* — It has been held that if a person under subpœna to testify before a grand jury applies to the judge in control of the grand jury for advice as to his testimony, his statements are privileged.[58]

54. Non-Privileged. — Granger *v.* Warrington, 8 Ill. 299; People *v.* Davis, 52 Mich. 569, 18 N. W. 362; Cole *v.* Andrews, 74 Minn. 93, 76 N. W. 962; Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909; Meysenberg *v.* Engelke, 18 Mo. App. 346.

55. In Lange *v.* Perley, 47 Mich. 352, 11 N. W. 193, a surety upon the bond of a defaulting county treasurer paid the amount of the bond, and brought suit against his principal to recover the amount so paid. The prosecuting attorney of the county, who had been a member of a committee appointed to obtain a surrender of the treasurer's property in settlement of his public liabilities, was permitted to testify as to knowledge obtained in the course of negotiations had to obtain such surrender. *Held,* that his knowledge was not privileged. The court says: "It was well understood that the transaction was of a public nature and that the facts were not private and confidential, nor confined to the knowledge of any descriptions of persons connected as attorney and clients."

56. City of Rockford *v.* Falver, 27 Ill. App. 604.

57. Advice of Corporation Counsel. — People *v.* Gilon, 9 N. Y. Supp. 243.

58. In People *v.* Pratt, 133 Mich. 125, 94 N. W. 752, a man who had been subpoenaed to appear as a witness before a grand jury applied for advice concerning his testimony to the judge of the court which caused the grand jury to be summoned. The judge stated "I cannot give you any advice." The judge then stated that the person applying was not bound to say before the grand jury anything to incriminate himself. He then advised the person addressing him to see an attorney. He then said: "Tell the truth, whatever it is." The person addressing the judge then proceeded to make a statement. In a subsequent prosecution of this person it was held that communications between him and the judge were privileged. The court says: "If Judge Person had not been, as he was, the judge of the circuit court for the county of Ingham, who had convened the grand jury, the principles of law above referred to would have prevented his disclosing the communication respondent made to him. It is true that Judge Person's position as judge of the circuit court prevented his becoming, in law, respondent's attorney. But it did not, in fact, prevent his advising respondent what course to pursue. How is the principle which regards as confidential communications between attorney and client affected by the fact that the attorney in this case was also a judge? If it be true that the fact that the attorney was the judge prevented his legally acting as attorney, it is also true that the fact that he occupied that position gave an increased weight to his advice. The reasons for regarding as confidential communications made in consequence of advice from an ordinary attorney apply with full force, and are re-enforced by others, when that advice emanates from an attorney who is also a judge. The law pro-

j. *Married Woman and Husband's Attorney.* — Communications between a married woman and her husband's attorney have been held to be privileged.[59]

k. *Attorney of Person Jointly Interested.* — Where two persons are jointly interested in an enterprise, and one of them refers the other to the solicitor of the first party for advice, and the second party consults such solicitor, their communications are privileged.[60]

l. *Attorney for Co-Conspirator.* — When several persons jointly indicted for conspiracy employ separate counsel, and meet, with their respective attorneys, for consultation as to their joint defense, none of the attorneys can testify as to statements made by any of the defendants.[61]

m. *Relation, Question of Fact.* — Whether or not the relation of attorney and client existed between given persons, is a question of fact,[62] but although a question of fact it has nevertheless been held

tects these communications as confidential, because of the nature of the confidence which exists between the client and the attorney of his choice. That confidence is not diminished, but is increased, when the advice is given by the judge authorized not merely to express an opinion, but to declare the law. Not often will a judge undertake to give legal advice. Circumstances may, however, as in this case, make it his duty to give it. When they do, he will not, in any technical sense, become the attorney of the person to whom it was given. But if, as a result of such advice, he receives the confidence of that person, the principles of public policy applicable to attorney and client require that confidence to be respected."

59. Statements made by a married woman to her husband's attorney in regard to sale of personal property, part of which is claimed by her, have been held privileged, the attorney being regarded as acting for both husband and wife. Scranton *v.* Stewart, 52 Ind. 68. To same effect, see Scott *v.* Ives, 22 Misc. 749, 51 N. Y. Supp. 49, where attorney who prepared a will for his client sent for testator's wife and consulted with her concerning her rights under the will.

Such communications are not privileged, as against the wife, in litigation between herself and husband, it appearing that in the transaction out of which the litigation arose the wife acted upon the advice of her husband's attorney. In such case the wife has the right to production of cases laid before counsel and opinions rendered thereon. Warde *v.* Warde, 3 Macn. & G. 365, 21 L. J. Ch. 90, 15 Jur. 759, *reversing* 1 Sim. (N. S.) 18, 42 Eng. Reprint 301. In this case it was held that the attorney was the common attorney of husband and wife. See "COMMON ATTORNEY," under III, 11, M, a, (1.).

60. Rochefoucauld *v.* Boustead, 74 L. T. N. S. (Eng.) 783.

61. Chahoon's Case, 21 Gratt. (Va.) 822, 841. See remarks of court in Rochefoucauld *v.* Boustead, 74 L. T. N. S. (Eng.) 783.

62. *Indiana.* — McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336.

Nebraska. — Basye *v.* State, 45 Neb. 261, 282, 63 N. W. 811; Clay *v.* Tyson, 19 Neb. 530, 26 N. W. 240.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64.

North Carolina. — Hughes *v.* Boone, 102 N. C. 137, 9 S. E. 286.

Texas. — Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Vermont. — Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

Such is a reasonable conclusion from the opinion of the court in Goltra *v.* Wolcott, 14 Ill. 88.

to be a question to be determined by the court, not by the jury.[63]

(1.) Decision of Trial Court Conclusive. — The finding of the trial court as to existence of relation is conclusive, and is not reversible by appellate court.[64]

(2.) Relation Disclaimed by One Claimed to be Client. — It has been held that when an attorney refuses to answer a question on the ground that his answer would involve the disclosure of matter communicated to him by a certain person as client, and the person referred to makes oath that the relation of attorney and client never existed between himself and witness, the attorney must testify.[65]

Contra. — But the contrary has been held.[66]

(3.) Relation Denied by Attorney. — If attorney denies that in a certain transaction he acted for a person claimed to be his client, he may testify concerning the transaction.[67]

(4.) Conflict Between Attorney and Client. — Cases involving conflict of testimony of attorney and client as to existence of relation are given in the notes.[68]

(5.) Attorney in Doubt. — If an attorney who is interrogated con-

Test as to Relation. — "If a person, in respect to his business affairs or troubles of any kind, consults with an attorney in his professional capacity with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established; and the communication made by the client or advice given by the attorney under such circumstances is privileged. An attorney is employed—that is, he is engaged in his professional capacity as a lawyer or counselor—when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings, or advocating his client's cause in open court. It is the consultation between attorney and client which is privileged, and which must ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him. The general rule undoubtedly is that a breach of professional relations between attorney and client, whatever may be the cause, does not of itself remove the seal of silence from the lips of the attorney in respect to matters received by him in confidence from his client. Foster *v.* Hall, 12 Pick. 89; Hunter *v.* Van Bomhorst, 1 Md. 504; Cross *v.* Riggins, 50 Mo. 335." Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848.

63. McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336. In this case, referring to question of relation, the court says: "This, however, was a matter of fact for the court to determine, we think, from the facts, after hearing them, beyond the jury."

64. Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

65. **Relation Denied by Client.** *In re* Mellen, 18 N. Y. Supp. 515; Schurtz *v.* Romer, 82 Cal. 474, 23 Pac. 118.

66. **Contra.** — Gulf, C. & S. F. R. Co. *v.* Gibson (Tex. Civ. App.), 93 S. W. 469.

67. Brinkerhoff *v.* Peek, 114 Mich. 628, 72 N. W. 621.

In case where attorney and a certain person contradicted each other as to existence of relation, held that attorney's testimony was admissible, apparently upon the ground that the trial court believed the attorney. Reese *v.* Bell, 138 Cal. xix, 71 Pac. 87.

68. State *v.* Calhoun, 50 Kan. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838. This was a pro-

ceeding in the nature of a writ of error *coram nobis* to revoke sentences passed upon plaintiff. The state claimed that error was committed in excluding the testimony of K., an attorney, on the ground that a conversation testified to was had while K. was acting as plaintiff's attorney. Plaintiff testified, in a deposition given seven years after the conversation, that K. never was his attorney. K. testified that when the conversation was had he was plaintiff's attorney. On objection of plaintiff, K.'s testimony was excluded. This ruling was *held* correct. The appellate court held that it was for the trial court to determine whether or not the relation of attorney and client existed. The court further *held* that plaintiff was not conclusively bound by his statements made in his deposition, but had the right, through his counsel, to show by the testimony of the proposed witness that the relation of attorney and client did in fact exist.

In M'Intyre *v.* Costello, 6 N. Y. Supp. 397, widow claimed dower in certain lands conveyed by her husband. It was claimed that the husband had bought the land in question from his sister, taking title in his own name. The attorney who prepared the deed by which the husband acquired title was offered as a witness to testify to declarations made to him by the husband prior to his acquisition of title, as well as subsequent declarations to the effect that the land belonged to the sister. The attorney testified that he acted for both parties to the deed, afterwards attempting to qualify this by stating that he acted for grantor and grantee (husband) or the person for whom grantee was transacting the business — adding "That is, his sister." He added that he never saw the sister in the matter, that he was general attorney for the husband, who paid him for this particular service. Witness was permitted to testify to declarations and admissions of husband as to ownership of the land. *Held,* that the admission of this testimony constituted error.

Conflict Between Attorney and Client as to Relation. — In Davis *v.* Morgan, 19 Mont. 141, 47 Pac. 793, an attorney's testimony was introduced to the effect that a certain person consulted him as to so transferring certain personal property as to avoid the levy of an execution. The attorney testified that the consultation was had, but that he did not consider this consultation and the advice which he gave as constituting the relation of attorney and client, that nothing was said about a fee, and he did not regard himself as attorney for the other person when he advised him. The other person testified that he consulted the attorney as such and for the purpose of obtaining his professional opinion. On motion the attorney's testimony was stricken out. This ruling was held correct. The supreme court says: "The omission to pay a fee is not the only test of whether such a relation may have existed."

Where testimony of an attorney is objected to on the ground that it will disclose confidential communication, and the attorney testifies that he was not the attorney for the person making the communication, and the circumstances under which it was made show that he was not, his testimony is admissible. Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

Evidence Conflicting — Attorney Permitted to Testify. — Where it is claimed that an attorney acted for all parties to a transaction, and the evidence on the subject is conflicting, the attorney will be permitted to testify as to statements made by the parties during the transaction. Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812. In this case an attachment had been levied on certain live stock as the property of S. H. claimed the property and brought proceedings to try the right of property. H. claimed under bill of sale executed by S. Plaintiff claimed that the bill of sale was made to hinder, delay and defraud creditors of S. The attorney who drew the bill of sale was offered as a witness to show statements of S. made at the time the bill of sale was drawn. His testimony was objected to. It appeared that H. and S. were present when the bill of sale was drawn, and that after the institution of the proceedings to try the right of

cerning information acquired from a certain person is in doubt as to existence of the relation of attorney and client between them, he should decline to testify,[69] or his testimony should be excluded.[70]

n. *Privileged, if Relation Believed to Exist.* — It has been held that if a person seeking professional assistance makes statements to an attorney believing that the attorney is acting for him, such statements are privileged.[71]

o. *Relation Wrongly Assumed.* — It has been held that, if attorney, in violation of duty, acts as attorney for a certain person, their communications are not privileged.[72]

D. Communication Must be Made While Relation Exists. It is essential that the communication be made while the relation of attorney and client exists, or during a conference held for the purpose of forming the relation.[73]

property, the attorney was employed by H. It also appeared that the attorney accepted employment from H., believing that it would not conflict with the interest of S., for whom he considered himself retained, he having been S.'s attorney prior to that time, and having continued to be such. It also appeared that before the trial the attorney received from S. a letter waiving privilege, and consenting that he might make full disclosure. H. testified that he employed the attorney to draw the bill of sale and paid him for it. S. and the attorney testified that S. was the employer. *Held*, that the attorney's testimony as to statements made by H. when the bill of sale was drawn was properly admitted.

69. People *v.* Barker, 56 Ill. 300.

70. Myers *v.* Dorman, 34 Hun (N. Y.) 115.

71. Relation Believed to Exist. Carroll *v.* Sprague, 59 Cal. 655; People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 546, 1 Am. St. Rep. 501; People *v.* Pratt, 133 Mich. 125, 94 N. W. 752, 67 L. R. A. 923, Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245.

In Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321, it is held that a communication which a person makes to an attorney under the impression that the attorney has consented to act for him is privileged, although the attorney did not so understand and denies that he agreed to act for such person. In this case several persons were indicted for conspiracy. One of them, having turned state's evidence, was asked as to a conversation he had had with an attorney. Witness testified that the attorney had agreed to act for him. The attorney testified that he had declined to act as attorney for the witness. The trial court refused to require the witness to testify to a conversation between himself and the attorney. On appeal this ruling was held correct. The supreme court says: "We have no doubt that if a communication should be made to an attorney in fact, by a party, under an impression that such attorney had consented or agreed to act as the attorney of such party, that such communication would be privileged, although the attorney himself may not have so understood the agreement."

72. In Tugwell *v.* Hooper, 10 Beav. 348, 50 Eng. Reprint 616, an attorney was appointed trustee for two persons. In a contest between two beneficiaries the attorney claimed that he had acted as attorney for one of them, and that their communications were privileged. The court held that the attorney, being trustee for both parties, could not act as adviser to one of them, and that, as to the other beneficiary, communication between attorney and his client were not privileged.

73. Such relation must be existent or in contemplation at the time the communication is made.

Georgia. — Skellie *v.* James, 81 Ga. 419, 8 S. E. 607.

a. *Communications Made Prior to Relation Are Not Privileged.*[74]

b. *Subsequent.* — Communications made after termination of relation are not privileged.[75]

Indiana. — Jennings *v.* Sturdevant, 140 Ind. 641, 40 N. E. 61.

Iowa. — Theisen *v.* Dayton, 82 Iowa 74, 47 N. W. 891.

Kansas. — Robinson's Exrs. *v.* Blood's Heirs, 10 Kan. App. 576, 62 Pac. 677.

Massachusetts. — Hoar *v.* Tilden, 178 Mass. 157, 59 N. E. 641.

Missouri. — Wilson *v.* Godlove, 34 Mo. 337.

New York. — Yordan *v.* Hess, 13 Johns. 492.

Tennessee. — Ellis *v.* State, 92 Tenn. 85, 20 S. W. 500.

In Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13, the court says: "The testimony which rendered it certain that the deceased had procured Hardison to amend his deed to the defendants by inserting therein the premises now in dispute, was that of Mr. Haygood, an attorney at law, who detailed a conversation which he had with the deceased and his brother, or rather, which they had with him, touching the matter. This testimony was objected to as disclosing knowledge acquired under the seal of professional confidence. We agree with the court below in thinking that Haygood was neither employed professionally, nor consulted with a view to employment. He was 'raided,' not retained. To exclude declarations as communications to counsel, or made with a view to employment, their root in the relation, or contemplated relation, of client and attorney must be manifest. They must be the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it. To tax a lawyer's courtesy or liberality for advice or services is not to employ him. Generally, the test of employment is the fee."

74. Prior to Employment — Non-Privileged. — *England.* — Vaillant *v.* Dodemead, 2 Atk. 524, 26 Eng. Reprint 715; Cutts *v.* Pickering, Ventr. 197, as cited in note to Vaillant *v.* Dodemead, *supra,* in Vol. 26, p. 715, English Reprint; cited to same effect by Lord Brougham in Greenough *v.* Gaskell, 11 Myl. & K. 98, 107, 39 Eng. Reprint 618; Bulstrod *v.* Letchmere, 2 Freeman Ch. 5 (case 4), 22 Eng. Reprint 1019.

Alabama. — Johnson *v.* Cunningham, 1 Ala. 249; Crawford *v.* McKissack, 1 Port. 433.

Georgia. — Chappell & Co. *v.* Smith, 17 Ga. 68.

Indiana. — Jennings *v.* Sturdevant, 140 Ind. 641, 40 N. E. 61.

Iowa. — State *v.* Swafford, 98 Iowa 362, 67 N. W. 284.

Missouri. — Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

New York. — Baker *v.* Arnold, 1 Caines 258.

North Carolina. — State *v.* Smith, 138 N. C. 700, 50 S. E. 859.

South Carolina. — Stoney *v.* M'Neil, Harp. Law 557, 18 Am. Dec. 666.

Texas. — Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 921; Simmons Hdw. Co. *v.* Kaufman, 77 Tex. 131, 8 S. W. 283.

In Theisen *v.* Dayton, 82 Iowa 74, 47 N. W. 891, an attorney was employed to draw a conveyance of land purchased by his client. His employer wished to retain him to render services in the future concerning the property conveyed, which employment the attorney refused. *Held,* that what was said in regard to the future employment was not privileged in an action in which the conveyance was in question.

75. Subsequent to Relation. *Georgia.* — Philman *v.* Marshall, 103 Ga. 82, 29 S. E. 598.

Illinois. — Chillicothe Ferry R. & B. R. Co. *v.* Jameson, 48 Ill. 281.

Indiana. — Doan *v.* Dow, 8 Ind. App. 324, 35 N. E. 709.

Kansas. — State *v.* Herbert, 63 Kan. 516, 66 Pac. 235.

Louisiana. — Williams, Phillips & Co. *v.* Benton, 12 La. Ann. 91.

New York. — Marsh *v.* Howe, 36 Barb. 649; Mandeville *v.* Guernsey, 38 Barb. 225.

Communications Subsequent to Relation. — In Yordan *v.* Hess, 13

c. *Former Employment Not Sufficient.* — The fact that an attorney had, prior to the time of making the communication in question, acted as such for a certain person in all or some of his business transactions, is not sufficient to entitle such communication to privilege, if it appears that the attorney was not so acting in the matter to which the communication related.[76]

d. *That Statement Repetition of Privileged Statement, Immaterial.* — The fact that statements the same as, or similar to, that in question were made while relation existed, does not render incompetent statements made, or voluntarily repeated, after termination of relation.[77]

e. *Negotiations for Employment.* — Privilege extends to statements made in the course of negotiations for the employment of an attorney.[78]

Negotiations by Third Person. — But if negotiations are made by a person claimed to have been acting as agent for the person alleged

Johns. (N. Y.) 492, it is held that statements made to attorney by one who had once been his client, but between whom and the attorney the relation had ceased to exist at the time communication was made, were not privileged. And this, although the statements may have been but repetitions of communications made while the relation existed. But the court states that if a repetition of the statement appears to have been elicited by an artifice, for the purpose of being used as evidence, the evidence should not be received.

In Hager *v.* Shindler, 29 Cal. 47, a person conveyed certain property to his attorney, who, in turn, conveyed it to a third party. In an action to set aside these deeds, on the ground of fraud, the attorney was called as a witness to show that both the deed to him and the deed by him were made without consideration. Questions were objected to as calling for disclosure of privileged communications. Objections were overruled, and, on appeal, this ruling was *held* correct, on the ground that the communication as to the first conveyance was made to witness not as attorney but as trustee, and as to the second conveyance, the relation of attorney had ceased to exist.

Statement of client to attorney after termination of action, to effect that he, client, is pleased with the result of the action, is not privileged. Cobden *v.* Kendricks, 4 T. R. 431.

76. *Indiana.* — Thomas *v.* Griffin, 1 Ind. App. 457, 27 N. E. 754.

Kansas. — State *v.* Herbert, 63 Kan. 516, 66 Pac. 235.

Missouri. — Wilson *v.* Godlove, 34 Mo. 337; Aultman *v.* Daggs, 50 Mo. App. 280, 299.

Nebraska. — Home F. Ins. Co. *v.* Berg, 46 Neb. 600, 65 N. W. 780.

New York. — People *v.* Hess, 8 App. Div. 143, 40 N. Y. Supp. 486.

North Carolina. — Eekhout *v.* Cole, 135 N. C. 583, 47 S. E. 655.

Pennsylvania. — *In re* Turner's Estate, 167 Pa. St. 609, 31 Atl. 867.

Texas. — Flack's Admr. *v.* Neill, 26 Tex. 273.

That Relation Once Existed Not Sufficient. — In Harless *v.* Harless, 144 Ind. 196, 41 N. E. 592, it is said that it is not enough to exclude a statement that the relation of attorney and client once existed between witness and a certain person, so long as it is not proposed to prove by witness confidential communications made in the course of his employment.

77. Brady *v.* State, 39 Neb. 529, 58 N. W. 161; Yordan *v.* Hess, 13 Johns. (N. Y.) 492.

78. Farley *v.* Peebles, 50 Neb. 723, 70 N. W. 231; Nelson *v.* Becker, 32 Neb. 99, 48 N. W. 962; State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

to occupy the relation of client, it must appear that such person authorized the employment.[79]

f. *Statement to Third Party of Intention to Employ.* — Privilege does not extend to statements that a person intends to employ a certain attorney, although made to another attorney with whom the attorney in question was associated.[80]

E. Communication Must Have Been Made by Reason of Relation. — It is also essential that the communication be made by reason of the existence of the relation of attorney and client.[81]

Information Presumed Acquired by Reason of Relation. — Communications made to an attorney by a third person, and relating to evidence in a pending cause in which he is engaged, are presumed to have been made to him in his professional capacity.[82]

79. Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

80. Baker *v.* Jackson (Ala.), 40 So. 348.

81. *England.* — Morgan *v.* Shaw, 4 Madd. 54, 56 Eng. Reprint 629.

Alabama. — Kling *v.* Tunstall, 124 Ala. 268, 27 So. 420.

Georgia. — Chappell & Co. *v.* Smith, 17 Ga. 68; McDougald *v.* Lane, 18 Ga. 444; Brown *v.* Matthews, 79 Ga. 1, 4 S. E. 13; Skellie *v.* James, 81 Ga. 419, 8 S. E. 607; Harkless *v.* Smith, 115 Ga. 350, 41 S. E. 634.

Iowa. — Reinhart *v.* Johnson, 62 Iowa 155, 17 N. W. 452.

Massachusetts. — Hoar *v.* Tilden, 178 Mass. 157, 59 N. E. 641.

Nebraska. — Clay *v.* Tyson, 19 Neb. 530, 26 N. W. 240.

Texas. — Taylor *v.* Evans (Tex. Civ. App.), 29 S. W. 172.

Vermont. — State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429.

If it may be fairly inferred that communications were induced by the fact of relationship, they are privileged. Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Myers *v.* Dorman, 34 Hun (N. Y.) 115.

82. Young *v.* Holloway, 57 L. T. N. S. (Eng.) 515. In this case the court says: "The affidavit here appears to me to be drawn in a way which ought not to be taken as a precedent. If we were to hold the plaintiff strictly to her affidavit, I think the affidavit is defective; but we must deal with the case upon broad principles, and must read the affidavit by the light of the admission of the opposite parties—that there is no other cause for which these letters can be suggested to have been sent to the solicitor and counsel, except the mere cause that they were the solicitor and counsel at the time in this action. If these letters had reference to the case in which they were solicitor and counsel, and if the true inference is that they were sent to them as such, the affidavit must be treated as if it had stated that inference on oath, which I think would be done if we allowed an adjournment for the purpose. If then we draw that inference upon the affidavit as it stands, we have simply to ask ourselves the question whether the fact that a letter was volunteered by a person who wrote and sent it to a solicitor because he was a solicitor, and for the purpose of the document being held by him as solicitor, differentiates this from the ordinary case where a solicitor has procured documents in the course of his employment. It appears to me that there is no such difference, and in reality there was as much an invitation to the person who sent these letters as if the solicitor had written to the person and expressly asked for them. His character as solicitor was an indication to the world that all information which was honest, *bona fide*, and material for the purposes of the cause might be sent to him, ought to be sent to him, and would be received by him on behalf of his client. Therefore he received those letters confidentially for his client, not for himself or for any other purpose, and

F. Confidential. — It is also essential that the communication in question was confidential,[83] and so regarded by client.[84]

Client's Belief Sufficient. — It has been held that communications relating to matters which are ordinarily the subject of professional advice are privileged, when made by client in the course of transacting his business, to his attorney, and believed by him to be confidential, although the attorney may have regarded what was said in the light of a casual conversation.[85] So, if under belief that it

I think received them for the very reason that he was professionally employed. Therefore this case falls within the principle laid down by Lord Blackburn in Lyell *v.* Kennedy, and by many other judges."

83. *England.* — Bunbury *v.* Bunbury, 2 Beav. 173, 9 L. J. Ch. N. S. 1, 1 Beav. 318, 48 Eng. Reprint 1146; Marsh *v.* Keith, 1 Dr. & S. 342; *s. c.* 30 L. J. Ch. 127, 3 L. T. 498, 62 Eng. Reprint 410; Cotman *v.* Orton, 9 L. J. N. S. Ch. 268; Parkhurst *v.* Lowten, 2 Swanst. 194, 216, 36 Eng. Reprint 589.

Alabama. — Kling *v.* Tunstall, 124 Ala. 268, 27 So. 420.

California. — Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131; Hager *v.* Shindler, 29 Cal. 47.

Georgia. — Burnside *v.* Terry, 51 Ga. 186.

Illinois. — Tyler *v.* Tyler, 126 Ill. 525, 541, 21 N. E. 616, 9 Am. St. Rep. 642.

Indiana. — Harless *v.* Harless, 144 Ind. 196, 41 N. E. 592.

Iowa. — Caldwell *v.* Meltveldt, 93 Iowa 730, 61 N. W. 1090; State *v.* Kidd, 89 Iowa 54, 56 N. W. 263.

Kansas. — In re Elliott (Kan.), 84 Pac. 750.

Louisiana. — Reeves *v.* Burton, 6 Mart. N. S. 283.

Missouri. — Henry *v.* Buddecke, 81 Mo. App. 360.

Montana. — Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

Nebraska. — Elliott *v.* Elliott (Neb.), 92 N. W. 1006.

New Hampshire. — Brown *v.* Payson, 6 N. H. 443.

New York. — King *v.* Ashley, 96 App. Div. 143, 89 N. Y. Supp. 482, *affirmed* 179 N. Y. 281, 72 N. E. 106.

Pennsylvania. — Levers *v.* VanBuskirk, 4 Pa. St. 309; Heaton *v.* Findlay, 12 Pa. St. 304; Kramer *v.* Kister, 187 Pa. St. 227, 40 Atl. 1008, 44 L. R. A. 432.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Vermont. — Earle *v.* Grout, 46 Vt. 113, 125.

Wisconsin. — Aultman & Co., *v.* Ritter, 81 Wis. 395, 51 N. W. 569.

"The purpose of the provision of law is, no doubt, to secure to litigants ample protection against any breach of the proper confidence which it is necessary that they should repose in their legal advisers. It may therefore be argued that the word "confidence," as used in the code, properly was intended to apply to any facts, the knowledge of which was acquired by the attorney in the course of his dealings as attorney with his client, whether the knowledge of such facts was acquired by word or writing, or in any other manner." McClure *v.* Goodenough, 12 N. Y. Supp. 459. The context shows that the word "argued" is used by the court in the sense of "assumed" or "concluded."

84. Regarded as Confidential. Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131. *In re* Elliott (Kan.), 84 Pac. 750.

85. Moore *v.* Bray, 10 Pa. St. 519; Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245. In this latter case it was attempted to be shown by two attorneys that a certain person was insane. It appeared that he had consulted each of them as to matters usually discussed with lawyers, but each testified that, on account of such person's condition, he had made no charge, and had not considered the relation as existing. Each admitted professional relations, and one conceded that the person in question acted upon a belief in the existence of the relation. The court says: "In

is necessary, client inserts unnecessary matter in privileged writing, it is privileged.[86]

a. *Whether or Not Confidential. — How Shown.* — Whether or not a particular communication was confidential is a matter to be established by evidence,[87] or by an application of the maxims and principles which usually control human action.[88]

Confidential or Not, Inference. — Whether or not a given communication was confidential, may be inferred from (1) the nature of the communication; (2) the circumstances under which it was made.

(1.) Nature of Communication. — (A.) Matters To Be Communicated To Another. — Matters communicated to an attorney for the purpose of being communicated to others are not confidential.[89]

this case Richard Collins twice sought out an attorney for the purpose of obtaining legal advice and assistance upon matters he deemed of importance. In each case the attorney consulted accepted his confidences as an attorney at law engaged in the practice of his profession, and obtained from him information imparted upon the faith of that relation. One of these attorneys conceded that Richard Collins acted upon a belief in the existence of such relation. The other conceded that he himself at the time acted in good faith upon such a belief to the extent of procuring a patent, writing letters, and investigating a title. Therefore neither one will be allowed to profane the relation after his client's death. Besides this, it would be a strange procedure which would permit a witness to testify outright that he believed a person to be insane at a certain time for the purpose of removing a bar to his relating certain facts, without which he would not be qualified to speak at all upon the question of the person's sanity. The very question at issue could not be conclusively decided by the witness in order to render him competent to speak upon it. If the witnesses had founded their opinions upon observations made in common with others in a nonprofessional capacity, or upon facts which did not come to their peculiar knowledge because their professional opinions and guidance had been sought, they might have shown themselves to be competent to testify. . . . In this case, however, it is quite clear the witnesses would not have learned the major portion of the facts which they disclosed, or held the most important conversations which they repeated on the witness stand, had they not undertaken to consult with and act for Richard Collins as his attorney. This being true, they were incompetent to testify as to such facts and conversations."

86. Cleave *v.* Jones, 7 Exch. (Welsby, H. & G.) 421.

87. Hager *v.* Shindler, 29 Cal. 47; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131. See note 88.

88. Hager *v.* Shindler, 29 Cal. 47. In this case the court says: "If it appears by extraneous evidence, or from the very nature of the transaction, that confidence was not, and on the maxims by which human nature is ordinarily governed, could not have been contemplated, then the fact communicated may be proved by the testimony of the attorney."

89. **Matters to be Made Known.** *England.* — Gore *v.* Bowser, 5 De G. & S. 30, 64 Eng. Reprint 1004; Gore *v.* Harris, 21 L. J. N. S. Ch. 10, 15 Jur. 1168. *Compare* Gainsford *v.* Grammar, 2 Camp. 9.

Canada. — Walton *v.* Bernard, 2 Grant Ch. (U. C.) 344, 363.

United States. — Edison Elec. L. Co. *v.* United States Elec. L. Co., 44 Fed. 294.

California. — Ferguson *v.* McBean, 91 Cal. 63, 73, 27 Pac. 518, 14 L. R. A. 65.

District of Columbia. — Oliver *v.* Cameron, McArthur & M. 237.

Illinois. — Scott *v.* Harris, 113 Ill. 447.

(B.) Matters To Be Made Public. — The communication of matters which the attorney must necessarily, in the discharge of his duty, make public is not confidential, as the making of statements to be embodied in a pleading to be filed for client.[90]

(C.) Paper, Recording Necessary To Attorney's Protection. — Nor is the delivery to attorney of a paper which it is necessary for him to record to protect his own interest.[91]

Kentucky. — List's Exrx. *v.* List, 26 Ky. L. Rep. 691, 82 S. W. 446.

New York. — Collins *v.* Robinson, 72 Hun 495, 25 N. Y. Supp. 268; Doheny *v.* Lacy, 59 N. Y. Supp. 724, 734, 42 App. Div. 218, *affirmed* 168 N. Y. 213, 61 N. E. 255; Bartlett *v.* Bunn, 10 N. Y. Supp. 210.

Texas. — Henderson *v.* Terry, 62 Tex. 281; Taylor *v.* Evans (Tex. Civ. App.), 29 S. W. 172.

Wisconsin. — Herman *v.* Schlesinger, 114 Wis. 382, 394, 90 N. W. 460, 91 Am. St. Rep. 922.

In McTavish *v.* Denning, Anthon. (N. Y.) 155, defendant's attorney was asked if he had not at a certain time, on behalf of defendant, made certain propositions to defendant's creditors. This question was objected to as calling for confidential communications. The court says: "The witness must answer the question proposed to him. The compromise was not a matter confidential in its nature, but was made public by communication to the creditors."

90. Caldwell *v.* Meltveldt, 93 Iowa 730, 61 N. W. 1090; Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867.

Matter to be Pleaded. — In Waldo *v.* Beckwith, 1 N. M. 182, an attorney was offered as a witness to prove that a partnership existed between certain persons. His testimony was objected to on the ground that he had learned the facts sought to be disclosed as attorney for those persons. It was shown that witness had been employed by them to bring suits. The court said that the information was given to be made public in bringing the suits, and could not be regarded as confidential.

Matters communicated to counsel for the purpose of being set forth in a pleading are not confidential. San Antonio & A. P. R. Co. *v.* Brooking (Tex. Civ. App.), 51 S. W. 537.

Pleading to be Filed. — In State *v.* Marshall, 8 Ala. 302, M. was indicted for burglary, the indictment charging him with being a slave. The state introduced as a witness an attorney who testified that M. had applied to him to prepare a petition to the legislature praying for M.'s freedom. Witness stated that he had prepared such a petition, but that M. had never called for it. Prisoner objected to this testimony, and his objection was overruled. On appeal this ruling was held correct. The court says: "No inference can be drawn from the statement upon the bill of exceptions that the communication was confidential, but the inference must be that it was not, as the only fact disclosed was one which it was proper to make public. If the disclosure had been of the facts upon which the prisoner rested his application to the legislature, it might be different." See also Cormier *v.* Richard, 7 Mart N. S. (La.) 177.

In *In re* Elliott (Kan.), 84 Pac. 750, an attorney was proceeded against for disbarment, it being charged, among other matters that he had disclosed privileged communications, the disclosure consisting in showing an answer prepared for a client. It appeared that the client had caused the substance of this answer to be printed in a newspaper, and had allowed the notary before whom it was verified to read it. As to the nature of the communication the court says: "The only purpose of preparing this answer evidently was that it was to be filed in court in the case in which it was entitled and thus making it public." *Held,* that the communication was not privileged.

91. Strickland *v.* Capital City Mills (S. C.), 54 S. E. 220.

(D.) Statements Made In Conferring Authority. — Statements made by client to attorney in the course of conferring authority upon him to make a contract or other business arrangement with third person for client are not confidential.[92]

(a.) *Authority To Authorize Another.* — Nor are statements giving him power to authorize a third person to do a certain act.[93]

(b.) *Authority To Compromise.* — Nor are statements made in conferring authority to make a compromise.[94]

(E.) Matters Necessarily Not Private. — Knowledge which attorney has of matters concerning his client which are necessarily not private in their nature is not confidential.[95]

92. Burnside *v.* Terry, 51 Ga. 186; Benton *v.* Benton, 106 La. Ann. 99, 30 So. 137; Martin *v.* Platt, 4 N. Y. Supp. 359; Williams *v.* Blumenthal, 27 Wash. 24, 67 Pac. 393; Bartlett *v.* Bunn, 10 N. Y. Supp. 210, 31 N. Y. St. 319; Shove *v.* Martine, 85 Minn. 29, 88 N. W. 254, 412.

In Koeber *v.* Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512, the court says: "The transaction here between Felker and plaintiff, if it took place, would fall obviously within all the reasons of the cases above quoted to justify inference of an implied authority to him to testify with reference thereto, and waiver of any privilege of secrecy. The attorney's own interests are vitally affected, for, if he may not prove that he had authority to settle the claim of plaintiff against the defendant, and to receive from the latter money in consideration thereof, he is placed in an attitude of fraud, and his standing and repute in the business world must suffer. Again, the irresistible effect of the granting of authority to one's attorney to deal with a third person is to authorize that attorney to communicate the fact, whether he does it by words or solely by executing the authority. Indeed, he cannot perform the service delegated to him without so communicating. The rule, therefore, outlined by the above-cited authorities, that an attorney is not restrained by any duty of confidence to his client to withhold the fact that he has received from that client authority as an agent to deal with a third person, certainly after the authority has been acted on, is founded upon the soundest reason, and is absolutely necessary to prevent the privilege of secrecy from being made an implement of injustice and fraud. The ruling of the court that Mr. Felker could not testify as to whether authority was given him by his client to make the written settlement which he did make was error."

93. Bartlett *v.* Bunn, 10 N. Y. Supp. 210, 31 N. Y. St. 319.

94. Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563.

95. Client's Statements in Court. Foreman *v.* Archer (Iowa), 106 N. W. 372.

Agreement Made in Court on behalf of client. Kramer *v.* Kister, 187 Pa. St. 227, 40 Atl. 1008, 44 L. R. A. 432.

Attorney's knowledge that cause of action in a case on trial is the same as that in another action in which he appeared. Levers *v.* Van Buskirk, 4 Pa. St. 309. See Heaton *v.* Findlay, 12 Pa. St. 304.

Attorney may testify as to statements made by client as witness upon a former trial of the action in which attorney is called. Kling *v.* Tunstall, 124 Ala. 268, 27 So. 420. But not if his knowledge of client's testimony was first imparted to him by client in the course of professional employment. Henry *v.* Buddecke, 81 Mo. App. 360.

Matter Not Private in Its Nature. Facts in Knowledge of Adversary. Schaaf *v.* Fries, 77 Mo. App. 346, 359. In this case counsel for plaintiff called upon defendant's attorney to obtain information as to transactions between plaintiff and defendant. He was informed that defendant held certain stock of plaintiff's intestate as collateral security, which

(a.) *Copy of Public Record.* — Client's act in giving attorney copy of a public record is not confidential.[96]

(b.) *Copies of Deposition.* — Copy of client's deposition in attorney's possession is not privileged.[97]

(c.) *Testimony Taken To Enable Attorney To Advise.* — But it has been held in England that if the solicitor for trustee in bankruptcy causes the examination of a witness to be taken for the purpose of enabling such solicitor to advise his client whether or not to bring an action concerning a bankrupt's affairs, the transcript of such testimony in the solicitor's possession is privileged.[98]

(d.) *Notes of Evidence* taken by an attorney or his clerk during the trial of an action are not privileged.[99]

(e.) *Notes of Proceedings in Chambers.* — Nor are an attorney's notes or memoranda of matters which take place during proceedings in chambers.[1]

(f.) *Document Identified by Client, But Not Filed.* — A privileged document is not deprived of its character by the fact that client for

defendant would surrender upon payment of the note thereby secured. Defendant sold the stock at pledgee's sale. Plaintiff sued, alleging conspiracy to obtain possession of the stock, and praying for damages. One issue was: Did plaintiff know, prior to pledgee's sale, that the stock was pledged as security for a debt. Upon the trial defendant offered to prove by plaintiff's attorney that he — plaintiff's attorney — had communicated to his client the knowledge obtained from defendant's attorney. Question objected to as calling for disclosure of confidential communication. Objection sustained. The rule sustaining objection was *held* erroneous, and judgment reversed. The court says: "One of the exceptions to the general rule which excludes communications between attorney and client, is in cases where the subject-matter of the communication is not in its nature private. 1 Greenleaf on Evidence, sec. 244. This exception is stated by the supreme court of Pennsylvania in Beeson *v.* Beeson, 9 Pa. 301, thus: 'The rule does not extend to the protection of matter communicated, not in its nature private, or which cannot properly be termed the subject of a confidential disclosure.' Applying the rule we think it reasonably clear that the communication by Krone to Mrs. Schaaf of the facts learned from Arnstein can not be regarded as a confidential disclosure. It concerned facts which were within the knowledge of those who were opposed in interest to Mrs. Schaaf, and which facts she employed Krone to ascertain for her." Schaaf Admr. *v.* Fries, 77 Mo. App. 346. To same effect, see Standard Oil Co. *v.* Meyer Bros. Drug Co., 84 Mo. App. 76, in which it is held that a letter from attorney to client stating that one of client's debtors was indebted to others was not privileged. The court said that as to the fact of such indebtedness was probably known to many persons, a statement of it was not in its nature private.

96. State *v.* Kidd, 89 Iowa 54, 56 N. W. 263.

97. Goldstone *v.* Williams, Deacon & Co., L. R. Ch. Div. 1899, Vol. 1, p. 47, 68 L. J. N. S. Ch. Div 24, 79 L. T. N. S. 373.

98. Learoyd *v.* Halifax J. S. Co., 62 L. J. N. S. Ch. 509, 68 L. T. N. S. 158.

99. Nicholl *v.* Jones, 2 H. & M. (Eng.) 588; Rawstone *v.* Mayor, etc. of Preston, L. R. 30 Ch. Div. 116, 54 L. J. N. S. Ch. Div. 1102, 52 L. T. N. S. 922; Robson *v.* Worswick, L. R. 38 Ch. Div. 370, 58 L. J. Ch. 31, 59 L. T. N. S. 399.

1. Ainsworth *v.* Wilding, 65 L. J. Ch. 432, 1 Ch. 673, 74 L. T. 193, 69 L. J. N. S. Ch. Div. 695.

whom it was prepared identifies it while on the witness stand, if it is not filed in evidence.[2]

(2.) Inferred From Circumstances of Making. — (A.) COMMUNICATION MADE IN PUBLIC PLACE. — The fact that a communication was made in a public place is a circumstance to be considered in determining its character.[3]

(B.) ATTORNEY ACTING FOR OTHERS THAN CLAIMANT. — That in arranging a certain transaction, an attorney acted for persons other than the one claiming privilege, and for himself, is a circumstance to show that knowledge acquired from claimant was not confidential.[4]

b. *Witness in Doubt.* — When an attorney called as a witness, is in doubt as to whether a certain statement was made by his client upon the witness stand, or whether it was made to him as attorney, the court should, of its own motion, exclude his testimony.[5]

Duty of Witness. — In such case, witness should submit the matter to the court for advice.[6]

G. PRIVATE. — To establish the character of a communication as confidential, it must have been made privately.[7]

a. *Communication in Presence of Third Person.* — Statements between attorney and client in the presence of third persons are not privileged as to the third persons, and they may give in evidence what they hear.[8]

2. Goldstone *v.* Williams, Deacon & Co., L. R. Ch. Div. 1899, Vol. 1, p. 47, 68 L. J. N. S. Ch. Div. 24, 79 L. T. N. S. 373.

3. Public Place — Street. — As to communications made upon a public street, see Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131; Goltra *v.* Wolcott, 14 Ill. 88.

The fact that a conference between attorney and client took place in a public building, and in a room in which other persons were present, will not, alone, cause the court to conclude that communication was not confidential. Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513. But the fact that conversation between attorney and client takes place in the presence of other persons, is entitled to some weight as showing that communications were not confidential, but is not conclusive. Brazier *v.* Fortune, 10 Ala. 516; Doheny *v.* Lacy, 168 N. Y. 213, *affirming* s. c. 59 N. Y. Supp. 724.

4. Pawson *v.* Merchants' Bank, 11 Ont. Pr. (Can.) 18.

5. People *v.* Atkinson, 40 Cal. 284.

6. People *v.* Barker, 56 Ill. 300. See Bank of Columbia *v.* French's Exrx., 1 Cranch C. C. (U. S.) 221.

7. Brazier *v.* Fortune, 10 Ala. 516; Murphy *v.* Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365; Stone *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356; Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106; State *v.* Kidd, 89 Iowa 54, 56 N. W. 263; Deuser *v.* Walkup, 43 Mo. App. 625; Miller *v.* Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107.

In Miller *v.* Palmer, 25 Ind. App. 357, 58 N. E. 213, 81 Am. St. Rep. 107, it was held that an attorney's clerk could testify that certain papers were, in open court, delivered to his employer as attorney for person claiming privilege.

Actually Overheard. — From remarks made in the opinion in Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627, it would seem that the court inclined to hold that one who claims a certain statement is not secret, because of presence of third persons, must show that it was actually overheard.

8. Third Persons. — *Alabama.*

b. *Statements of Third Person in Presence of Attorney and Client.* Nor are statements of a third party, nor the client's agent, in presence of attorney and client, although the third party employs attorney on behalf of client, and pays him for his services.[9]

c. *Third Persons Present, Not Privileged.* — The authorities are conflicting on the question whether or not an attorney may testify to communications which take place between himself and client in the presence of third persons. It has been held that he may testify.[10]

Cotton *v.* State, 87 Ala. 75, 6 So. 625.

Colorado. — Denver Tramway Co. *v.* Owens, 20 Colo. 107, 129, 36 Pac. 848.

Idaho. — State *v.* Perry, 4 Idaho 224, 38 Pac. 655.

Iowa. — State *v.* Sterrett, 68 Iowa 76, 25 N. W. 936.

Massachusetts. — Blount *v.* Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554; Day *v.* Moore, 13 Gray 522; Hoy *v.* Morris, 13 Gray 519, 74 Am. Dec. 650.

Missouri. — Tyler *v.* Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 327; Weinstein *v.* Reid, 25 Mo. App. 41.

Nebraska. — Basye *v.* State, 45 Neb. 261, 283, 63 N. W. 811.

New York. — Jackson *v.* French, 3 Wend, 337, 20 Am. Dec. 699; People *v.* Buchanan, 145 N. Y. 1, 26, 39 N. E. 846.

Texas. — Walker *v.* State, 19 Tex. Crim. 176.

In Goddard *v.* Gardner, 28 Conn. 172, the court says: "No reason of necessity requires that any witness (save an interpreter,) should ever be present at a consultation between the client and his attorney, and if the client procures or submits to the presence of such a witness, he voluntarily confides his secrets, not to his attorney only, but also to the witness, in whose custody the law can not protect them when the interests of justice require that they should be disclosed. 2 Stark. Ev., 230. 1 Greenl. Ev. § 239. 1 Phil. Ev., 162. Gainsford *v.* Grammar, 2 Camp., 9 Jackson *v.* French, 3 Wend., 337, Hatton *v.* Robinson, 14 Pick., 416.

In the case before the court, the consultation was held in the presence of a witness in no way connected with the case or with the parties, whose presence was unnecessary, whose services were in no way appropriated, and who had no interest in, or connection with, the professional business of the attorney. The facts communicated in the consultation were voluntarily communicated to the witness as well as to the attorney. The rule which enjoins the attorney's silence does not extend to such a witness, and the court below erred in refusing to hear his testimony. It is not our duty to promulgate any opinion of the conduct of the witness. The moral sense of almost every man will indicate truly the line of duty and propriety in such a case as this. To such protection as that moral sense affords, the party must be referred."

9. Frank *v.* Morley's Estate, 106 Mich. 635, 64 N. W. 577.

10. *England.* — Griffith *v.* Davies, 5 Barn. & Ad. 502, 27 E. C. L. 114; Ripon *v.* Davies, 2 N. & M. 310; 28 E. C. L. 358; Weeks *v.* Argent, 16 M. & W. 817, 16 L. J. 209, 11 Jur. 525.

California. — Gallagher *v.* Williamson, 23 Cal. 332, 83 Am. Dec. 114; Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Murphy *v.* Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

Georgia. — Stone *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356.

Illinois. — Andrews *v.* Scott, 113 Ill. App. 581, 594, *affirmed in* Scott *v.* Aultman, 211 Ill. 612, 71 N. E. 1112.

Indiana. — Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106.

Iowa. — Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673.

Michigan. — House *v.* House, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570; Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

Mississippi. — Perkins Admr. *v.* Guy, 55 Miss. 153, 178, 30 Am. Rep. 510.

(1.) Clerk. — Also that his clerk may testify to conversations between his employer, his employer's client, third persons and himself.[11]

(2.) Client's Agent Present. — But if the third person present sustains the relation of confidential agent of client, communication in his presence is confidential.[12]

d. *Third Persons Present Privileged.* — It has also been held that communications between attorney and client are confidential notwithstanding the presence of third persons, and that the attorney may not be compelled to testify.[13]

Missouri. — Weinstein *v.* Reid, 25 Mo. App. 41; Deuser *v.* Walkup, 43 Mo. App. 625; Hamil *v.* England, 50 Mo. App. 338.

Nebraska. — Elliott *v.* Elliott, 92 N. W. 1006; Adler & Sons Cloth. Co. *v.* Hellman, 55 Neb. 266, 75 N. W. 877.

New Jersey. — Carr *v.* Weld, 19 N. J. Eq. 319; Roper *v.* State, 58 N. J. L. 420, 33 Atl. 969.

New York. — Whiting *v.* Barney, 30 N. Y. 330, 86 Am. Dec. 385; Britton *v.* Lorenz, 45 N. Y. 51; Doheny *v.* Lacy, 168 N. Y. 213, 224, 61 N. E. 255, *affirming* 59 N. Y. Supp. 724; Brand *v.* Brand, 39 How. Pr. 193, 202; Root *v.* Wright, 21 Hun 344; Woodruff *v.* Hurson, 32 Barb. 557; Hurlburt *v.* Hurlburt, 2 N. Y. Supp. 317; Smith *v.* Crego, 7 N. Y. Supp. 86; *In re* McCarthy's Will, 8 N. Y. Supp. 578; Sheldon *v.* Sheldon, 11 N. Y. Supp. 477; Greer *v.* Greer, 12 N. Y. Supp. 778; Brennan *v.* Hall, 14 N. Y. Supp. 864, *affirmed* 131 N. Y. 160, 29 N. E. 1009; Cooperson *v.* Pollo, 62 N. Y. Supp. 772; Mertens *v.* Wakefield, 35 Misc. 501, 71 N. Y. Supp. 1062; Lecour *v.* Importers & T. Nat. Bk., 61 App. Div. 163, 70 N. Y. Supp. 419; *In re* Barnes' Will, 70 App. Div. 523, 75 N. Y. Supp. 373; *In re* Simons' Estate, 48 Misc. 484, 96 N. Y. Supp. 1103; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846; Root *v.* Wright and Greer *v.* Greer, *supra*, approved in Van Alstyne *v.* Smith, 82 Hun. 382, 31 N. Y. Supp. 277, though circumstances under which communication there in question was made, are not stated.

North Carolina. — Carey *v.* Carey, 108 N. C. 267, 12 S. E. 1038; Hughes *v.* Boone, 102 N. C. 137, 159, 9 S. E. 286.

Pennsylvania. — Hummel *v.* Kistner, 182, Pa. St. 216, 37 Atl. 815.

South Carolina. — Moffatt *v.* Hardin, 22 S. C. 9.

In Deuser *v.* Hamilton, 52 Mo. App. 394, it was held that memorandum made by attorney while transacting business for his client in the presence of others was not privileged.

In State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429, it is said that attorney may testify as to knowledge of client's condition acquired in presence of third person.

Who are Third Persons. — In matter of Bellis & Milligan, 38 How. Pr. (N. Y.) 79, it is said that client's wife to whom attorney conveyed land which had just been conveyed to him by his client to protect the same from his creditors was not a third person.

11. Cooperson *v.* Pollo, 62 N. Y. Supp. 772.

12. Bowers *v.* State, 29 Ohio St. 542; Spaulding *v.* State, 61 Neb. 289, 85 N. W. 80.

13. Denver Tramway Co. *v.* Owens, 20 Colo 107, 129, 36 Pac. 848; Kaut *v.* Kessler, 114 Pa. St. 603, 7 Atl. 586; Hartness *v.* Brown, 21 Wash. 655, 59 Pac. 491; Gabriel *v.* McMullin, 127 Iowa 426, 103 N. W. 355.

From the ruling in Spaulding *v.* State, 61 Neb. 289, 85 N. W. 80, it would seem that an attorney is incompetent to testify to communications made by client in presence of third persons who employ the attorney on behalf of person making communication. But in Frank *v.* Morley's Estate, 106 Mich. 635, 64 N. W. 577, it is held that attorney may testify concerning statements made in presence of himself and

Presence of Third Persons at conference between attorney and client is a circumstance to be considered in determining whether or not a certain communication was confidential.[14]

e. *Conversation Between Client and Third Person Not Privileged.* Attorney may give in evidence conversation held in his presence by his client and a third person relating to the matter concerning which the attorney is acting for his client.[15]

f. *Communication From Third Person to Attorney, Not Privileged. — Statement of Third Person.* — Attorney may testify as to statement of third person made to him in presence of himself and client.[16] Also as to his own statement made to client's opponent in client's presence.[17] Also as to conversations between third parties in the presence of himself and client.[18]

g. *Injunction of Secrecy Not Essential.* — It is not necessary that client enjoin his attorney to keep the communication secret.[19]

H. PURPOSE, ADVICE. — It must appear that the communication was made to the attorney for the purpose of obtaining his advice

client by person who employs him for client, and pays his fee.

In Blount *v.* Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554, it is held that although communications between attorney and client are made in the presence of third persons, they are, nevertheless, as between attorney and client, privileged. "They (persons claiming the privilege) contend that if they (communications) are made in the presence and hearing of a third person, that removes the privilege, and makes the testimony of the attorney concerning them admissible. But as between the client and attorney, they are still confidential, though made in the presence or hearing of a third party. The only effect of that is that they are less confidential in fact, and that such third party may testify to them. It does not qualify the attorney as a witness."

14. Brazier *v.* Fortune, 10 Ala. 516; Doheny *v.* Lacy, 168 N. Y. 213, 61 N. E. 255, *affirming* 59 N. Y. Supp. 724.

15. *California.* — Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

Georgia. — Stone *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356.

Iowa. — Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673.

Minnesota. — Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

New York. — Brennan *v.* Hall, 131 N. Y. 160, 29 N. E. 1009, *affirming* 14 N. Y. Supp. 864; *In re* McCarthy's Will, 8 N. Y. Supp. 578.

North Carolina. — Carey *v.* Carey, 108 N. C. 267, 12 S. E. 1038.

South Carolina. — Moffatt *v.* Hardin, 22 S. C. 9, 26.

16. Frank *v.* Morley's Estate, 106 Mich. 635, 64 N. W. 577; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131. *Contra.* — Hyde *v.* M'Cartney, 2 Molloy (Irish Ch.) 544.

17. Ripon *v.* Davies, 2 N. & M. 310, 28 E. C. L. 358; Hughes *v.* Boone, 102 N. C. 137, 159, 9 S. E. 286.

18. Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114; Moffatt *v.* Hardin, 22 S. C. 9, 25; Hughes *v.* Boone, 102 N. C. 137, 159, 9 S. E. 286.

19. Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; McLellan *v.* Longfellow, 32 Me. 494, 54 Am. Dec. 599; Wheeler *v.* Hill, 16 Me. 329.

From language used in State *v.* Kidd, 89 Iowa 54, 56 N. W. 263, it would seem that the supreme court of Iowa were inclined to hold, that writing sent by client to attorney is not privileged, unless client enjoins secrecy.

as to the rights or obligations of his client, or obtaining the rendition by him of other professional service.[20]

a. *General Conversation Not Privileged.* — A mere general conversation between a person and an attorney, when there is nothing to show that the latter's advice was sought to determine the conduct

20. *England.* — Gardner *v.* Irvin, 48 L. J. N. S. Exch. 223, 4 Exch. Div. 49, 40 L. T. 35; *Ex parte* Campbell, 5 Ch. App. 703; s. c. 23 L. T. N. S. 289; Cobden *v.* Kendricks, 4 T. R. 431; Foakes *v.* Webb, 54 L. J. Ch. 262, 28 Ch. Div. 287, 51 L. T. 625.

Colorado. — Machette *v.* Wanless, 2 Colo. 169, 179.

Delaware. — Johnson *v.* Farmers' Bank, 1 Harr. 117.

Illinois. — Granger *v.* Waninglon, 8 Ill. 299.

Indiana. — Borum *v.* Fouts, 15 Ind. 50; Lloyd *v.* Davis, 2 Ind. App 170, 26 N. E. 232; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, 345.

Massachusetts. — Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415.

Michigan. — House *v.* House, 61 Mich. 69, 27 N. W. 858, 1 Am. St. Rep. 570; Carty *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

Minnesota. — Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

Missouri. — State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160; Schaaf *v.* Fries, 77 Mo. App. 346, 359.

Nebraska. — Brady *v.* State, 39 Neb. 529, 58 N. W. 161.

New York. — Marsh *v.* Howe, 36 Barb. 649; Wadd *v.* Hazleton, 17 N. Y. Supp. 410; Morvell *v.* Van Buren, 28 N. Y. Supp. 1035; Phoebus *v.* Webster, 40 Misc. 528, 82 N. Y. Supp. 868.

Texas. — Flack's Admr. *v.* Neill, 26 Tex. 273; Henderson *v.* Terry, 62 Tex. 281; Stallings *v.* Hullum, 79 Tex. 421, 15 S. W. 677.

Vermont. — Earle *v.* Grout, 46 Vt. 113.

Wisconsin. — Aultman *v.* Ritter, 81 Wis. 395, 51 N. W. 569.

The communication must have been made for the purpose of obtaining the attorney's advice for the regulation of his client's conduct. Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599.

"But to render a communication a privileged one . . . it must have been made to the attorney by the party or client as his legal adviser, and for the purpose of obtaining his legal advice and opinion relative to some legal right or obligation." Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 320. See also Orman *v.* State, 22 Tex. App. 604, 58 Am Rep. 662.

In Laflin *v.* Herrington, 1 Black (U. S.) 326, it was held that a letter written by a client to his attorneys complaining of their lack of fidelity was not privileged.

Statements Concerning Payment of Attorney's Fee. — Attorney may testify concerning his client's statements in regard to payment of fee. Eekhout *v.* Cole, 135 N. C. 583, 47 S. E. 655; Strickland *v.* Capital City Mills (S. C.), 54 S. E. 220; Smithwick *v.* Evans, 24 Ga. 461. But see Holden *v.* State, 44 Tex. Crim. 382, 71 S. W. 600.

Compare People *v.* Pratt, 133 Mich. 125, 94 N. W. 752, in which a ruling apparently contrary to the rule stated in the text is made. In this case it is said that "The privilege is not confined to communications made for the purpose of obtaining advice. It extends to 'communications made to an attorney in the course of any professional employment, and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other.'" *Citing* Williams *v.* Fitch, 18 N. Y. 546. In this case a person under subpoena to appear before a grand jury applied for advice as to his testimony to the judge of the court which summoned the grand jury. It was held that their communications were privileged. See dissenting opinion.

of the person addressing him, and when there was no retainer, is not privileged.[21]

b. *Attorney Also Trustee.* — If attorney acts both as trustee and professional adviser for his client, their communications concerning the disposition of the trust property, not made for the purpose of obtaining advice, are not privileged.[22]

c. *Attorney Trustee for Client's Creditors.* — If an attorney acts as trustee for his client's creditors under a deed of trust executed by his client, communications between attorney and client subsequent to the execution of the deed are not privileged.[23]

d. *Attorney Agent for Other Party to Transaction.* — If a person address a communication to an attorney who is agent for a third person with whom the person addressing is transacting business, the attorney may testify concerning matters learned through such communications, although in conducting negotiations he renders services which are usually performed by lawyers.[24]

21. Wadd *v.* Hazleton, 17 N. Y. Supp. 410.

In Thompson *v.* Kilborne, 28 Vt. 750, 67 Am. Dec. 742, the court says: "This anomalous relation testified to in the deposition, and which seems so much to puzzle Johnson, and which he so justly deprecates, certainly grows out of a too common facility upon the part of the profession in this state to undervalue their professional and official character as sworn officers of the highest judicial tribunal in the state. The practice of giving advice upon legal subjects without study and examination, and without corresponding pay, and a distinct retainer, is certainly a vicious one. The practice of the profession of giving street advice misleads the general opinion in regard to the value and dependence upon such advice. It would no doubt be better for the profession and their clients, both, if all professional advice in regard to the prosecution and defense of claims were given in writing, as it is in many places, and both parties are thereby put under the proper responsibility in regard to it, the one to pay for it, and the other to make it hold good, or to show at least that it was not notoriously bad. But at all events, we cannot regard a conversation of this loose and indefinite character as entitled to the protection of professional confidence."

In *In re* Monroe, 2 Connolly (N. Y.) 395, the court says: "I am not at all satisfied that the learned assistant to the Surrogate, in some of his rulings, was free from legal error in sustaining the objections made on behalf of proponent, who was personally present, to the evidence of the witness who claimed to be his attorney because he had been consulted by him on the street and at the lunch table about drawing a will for decedent. Sidewalk advice from attorneys upon legal questions, for which no compensation is asked or expected, and none given except a luncheon, should not be regarded as a privileged communication." The report does not state who paid for the luncheon.

Complaints to one attorney of the conduct of another with whom witness is associated in business are not privileged. Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. Supp. 539, *affirmed* without opinion, 176 N. Y. 613, 68 N. E. 1114. See Rudd *v.* Frank, 17 Ont. (Can.) 758.

22. Hager *v.* Shindler, 29 Cal. 47, 64.

23. Trustee for Creditors. Pritchard *v.* Foulkes, C. P. Coop. 14, 47 Eng. Reprint 379.

24. Turner *v.* Turner, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 79. In this case the court says: "W. J. Neel, Esq., was called as a witness for the plaintiff and was permitted to testify to a conversation between

e. *Friendly Advice as to Conduct,* given by attorney, is not privileged.[25]

f. *Attorney as Arbitrator.* — If attorney acts as arbitrator between two persons, their communications to him concerning the matter submitted are not privileged.[26]

g. *Statements by Witness.* — Communications between an attor-

J. Dallas Turner and his wife in reference to the payment of the claim of the plaintiff out of money the proceeds of a loan which the witness had negotiated for Mrs. Turner. He was also permitted to testify to other matters in connection with the negotiation of this loan. This evidence was objected to on the ground that the relation of attorney and client existed between the witness and the defendant, and that therefore the witness was not competent to testify in reference to any matter knowledge of which he derived on account of the professional relation claimed to exist between the parties. It appeared that Mr. Neel carried on, in connection with the practice of his profession as an attorney, the business of a negotiator of loans; that he was authorized by the company which he represented to receive applications for loans; that these applications were transmitted to the company, and if the security offered was satisfactory the loan would be accepted, and the money would be sent to Mr. Neel, who, after deducting such sums as had been agreed upon between him and the applicant for expenses and commissions, would pay over the net proceeds to the applicant. It is clear from the testimony that Mr. Neel bore that relation to the applicant and the loan company which has become so familiar to every one in this state. He was the agent of the applicant, and not the agent of the lender. But he was expected by the lender, on the acceptance of the application, to see that the applicant had an unincumbered title to the property, and if there were incumbrances it was his duty to see that these incumbrances were removed before any portion of the money was paid over to the applicant. He owed a duty to the applicant, as agent, to do every act that was legitimate and proper to secure the acceptance of the loan. In the performance of these duties it would become necessary for him to exercise his knowledge and information as an attorney at law, but he was really not employed as an attorney, but simply as an agent who, on account of the fact that he was also an attorney, might discharge the duty that was owing to the applicant without calling for the services of another person. . . . This was the view taken by this court in Skellie *v.* James, 81 Ga. 419, in which the testimony of Judge Miller, who occupied a relation to the transaction then under investigation similar to that which Mr. Neel occupied in the present case, was held to be admissible. In Freeman *v.* Brewster, 93 Ga. 652-653, where it was held that the testimony of an attorney at law was not admissible, the case of Skellie *v.* James was distinguished, upon the ground that it there appeared that the knowledge of the attorney as to the loan about which he was introduced as a witness was acquired, not as attorney for the borrower, but as attorney for the lender, who was not a party to the case. See also, in this connection, Jackson *v.* Bennett, 98 Ga. 106 (2); Stone *v.* Minter, 111 Ga. 45."

25. If attorney addresses person who has committed an assault upon his client, and advises him to leave town for a short time to avoid arrest, the conversation between them is not privileged, if it appear that the advice was tendered in a friendly way, and not as coming from a legal adviser. Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64. See Rudd *v.* Frank, 17 Ont. (Can.) 758.

26. Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

ney and a person who is, or will be, a witness in a case in which the attorney is engaged, are not privileged.[27]

h. *Statements as to Matters of Fact.* — Communications to an attorney for the purpose of obtaining information as to matters of fact are not privileged.[28]

i. *Opinion on Abstract Question of Law.* — The rule does not apply when a person requests an attorney's opinion upon an abstract question of law, it not appearing that the person addressing the attorney had done any act in regard to which he required professional advice.[29]

j. *Service Not Requiring Legal Skill.* — Where the nature of the employment is not such as to require legal skill in its exercise, communications relating to it are not privileged.[30]

27. City of Rockford *v.* Falver, 27 Ill. App. 604; People *v.* Heart, 1 Cal. App. 166; Lalance & G. Mfg. Co. *v.* Haberman Mfg. Co., 87 Fed. 563. But see Curling *v.* Perring, 2 Myl. & K. 380, 4 L. J. Ch. (N. S.) 80, 39 Eng. Reprint 989. See also English cases in notes 87-90, *ante*, under III, 10, D, e.

28. Branwell *v.* Lucas, 2 Barn. & C. 745, 9 E. C. L. 233; Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; Higbee *v.* Dresser, 103 Mass. 523; Appeal of Turner, 72 Conn. 305, 44 Atl. 310; Home F. Ins. Co. *v.* Berg, 46 Neb. 600, 65 N. W. 780; Piano Mfg. Co. *v.* Frawley, 68 Wis. 577, 32 N. W. 768.

Nor is attorney's statement to client as to matter of fact. Rosewater *v.* Schwab Cloth. Co., 58 Ark. 446, 25 S. W. 73. To same general effect, see McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, 345.

29. McMannus *v.* State, 2 Head (Tenn.) 213.

30. Walker *v.* Wildman, 6 Madd. (Eng.) 47, 56 Eng. Reprint 1007; State *v.* Marshall, 8 Ala. 302; Jackson *v.* Bennett, 98 Ga. 106, 26 S. E. 53; *In re* O'Donohoe, 18 Fed. Cas. No. 10,435; *s. c.*, 2 Hask. 17, 7 Fed. Cas. No. 3990.

Where a person requests an attorney to use his influence with a third person — his client — to induce such person to pay money to the one making the request, their communications on the subject are not privileged. *In re* Turner's Estate, 167 Pa. St. 609, 31 Atl. 867.

The fact that the attorney had acted as adviser, in small matters, of the person addressing him, is immaterial. *Ib.*

Instruction as to Mechanical Act. Client's instructions to his attorney regarding the performance of a mechanical act are not privileged. Higbee *v.* Dresser, 103 Mass. 523. In this case client wrote his attorney instructing him to deliver a certain note to another attorney. *Held*, the letter was not privileged. See also Dixon *v.* Parmelee, 2 Vt. 185; Aultman & Co. *v.* Ritter, 81 Wis. 395, 51 N. W. 569, where it was held that an attorney could be compelled to testify that he had received from his client a check to be used in paying fees and charges of a person who had conducted a sale under a certain chattel mortgage, and that he had paid the same.

Instruction as to Delivery of Deed. — Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867.

Message to Another Person. — A person imprisoned on a criminal charge requested an attorney to call upon the officer in charge of the prosecution and request that prisoner be given a light sentence. *Held*, that such communication was not privileged. State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160, the court says: "While it is true, as contended for by counsel for defendant, that, if the statements made to the witness Furling were made while he was acting as his attorney in endeavoring to receive a lighter sentence by pleading guilty, such evidence was incompetent, the evidence shows that he never at any time occupied that relation toward

(1.) Attorney as Scrivener. — Thus, if an attorney simply acts as a scrivener in drawing papers for client, and no statements are made which necessitate the giving of professional advice, communications between attorney and client in the course of the transaction are not privileged.[31]

him. Upon the contrary the witness testified that he was never employed by defendant, never expected any remuneration for what he did, which was merely gratuitous, and his statement is not contradicted in any manner by any other witness. The mere fact that he was a practicing attorney, and that he complied with the request made of him by defendant by no means created the relation of attorney and client. It required no professional skill, and any other person of ordinary intelligence could have performed the same service. No fee was paid nor was there any contract either express or implied by which one was to be paid. 'It is said that two things are necessary to establish the relation between attorney and client: *First*, the agreement of the attorney to be an attorney for the party; and *second*, the agreement of the party to have the other for an attorney.' Weeks on Attorneys at Law, § 185."

Message. — People *v.* Hess, 8 App. Div. 143, 40 N. Y. Supp. 486. In this case defendant when arrested on criminal charge addressed an attorney who had previously acted as such for him. The attorney stated that he could not and would not act as defendant's attorney in the criminal case. Afterwards defendant sent for the attorney and wished to talk with him about the case. The attorney repeated that he could not act as defendant's counsel. Defendant stated that there was a matter which he did not wish to speak about to counsel, but that he wished to talk with witness because of confidence founded upon acquaintanceship. Defendant then requested witness to take a message to another person who had been arrested upon the same charge as defendant. The attorney took the message and reported the reply to defendant. The message and the interview between defendant and witness when the reply was reported were claimed to be privileged. *Held*, that relation did not exist as to the matters in question, and attorney should testify.

Contents of Notice — Fact of Service. — Attorney's knowledge of the contents and of the fact of service of notice prepared and served by him for his client, indorsee of a draft, requiring another indorsee to sue the drawer, is not privileged. Collins *v.* Johnson, 16 Ga. 458.

31. *England.* — Vailiant *v.* Dodomede, 2 Atk. 592, 26 Eng. Reprint 754.

Colorado. — Caldwell *v.* Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. Rep. 599; Machette *v.* Wanless, 2 Colo. 169, 179.

Dakota. — O'Neill *v.* Murray, 6 Dak. 107, 50 N. W. 619.

Georgia. — Corbett *v.* Gilbert, 24 Ga. 454.

Illinois. — De Wolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 371; Smith *v.* Long, 106 Ill. 485.

Indiana. — Borum *v.* Fouts, 15 Ind. 50; Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782; Thomas *v.* Griffin, 1 Ind. App. 457, 27 N. E. 754.

Kansas. — Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892; Grimshaw *v.* Kent, 67 Kan. 463, 73 Pac. 92.

Michigan. — Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

Minnesota. — Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516.

Montana. — Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

Pennsylvania. — Appeal of Goodwin Gas Stove & M. Co., 117 Pa. St. 514, 12 Atl. 736, 2 Am. St. Rep. 696.

Texas. — Stallings *v.* Hullum, 79 Tex. 421, 15 S. W. 677.

Vermont. — Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

"Attorney and Conveyancer." If attorney testify that a certain communication was made to him "in his capacity of attorney, counselor and conveyancer," his testimony should be excluded. Linthicum *v.* Reming-

Advice in Connection With Preparation of Papers. — But if the attorney, in connection with the drawing of papers gives advice concerning the purpose they are designed to accomplish, or devises or suggests the plan which results in their preparation, or renders any legal service in regard to the transaction, communications on the subject are privileged.[32]

ton, 5 Cranch C. C. (U. S.) 546.

Preparation of Will. — See *In re* Downing's Will, 118 Wis. 581, 95 N. W. 876, in which an attorney drawing a will was held to have acted as a scrivener. But in Loder *v.* Whelpley, 111 N. Y. 239, 248, 18 N. E. 874, it is held that a communication to an attorney in regard to the preparation of a will is privileged, although asking no questions, and without advising his client, he does nothing more than reduce client's directions to writing.

Conveyancer Not Admitted to Practice. — Statements made to a person who acts as conveyancer and general adviser, but who has never been admitted to practice, are not privileged. Later *v.* Haywood (Idaho), 85 Pac. 494. See reference to case prior to 1676 in Bulstrod *v.* Letchmere, 2 Freeman Ch. (Eng.) 6 (case 4.) [1676] (1), 22 Eng. Reprint 1019.

In Randel *v.* Yates, 48 Miss. 685, this language is used: "An attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged, and may testify as to what comes to his knowledge in connection with such transaction. And when the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him, while thus engaged, will not be regarded as privileged."

But in Fox *v.* Spears (Ark.), 93 S. W. 560, it was held that client's statements to attorney that he had sold the land there in controversy, and instructions to draw a deed were privileged.

32. Brown *v.* Butler, 71 Conn. 576, 42 Atl. 654; Barry *v.* Coville, 7 N. Y. Supp. 36, 25 N. Y. St. 658; Gray *v.* Fox, 43 Mo. 570, 97 Am. Dec. 416; Carter *v.* West, 93 Ky. 211, 19 S. W. 592; Watson *v.* Young, 30 S. C. 144, 8 S. E. 706.

Where the record shows that an attorney who drew a deed for his client was selected to devise and consummate a plan by which a man could secure to his wife payment, in land, of a debt owing to her, and that this plan was carried out by the deed, so drawn, the attorney is deemed to have been employed professionally, and not as a draughtsman. This conclusion is strengthened by the fact that, after drawing an executory agreement which preceded the deed, the attorney brought an action upon it in behalf of one of his clients. In this case it was held that communications between attorney and clients were privileged. Blunt *v.* Strong, 60 Ala. 572.

In Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513, the court says: "He (an attorney offered as a witness) was applied to by Mr. Fauntleroy to draw such a deed as would settle the negroes on the appellee, Aphia, and exempt them from liability to her husband's creditors. The preparing of such deed necessarily required some degree of legal knowledge, and it might not be that a person wholly unskilled in law would be competent to draw it. While we say this, it is by no means intended to be admitted that where an attorney is retained and consulted, his right to disclose his client's secrets depends at all upon the difficulty or clearness of the case submitted."

Attorney as Conveyancer. — In other cases it is held that communications to attorney who acts as conveyancer are privileged. Brand *v.* Brand, 39 How. Pr. (N. Y.) 193, 263.

In Todd *v.* Munson, 53 Conn. 579, 4 Atl. 99, the court says: "Instruc-

(2.) Attorney as Notary. — Statements made, while acknowledging an instrument, to a notary public who is also an attorney, but whose professional advice is not asked, are not privileged.[33]

(A.) That Attorney Acting As Scrivener Or Notary Paid By One Party, Immaterial. — The fact that an attorney who acts as scrivener or notary for both parties to a transaction is paid by one of them, does not constitute him an attorney for such party in the sense that his action can be considered that of a lawyer rather than scrivener or notary.[34]

(B.) Pretending To Act As Notary, When In Fact Attorney. — But if an attorney who is employed to prepare a document acts as an attorney, he will not, by claiming that he merely acted as a notary, be permitted to disclose matters communicated to him by the person for whom he acted.[35]

tions by a grantor to an attorney drawing a deed are not ordinarily privileged communications. Hatton *v.* Robinson, 14 Pick. 416; Hebbard *v.* Haughian, 70 N. Y. 54. . . . But the difficulty is that the record does not show the precise nature of the communications from the grantors which the plaintiff expected to prove. It appears that he offered to prove by the declaration of one of the grantors made at the time the deed was executed, 'that the purpose of the deed was that Mrs. Munson could hold the property, and, subsequent to the death of Mr. and Mrs. Todd, sell or divide the property and give half to the plaintiff.' Now it may be that that purpose was the result of his consultation with his attorney—that it was what his attorney advised or directed; and, on the other hand, it may be that the declaration, whatever it was, was intended as an instruction to the attorney to prepare a deed expressing therein such a trust as the purpose contemplated. This latter supposition however seems to be excluded by the pleadings; for it is not alleged that the deed was not written according to the instructions; it is not alleged even that the deed is not just as the grantors intended it should be. We are thrown back then upon an express parol trust as the object of the proof to be gathered from the declarations. As it is possible that such a trust can only be shown by bringing before the court the private conferences between the client and his attorney, it is not clear that the court erred in excluding the evidence on that ground." As the court held the evidence in question inadmissible on another ground, the case can hardly be considered as establishing the proposition that instructions as to preparation of deeds are not privileged. It is difficult to see how the same court in Brown *v.* Butler, 71 Conn. 576, 42 Atl. 654, came to cite Todd *v.* Munson, as authority in holding that such instructions are privileged.

33. Notary Public. — Lukin *v.* Halderson, 24 Ind. App. 645, 57 N. E. 254; Aultman *v.* Daggs, 50 Mo. App. 280, 298.

Fact of Acknowledgment. — If a client acknowledges a deed before his attorney, who is also a notary public, the fact of acknowledgement is not privileged. Mutual L. Ins. Co. *v.* Corey, 7 N. Y. Supp. 939, 27 N. Y. St. 608. Upon appeal, the judgment in this case was reversed upon another ground, this subject not being discussed. See 135 N. Y. 326.

34. Payment by One Party, Immaterial. — Lukin *v.* Halderson, 24 Ind. App. 645, 57 N. E. 254; Thomas *v.* Griffin, 1 Ind. App. 457, 27 N. E. 754.

35. Getzlaff *v.* Seliger, 43 Wis. 297. This was a case for foreclosure of a mortgage executed by man and wife. Answer alleged that mortgage was procured, as to the wife, by duress. It was also contended that plaintiff, assignee of the mortgage, was not a *bona fide* purchaser for

k. *Immediate Advice Not Essential.* — It is not essential that advice be requested, or be necessary, immediately upon the making of the communication. It is sufficient if the matter inquired about was imparted to the attorney for the purpose of informing him of the facts concerning which his services were required.[36]

l. *Capacity Inferred From Other Service.* — The capacity in which an attorney acted may be inferred from acts done by him in

value. An attorney who had conducted a prosecution against the husband, to avoid which the wife executed the mortgage, and who was afterwards employed by mortgagee to draw the assignment in question, and who appeared for mortgagors upon the trial, was permitted to testify as to statements made to him by the mortgagee. This ruling was held erroneous. The supreme court says: "We reject the testimony of the attorney who conducted the prosecution against the husband; was afterwards employed by the mortgagee to draw the assignment of the mortgage to the respondent; and finally appeared for the appellants on the trial below. Such shifting of retainer, on the same subject matter, is essentially suspicious. And when this person appeared as a witness for the appellants to testify to the mortgagee's disclosures to him while acting as the mortgagee's attorney, the rule of law called upon the court below, in judicial propriety, peremptorily to close his mouth. He was admitted to betray professional confidence, upon his statement that he was acting as a notary and not as attorney. That is a transparent subterfuge unworthy of consideration. One fitted to hold either office should better comprehend the difference in the duties of a notary public and the duties of an attorney at law. No attorney should be tolerated in violating the confidence of his client, by the pretense that he received it as a notary."

36. Liggett *v.* Glenn, 51 Fed. 381, 398, 2 C. C. A. 286, 4 U. S. App. 438.

In National Bank of the Republic *v.* Delano, 177 Mass. 362, 58 N. E. 1079, 83 Am. St. Rep. 281, it was attempted to be shown that certain notes executed by an individual had been renewed as obligations of a firm of which he was a member. To show that another member of the firm consented to these renewals, an attorney who had been employed to conduct insolvency proceedings for the firm was asked as to statements made to him by such other member in the course of preparing the insolvency proceedings. The court says: "The insolvency of an ordinary partnership imports the insolvency of every partner, and the proceedings in insolvency, in such a case may involve the marshaling of the assets and claims as between the creditors of the firm and the individual creditors of each partner. Whether the notes in dispute were provable against the firm, or only against the individual estate of George, was a matter with which Emmons, in the course of his professional duty, was likely to have occasion to deal, both as counsel for the firm and as counsel for Cadmus. He needed to be informed about it, and the communication made by Cadmus was in the strict line of the information needed. Indeed, it is difficult to see how the attorney could have been in a situation to do his duty properly without some information on this point. It is a plain case of a communication from a client to an attorney while such attorney, and employed to continue to act as such in a matter running into the future. The communication was of a fact about which he, as such attorney, and in no other capacity, needed information. It was made to him in the course of his employment It matters not that at that time it was not made for the express purpose of taking advice. It is enough if it was a statement of a fact made in the course of the employment, and was material thereto, or believed to be such, and was made by client to his attorney in recognition and because

regard to matters connected with the subject of the communication in question.[37]

I. Communication Must Relate to Employment. — It is essential to the exercise of the privilege, that the communication in question relate to the matter concerning which the attorney's services are required.[38]

of the professional relation between them. The case is clearly distinguishable from Hatton *v.* Robinson, 14 Pick. 416, and similar cases upon which the petitioner relies."

37. Blunt *v.* Strong, 60 Ala. 572. In this case an attorney who was employed to devise and consummate a plan by which his client might secure to his wife payment in land, of a debt, prepared an agreement in furtherance of the scheme devised. Afterwards, the same attorney filed a bill, on behalf of the wife, to have this executory agreement ratified. In an action brought by a subsequent purchaser from the husband it was held that the attorney could not, against objection by husband and wife, testify that a mistake had been made in the paper prepared by him. The court says that the fact that he, as attorney for the wife, brought suit upon the agreement, showed that he was more than a mere scrivener; that the fact of his having acted in his professional capacity was an inference from his act in bringing suit.

38. *England.* — Paddon *v.* Winch, 39 L. J. Ch. 627, L. R. 9 Eq. 666, 22 L. T. 403; Cobden *v.* Kendrick, 4 T. R. 431; Caldbeck *v.* Boon, 7 Ir. Com. Law 32.

California. — Satterlee *v.* Bliss, 36 Cal. 489, 509; Carroll *v.* Sprague, 59 Cal. 655.

Iowa. — State *v.* Mewherter, 46 Iowa 89; State *v.* Swafford, 98 Iowa 362, 67 N. W. 284.

Kentucky. — Denunzio's Receiver *v.* Scholtz, 117 Ky. 182, 77 S. W. 715.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415.

Montana. — Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

Nebraska. — Clay *v.* Tyson, 19 Neb. 530, 26 N. W. 240.

New Hampshire. — Brown *v.* Payson, 6 N. H. 443.

New York. — Woodruff *v.* Hurson, 32 Barb. 557; Wadd *v.* Hazleton, 17 N. Y. Supp. 410; Mowell *v.* Van Buren, 28 N. Y. Supp. 1035; Stanfield *v.* Knickerbocker Trust Co., 1 App. Div. 592, 37 N. Y. Supp. 600; People *v.* Hess, 8 App. Div. 143, 40 N. Y. Supp. 486; Brennan *v.* Glennon, 44 App. Div. 107, 60 N. Y. Supp. 643.

Pennsylvania. — Heister *v.* Davis, 3 Yeates 4.

Texas. — Stallings *v.* Hullum, 79 Tex. 421, 15 S. W. 677.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

"But the relation of attorney and client must exist as to the subject matter of the communication, else the communication will not be privileged." Aultman *v.* Daggs, 50 Mo. App. 280, 298.

"The communication must also be made for the purpose of obtaining professional advice or aid in the matter to which the communication relates." Flack's Admr. *v.* Neill, 26 Tex. 273; Earle *v.* Grout, 46 Vt. 113.

In Rosewater *v.* Schwab Cloth. Co., 58 Ark. 446, 25 S. W. 73, it was held that, on the issue whether or not a certain sale of goods was *bona fide*, the evidence of an attorney that he informed the purchaser, a few days before the sale, that he, the attorney, held claims against the vendor, was not objectionable as a communication from attorney to client, although the purchaser had sought advice from such attorney and thereby caused him to believe that he contemplated purchasing the goods in question.

Attorney Acting in Another Matter. — When attorney is questioned as to statements to or by a certain person, it is not sufficient to entitle such statement to privilege, that witness was acting as attorney for such person in a matter other than that to which the question was directed. Marsh *v.* Howe, 36 Barb. (N. Y.) 649,

a. *Collateral Matters.* — As a consequence of the rule just stated, it follows that if in the course of professional consultation, client communicates to his attorney matters foreign to the subject of the attorney's employment, such matters are not privileged.[39]

Statements to Attorney for Opponent, Also for Person Communicating. — Statements made by a person to an attorney are not privileged, if made concerning a matter in which the attorney is acting for the opponent of the person addressing him, although the attorney may at the same time be the attorney for such person in another matter. State *v.* Snowden, 23 Utah 318, 65 Pac. 479. In this case R. was acting as attorney for S. who was under prosecution on a criminal proceeding. At the same time R. acted as attorney for the wife of S. in a divorce suit against S. *Held,* that statements made by S. to R. in regard to the divorce suit were not privileged.

Statements as to Future Employment. — If while an attorney is rendering professional service to his client, client proposes to attorney to accept future employment in regard to the matter in which the attorney is acting, and the attorney declines to do so, statements relating to such proposed employment are not privileged. Theisen *v.* Dayton, 82 Iowa 74, 47 N. W. 891.

Hypothetical Case, see note 77, under III, 10, A, *ante.*

Opinion on Abstract Question of Law. — The rule of privilege does not apply when attorney's opinion is asked upon an abstract question of law, it not appearing that the person addressing him had done any act in regard to which he required professional advice. McMannus *v.* State, 2 Head (Tenn.) 213.

39. *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591; Laflin *v.* Herrington, 1 Black (U. S.) 326, 339. Matter of Bellis *v.* Milligan, 38 Hun (N. Y.) 79; Johnson *v.* Daverne, 18 Johns. (N. Y.) 134, 10 Am. Dec. 198; Heister *v.* Davis, 3 Yeates (Pa.) 4.

"It is settled that if a client, pending the relation, communicates to his attorney a fact foreign to the object for which the attorney was retained, the communication is not to be regarded as confidential. The scope of the confidence is as the scope of the purpose. Each is considered to be the exact measure of the other." Hager *v.* Shindler, 29 Cal. 47.

"All that a client says to his attorney is not to be rejected as privileged communication. The privilege does not extend to extraneous or impertinent communications." Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604.

If when attorney is engaged in preparing articles of incorporation and a will for his client, the latter makes statements concerning certain personal property not connected with the attorney's employment, such statements are not privileged. Denunzio's Receiver *v.* Scholtz, 117 Ky. 182, 77 S. W. 715.

In Caldbeck *v.* Boon, 7 Ir. C. L. 32, client, after directing the issuance of execution against his judgment debtor, asked his solicitor's clerk if a certain person might accompany the arresting bailiff in order to point out the debtor. The person referred to accompanied the bailiff, and pointed out the wrong man, who brought action for damages against the sheriff. *Held,* that in such action the solicitor's clerk could testify as to his client's statements, as they did not relate to the subject of professional employment.

In State *v.* Mewherter, 46 Iowa 88, trial court permitted an attorney to testify as to threats made by his client against another person in the course of professional consultation. In affirming judgment the supreme court says: "But it very clearly appears that the threats in no manner pertained to the business of professional consultation; they had nothing to do with the litigation or contemplated litigation about which the advice and assistance of the attorneys were solicited. It cannot be claimed, even, that the intention expressed by the threats was a matter submitted to the attorneys professionally. Their advice and aid were

(1.) Statements as to Fee. — Thus statements as to the attorney's fee are not privileged.[40]

(2.) Fee Contract Contained in Statement of Confidential Matter. — But if an agreement concerning attorney's fee is stated in a writing which contains matter communicated to attorney to enable him to perform his duty, the entire writing is privileged.[41]

Privileged, if Involving Disclosure. — Also, if a statement as to the manner of paying fee would involve a disclosure of a matter material to the case upon which the attorney was consulted, such statement will be held privileged.[42]

(3.) Matter Connected With Employment — But it is sufficient if the communication relates to a matter so connected with the employment as attorney or counsel as to create a presumption that that employment was the ground of the address by the client.[43]

not sought in regard to it. The defendant's enmity, spirit of revenge, or other motive, whatever it may have been, which prompted the threats had no connection with the matter involving the rights of defendant submitted to the attorneys. Neither the threats nor the motives of defendant were the subject of professional communication. They cannot therefore be regarded as privileged. 1 Greenleaf's Ev., § 140; Pierson *v.* Steortz, Morris 136; Code, § 3643."

40. Strickland *v.* Capital City Mills (S. C.), 54 S. E. 220; Smithwick *v.* Evans, 24 Ga. 461; Moats *v.* Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

41. Liggett *v.* Glenn, 51 Fed. 381, 398, 2 C. C. A. 286, 4 U. S. App. 438.

42. State *v.* Dawson, 90 Mo. 149, 1 S. W. 827. See statement in note 77, under III, 10, A, *post.*

To effect that attorney will not be compelled to testify to manner of payment of fee, when such testimony would tend to disclose a matter material to his client's case, see Holden *v.* State, 44 Tex. Crim. 382, 71 S. W. 600. In this case defendant was indicted for theft. Her attorney was required to testify that, as a fee, she paid him ten dollars in two five dollar bills. The appellate court said this testimony was used to show that the amount of money found in defendant's possession corresponded with the amount stolen, that it was testimony of an inculpatory character, and should not have been admitted.

43. Myers *v.* Dorman, 34 Hun (N. Y.) 115; Bartlett *v.* Bunn, 10 N. Y. Supp. 210, 31 N. Y. St. 319; Turquand *v.* Knight, 2 M. & W. (Eng.) 98, 2 Gale 192, 6 L. J. Ex. 4.

In Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627, it is held that statements are privileged although made in the form of a hypothetical case presented to attorney, if the evidence shows that the relation of attorney and client had previously existed between the parties, and that the attorney himself connected the supposititious case with the actual transaction which afterwards formed the basis of the action in which the attorney's testimony was offered. The court held that the communication related to a matter so connected with the attorney's employment as to afford a presumption that the relation was client's reason for making his statement.

In McIntosh *v.* Moore, 22 Tex. Civ. App. 22, 53 S. W. 611, a woman had retained an attorney to defend certain actions threatened to be brought against her by her husband to obtain divorce and also to obtain cancellation of a deed by which he had conveyed certain land to her. The husband had also devised to her the land covered by the deed. In a proceeding to probate the husband's will this attorney was permitted to testify as to a conversation between himself and client as to the effect of the destruction of the husband's will. *Held,* that the testimony was improperly admitted. The court says: "But was the in-

b. *Courts Liberal in Applying Rule.* — Courts will be liberal in applying the rule which excludes collateral matters from privilege, and will hold any matter communicated between attorney and client to have been communicated in confidence, if the evidence affords reasonable ground for believing that it was communicated in reliance upon the existence of the relation.[44]

J. Necessity For Communication. — Another essential to claim of privilege is, the matter communicated must be necessary or believed by client to be necessary to be known by the attorney to enable him to perform his duty.[45]

8. Matters That Are Not Essential. — A. Agreement of Employment. — It is not essential to claim of privilege for a given

quiry of Mrs. McIntosh and the advice of the attorney disconnected with and have no bearing on the business about which he was employed by her? As is seen, he was retained to defend suits contemplated by appellant's husband for divorce and cancellation of a deed which conveyed her certain property which was by the will bequeathed to her. The final result of a suit can not always be foreseen, and it was natural for Mrs. McIntosh to desire to know, in the event of a divorce and cancellation of her deed by a decree of the court, what would be the effect of the destruction of the will. Well might she have apprehended, as she says, that if the divorce should be granted, the deed canceled, and the will destroyed, she would get nothing by her marriage except her husband's name." McIntosh *v.* Moore, 22 Tex. Civ. App. 22.

In Brazier *v.* Fortune, 10 Ala. 516, it is stated that if, in course of conversation with his attorney concerning matters upon which professional advice is usually required, client makes a remark having some, though not necessary connection with the subject of consultation, this remark is privileged.

In Lockhard *v.* Brodie, 1 Tenn. Ch. 384, client had employed an attorney to aid in having property sold at a certain decretal sale conveyed to client's wife. It was held that communications in regard to this sale were privileged, although made in the course of a consultation regarding an action pending against client. The case seems to proceed upon the theory that as the result of the action against the husband might affect the wife's title to the land in question, there was a connection between the action and the employment in regard to the decretal sale.

44. Moore *v.* Bray, 10 Pa. St. 519. In this case the court says: "It is true, the rule does not embrace the disclosure of collateral facts, made during accidental conversations, held irrespective of the professional character of the recipient. But the circle of protection is not so narrow as to exclude communications a professional person may deem unimportant to the controversy, or the briefest and lightest talk the client may choose to indulge with his legal adviser, provided he regards him as such, at the moment. To found a distinction on such a ground, would be to measure the safety of the confiding party by the extent of his intelligence and knowledge, and to expose to betrayal those very anxieties which prompt those in difficulty to seek the ear of him in whom they trust, in season and out of season. The general rule is, that all professional communications are sacred. If the particular case form an exception, it must be shown by him who would withdraw the seal of secrecy, and, I think, should be clearly shown." See also cases cited in next preceding note. To same effect, see Cleave *v.* Jones, 7 Exch. W. H. & G. (Eng.) 421, 21 L. J. N. S. Exch. 105.

45. Gillard *v.* Bates, 6 M. & W. (Eng.) 547, 9 L. J. N. S. Exch. 171,

communication that the person making it and the attorney to whom it is made enter into an agreement for the rendition of services, or that the attorney be regularly retained, or a fee paid or promised. Consequently, the essential conditions being present, a given communication is privileged, although no agreement be made, nor the attorney retained, or fee paid or promised.[46]

a. *Employment Expected by Attorney. — Previous Relation.* Communication is privileged, although at the time it was made the attorney had not been employed, if it appear that he expected to be employed if a suit should grow out of the matter referred to, and that he was the professional adviser of the person communicating, and was usually employed in his cases.[47]

b. *Former Employment Not Necessary.* — It is not necessary that the client should have employed the attorney professionally in transactions prior to that in question.[48]

8 D. P. C. 774. See also State *v.* Kidd, 89 Iowa, 54, 56 N. W. 263.

46. *Alabama.* — State *ex rel.* Attorney General *v.* Tally, 102 Ala. 25, 35, 15 So. 722.

Georgia. — Riley *v.* Johnston, 13 Ga. 260; Young *v.* State, 65 Ga. 525; Peek *v.* Boone, 90 Ga. 767, 17 S. E. 66.

Illinois. — Thorp *v.* Goewey, 85 Ill. 611.

Louisiana. — Bailly *v.* Robles, 4 Mart. N. S. 361.

Maine. — Sargent *v.* Hampden, 38 Me. 581; Wade *v.* Ridley, 87 Me. 368, 32 Atl. 975.

Mississippi. — Crisler *v.* Garland, 11 Smed. & M. 136, 49 Am. Dec. 49; Perkins Admr. *v.* Guy, 55 Miss. 153, 178, 30 Am. Rep. 510.

Missouri. — Cross *v.* Riggins, 50 Mo. 335.

Tennessee. — Lockhard *v.* Brodie, 1 Tenn. Ch. 384.

Wisconsin. — Orton *v.* McCord, 33 Wis. 205; Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839.

In West *v.* Freeman, 69 Mo. App. 682, it is said that Cross *v.* Riggins, 50 Mo. 335, had been overruled by State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160, and an attorney's testimony was admitted because it appeared that no contract of employment was made between him and the person consulting him. See dissenting opinion in Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39 to same effect. As to State *v.* Hedgepeth, 125 Mo. 14, 28 S. W. 160, referred to in West *v.* Freeman, as overruling Cross *v.* Riggins, the ruling there seems to have proceeded upon the theory that the communication there involved was not made for the purpose of enabling the attorney to render professional service. See note 30, under III, 7, H, j, *ante*.

47. Riley *v.* Johnston, 13 Ga. 260. In this case the statute relied upon as creating privilege provided that it should not be lawful for an attorney to testify for or against his client in any case as to any matter or thing, the knowledge of which he may have acquired from his client, or during the existence, and by reason of the relationship of client and attorney. The court says:

"Now, although Mr. Stubbs was not at the time under a contract with Riley, as his attorney in the case which subsequently arose between Riley and Johnston, yet to all intents and purposes contemplated by the Act of 1850, the relation of client and attorney existed at the time when he acquired the knowledge of the matters about which he was called to testify. If so, in the case which afterwards occurred, it was not competent for him to be sworn as a witness as to those matters, for or against Riley."

48. Denver Tramway Co. *v.* Owens, 20 Colo. 107, 128, 36 Pac. 848.

c. *Communication in Anticipation of Employment.* — Statements made by a person to an attorney, in anticipation or expectation of employment, are privileged,[49] although the attorney is not afterward employed.[50] But in such case it must appear that the person addressing the attorney intended to employ him or take his advice as attorney.[51]

d. *Contemplated Action Not Brought.* — Communication made in anticipation or expectation of employment is privileged, although the attorney does not bring an action for the purpose of bringing which he was consulted.[52]

e. *Employment Refused.* — Such communications are privileged, although the attorney refuses the employment.[53]

Statements After Employment Refused. — Communications to an attorney made after he has refused a tendered employment are not privileged.[54]

f. *Relation Broken.* — Communications are privileged, although person making them afterwards employs other counsel to render

49. Young *v.* State, 65 Ga. 523; Peeke *v.* Boone, 90 Ga. 767, 17 S. E. 66; State *ex rel.* Atty.-Gen. *v.* Tally, 102 Ala. 25, 15 So. 722; Haywood *v.* State, 114 Ga. 111, 39 S. E. 948.

Even when attorney had formerly been employed by adversary, the person making the communication believing that relation between his adversary and the attorney no longer existed. Nelson *v.* Becker, 32 Neb. 99, 48 N. W. 962.

Employment Expected by Attorney. — Riley *v.* Johnston, 13 Ga. 260. See note 47, *ante*.

But simple request to attorney to act as such for person addressing him is not privileged. Eekhout *v.* Cole, 135 N. C. 583, 47 S. E. 655.

50. Peek *v.* Boone, 90 Ga. 767, 17 S. E. 66; Thorp *v.* Goewey, 85 Ill. 611; Bailly *v.* Robles, 4 Mart. N. S. (La.) 361; Sargent *v.* Hampden, 38 Me. 581; Cross *v.* Riggins, 50 Mo. 335.

Conversation had with an attorney with a view to his retainer for the person making the communication is privileged, although the relation of attorney and client does not become established between them. State *ex rel.* Atty.-Gen. *v.* Tally, 102 Ala. 25, 15 So. 722.

51. Sharon *v.* Sharon, 79 Cal. 633, 680, 22 Pac. 26, 131.

52. Desired Action Not Taken. Reed *v.* Smith, 2 Ind. 160; Denver Tramway Co. *v.* Owens, 20 Colo. 107, 128, 36 Pac. 848.

53. Crisler *v.* Garland, 11 Smed. & M. (Miss.) 136, 49 Am. Dec. 59; Wade *v.* Ridley, 87 Me. 368, 32 Atl. 975; Perkins' Admr. *v.* Guy, 55 Miss. 153, 178; Strong *v.* Dodds, 47 Vt. 348; Cromack *v.* Heathcote, 2 Brod. & B. 4, 6 E. C. L. 1. See People *v.* Pratt, 133 Mich. 125, 94 N. W. 752, 67 L. R. A. 923, where a judge to whom a person applied for advice stated that he could not give it, and then proceeded to hear a statement of the matter in question. It was held that the judge's testimony was improperly admitted.

54. Farley *v.* Peebles, 50 Neb. 723, 70 N. W. 231; Avery *v.* Mattice, 9 N. Y. Supp. 166; People *v.* Heart, 1 Cal. App. 166; Theisen *v.* Dayton (Iowa), 47 N. W. 891.

If at beginning of conference the attorney informs the person making the communication that he will have nothing to do with the matter, and no contract is made, or retainer paid, the communication is not privileged. Ewers *v.* White's Estate, 114 Mich. 266, 72 N. W. 184; Plano Mfg. Co. *v.* Frawley, 68 Wis. 577, 32 N. W. 768. See also Haulenbeek *v.* McGibbon, 14 N. Y. Supp. 393, although the report does not show at what point in the transaction the attorney stated his refusal to act for either party. See also

the desired service,[55] or declines to further counsel with attorney after making confidential communications.[56]

g. *Hostile Employment Accepted.* — Communications are privileged, although the attorney who was consulted accepts employment from the adversary of the person communicating.[57]

Hostile Employment Already Accepted. — But if attorney states to one who has been his client that in a certain matter he has already accepted employment from one who afterwards becomes an adversary of the person offering employment, and such person nevertheless employs the attorney, their communications in regard to the matter in which the attorney acted for the adversary are not privileged.[58]

h. *Attorney's Belief That Employment Was Intended, Not Sufficient.* — It has been held that the fact that attorney thought a certain person had made a statement as a preliminary to instructing him to render professional service is not sufficient to render such statement privileged, when it appears that such person did not give any instructions, and there is nothing to show that he ever intended to give any, and no professional employment followed from the conversation, and such person afterward employed other counsel to represent him in the transaction in question.[59]

B. Retainer Non-Essential. — It is not essential that the client pay a retainer.[60]

C. Fee Non-Essential. — It is not essential that client pay, or offer to pay a fee for the service proposed or rendered.[61]

Setzar *v.* Wilson, 4 Ired. L. (26 N. C.) 501, 513.

55. Different Counsel Employed. Cross *v.* Riggins, 50 Mo. 335.

56. Further Consultation Declined. — Jahnke *v.* State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

57. Attorney Employed by Adversary. — Cross *v.* Riggins, 50 Mo. 335.

58. Hostile Employment. — Clay *v.* Tyson, 19 Neb. 530, 26 N. W. 240.

59. Rudd *v.* Frank, 17 Ont. Q. B. (Can.) 758.

60. King *v.* Barrett, 11 Ohio St. 261; Gage *v.* Gage, 13 App. Div. 565, 43 N. Y. Supp. 810. See Ewers *v.* White's Estate, 114 Mich. 266, 72 N. W. 184, as cited in note 56, *ante*.

"It is not necessary that any retainer be paid, promised or charged." Denver Tramway Co. *v.* Owens, 20 Colo. 107, 128, 36 Pac. 848.

61. *United States.* — Alexander *v.* United States, 138 U. S. 353.

Arkansas. — Andrews' Admx. *v.* Simms' Admr., 33 Ark. 771.

Colorado. — Denver Tramway Co. *v.* Owens, 20 Colo. 107, 128, 36 Pac. 848.

Illinois. — Goltra *v.* Wolcott, 14 Ill. 88.

Indiana. — Reed *v.* Smith, 2 Ind. 160; Bower's Admr. *v.* Briggs, 20 Ind. 139.

Louisiana. — Morris *v.* Cain's Exrs., 39 La. Ann. 712, 726, 1 So. 797, 2 So. 418.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400.

Michigan. — Mack *v.* Sharp, 138 Mich. 448, 101 N. W. 631.

Missouri. — Cross *v.* Riggins, 50 Mo. 335.

Montana. — Davis *v.* Morgan, 19 Mont. 141, 47 Pac. 793 (see statement of case in note 37, *ante*.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; March *v.* Ludlum, 3 Sandf. Ch. 35, 45; Pfeffer *v.* Kling, 58 App. Div. 179, 68 N. Y. Supp. 641; *s. c. affirmed* 171 N. Y. 668, 64 N. E. 1125.

Tennessee. — Lockhard *v.* Brodie, 1 Tenn. Ch. 384.

D. Reference to Litigation Not Essential. — It is not essential that the communication be made with reference to pending or contemplated litigation, it being sufficient that it be made concerning any act or transaction which is a proper subject for professional advice.[62]

9. Privilege Not Affected By. — A. Client's Knowledge of Rule of Privilege. — It is immaterial whether or not the client making or receiving a confidential communication understood the nature or extent of his privilege.[63]

B. Spontaneous or Responsive, or whether client's statement was made spontaneously, or in response to question by attorney.[64]

C. By Client or Attorney, Immaterial. — It is immaterial whether the statement in question was made by client or attorney.[65]

D. Client's Relation to Case Immaterial. — It is immaterial whether or not the client is a party to the case in which the attorney's testimony is offered.[66]

Texas. — Slaven *v.* Wheeler, 58 Tex. 23.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Wisconsin. — Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839.

"The payment of a fee is not the test of that relation." Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245. See also State *v.* Herbert, 63 Kan. 516, 66 Pac. 235.

Also privileged, if, at time of making communication, client believed that another person was to pay the attorney's fee. Hunter *v.* Van Bomhorst, 1 Md. 504.

In De Wolf *v.* Strader, 26 Ill. 225, 79 Am. Dec. 371, the court said, in holding that an attorney who simply acted as a scrivener could be compelled to testify: "There is no retainer shown, or offer to retain, or fee paid. This, and this only, can consummate the relation."

62. See *post*, note 68, under III, 10, J, "Not Limited to Litigation."

63. McLellan *v.* Longfellow, 32 Me. 494, 54 Am. Dec. 599.

64. Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

65. Turton *v.* Barber, L. R. 17 Eq. 329, 43 L. J. Ch. 468; Jenkinson *v.* State, 5 Blackf. (Ind.) 465; Bigler *v.* Reyher, 43 Ind. 112; Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362.

66. Wilson *v.* Rastall, 4 Term Rep. (Eng.) 754; Chant *v.* Brown, 7 Hare 79, 68 Eng. Reprint 32; Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Hart *v.* Thompson, 15 La. O. S. 88. But see Payne *v.* Miller, 103 Ill. 442. In this case the testimony of an attorney was objected to. The court says: "As to Irwin, he was acting, at the time to which his testimony relates, as the attorney of Jarvis, who has no perceivable interest in this litigation or the facts testified to by the witness. If this were a controversy between Jarvis and some one else, growing out of what occurred at that time, and Jarvis was here objecting to his testimony on the ground the facts testified to were acquired by him by reason of his employment as his attorney, there would be at least some apparent reason for the objection. But such is not the case. There is clearly nothing in the objection."

Incompetent Against Co-Party. Confidential communication cannot be given in evidence by attorney for one party to an action as against one who is a party on the same side as his client, although the relation of attorney and client never existed between the witness and the person against whom his testimony is offered. Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

It is immaterial that client has, at the time testimony is offered, parted with his interest in the transaction

Contra. — But the contrary has been held by several courts.[67]

E. Attorney's Willingness Immaterial. — It is immaterial that the attorney is willing to give the privileged matter in evidence.[68]

F. Attorney Not Admitted to Practice in Locus Fori. — An attorney's knowledge is privileged, although it was communicated to him in a country where he was not admitted to practice, and privilege was claimed in a court of that country.[69]

G. That Client May Be Witness, Immaterial. — The priv-

involved in the action. Benjamin *v.* Coventry, 19 Wend. (N. Y.) 353.

67. Contra. — Hamilton *v.* Neel, 7 Watts (Pa.) 517. In this case an attorney was questioned as to contents of papers of his client. Objection was sustained. In reversing judgment the supreme court of Pennsylvania says: "This evidence seems to have been objected to by the counsel for the plaintiff below and overruled by the court, because all the knowledge possessed by the witness of the matter was obtained when and by his having been counsel for Jones. But surely it was an entire misapprehension to suppose that the rule which prevents counsel or attorneys at law from disclosing the communications of their clients by giving evidence of them as witnesses was applicable in this instance. Jones was no party to this action, and his rights could not be affected, either directly or indirectly, in the least by the evidence; nor yet by the result of this action, whatever it might or may be. Had Jones's situation admitted of his being brought to court on trial as a witness himself, it cannot be questioned but he might have been compelled to have produced the paper and to have testified to all he knew respecting it. It is for the protection and security of clients that their attorneys at law or counsel are restrained from giving evidence of what they have had communicated and entrusted to them in that character; so that legal advice may be had at any time by every man who wishes it in regard to his case, whether it be bad or good, favorable or unfavorable to him, without the risk of being rendered liable to loss in any way or to punishment by means of what he may have disclosed or entrusted to his counsel. But where it is impossible that the rights or interests of the client can be affected by the witness's giving evidence of what came to his knowledge by his having been counsel and acted at the time as attorney or counsel at law, the rule has no application whatever, because the reason of it does not exist."

It was held in Georgia under statute of 1850 that the attorney's disqualification extended only to a case tending to which his client was a party, and in which the attorney was engaged. Swift *v.* Perry, 13 Ga. 138.

68. *England.* — Strode *v.* Seaton, 2 Ad. & El. 171, 29 E. C. L. 62.

United States. — Chirac *v.* Reinicker, 11 Wheat. 280, 294.

California. — People *v.* Atkinson, 40 Cal. 284.

Indiana. — Wilson *v.* Ohio Farmers' Ins. Co., 164 Ind. 462, 73 N. E. 892.

Louisiana. — Morris *v.* Cain, Exrs. 39 La. Ann. 712, 726, 1 So. 797, 2 So. 418.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

Tennessee. — McMannus *v.* State, 2 Head 213.

Virginia. — Clay *v.* Williams, 2 Munf. 105, 5 Am. Dec. 453.

In Maddox *v.* Maddox, 1 Ves. Sr. 61, 27 Eng. Reprint 893, Lord Hardwicke states that, if an attorney does not object to being examined, his deposition may be read. See editor's note to this case, p. 892, Vol. 27, Full Eng. Reprint.

69. Lawrence *v.* Campbell, 4 Drew 485, 28 L. J. Ch. 780, 5 Jur. N. S. 1071, 62 Eng. Reprint 186.

ilege exists, although the law permits the client to become a witness in his own behalf, or requires him to testify when called as a witness by his opponent.[70]

H. Matter Communicated Not Material or Important. The privilege is not affected by the fact the matter communicated was not material or important to the case in reference to which it was stated.[71]

I. Immaterial That Client Guilty of Crime. — If in an action for divorce a public officer intervenes on the ground that a party to the action had been guilty of adultery, he cannot ask such

70. Root *v.* Wright, 84 N. Y. 72, 38 Am. Rep. 495; Brand *v.* Brand, 39 How. Pr. (N. Y.) 193, 261.

71. In Moore *v.* Bray, 10 Pa. St. 519, the court says: "It is true, the rule does not embrace the disclosure of collateral facts, made during accidental conversations, held irrespective of the professional character of the recipient. But the circle of protection is not so narrow as to exclude communications a professional person may deem unimportant to the controversy, or the briefest and lightest talk the client may choose to indulge with his legal adviser, provided he regards him as such, at the moment. To found a distinction on such a ground, would be to measure the safety of the confiding party by the extent of his intelligence and knowledge, and to expose to betrayal those very anxieties which prompt those in difficulty to seek the ear of him in whom they trust, in season and out of season. The general rule is, that all professional communications are sacred. If the particular case form an exception, it must be shown by him who would withdraw the seal of secrecy, and, I think, should be clearly shown."

In Aiken *v.* Kilburne, 27 Me. 252, the court says: "Exception is taken to the exclusion of a part of the deposition of John E. Stacy, on the ground that the statements made by Ball to him, were privileged communications made by a client to his attorney. Mr. Stacy testifies, that they were made in a conversation between him and Ball respecting a suit, in which he had been previously retained, then pending in Court, in the name of Otis against Ball. Some portions of that conversation do not appear to have been material, or necessary to the defense presented in that suit. But whether they must be regarded as matters of professional confidence, and therefore privileged communications, does not depend upon their importance or materiality in the defense of that suit. If it did, the confidence so essential between client and attorney, would be greatly impaired, if not destroyed. For the client cannot be expected to be fully informed how far many matters communicated may be important or material. Nor can he reasonably be expected to decide and to be governed by such considerations in making his disclosures, his object being, to communicate every thing in any way appertaining to the transaction, that his attorney may be liable to no surprise. The character in which those communications were made and received, and not their relevancy or materiality to the defense of that suit, must therefore decide, whether they should be regarded as privileged or not."

Testimony Prejudicial or Not. In Rowland & Co. *v.* Plummer, 50 Ala. 182, we find this language: "As to the attorney, his privilege is personal, and the client may waive it. (1 Phill. Ev. (Cowen's Ed. 1849) p. 163; 3 Ib. and note pp. 182 et seq). It seems, also, that the disclosures which are forbidden to be made, are such as would be prejudicial to the client. He could not complain of that which did him no injury." In this case suit was brought against J. as indorser upon a promissory note. J's answer showed that he had transferred the note to his wife in payment of borrowed money. J's attorney was offered as a witness to

party whether or not he had made a confession to such officer, who had formerly acted as his attorney.[72]

J. Attorney Officer of Municipal Corporation. — It is also immaterial that an attorney interrogated is also an officer of the municipal corporation concerning whose communication he is interrogated.[73]

K. Object of Testimony. — That attorney's testimony is sought for the purpose of contradicting his client, who has testified, does not alter the rule.[74]

Or to Lay Foundation for Opinion as to Sanity. — Nor is an attorney's testimony rendered admissible as against client's objection by the fact that his testimony is sought for the purpose of laying foundation for an opinion that his client was of unsound mind.[75]

10. What Matters Privileged. — The privilege extends to all matters confidentially communicated between attorney and client, for purposes and under circumstances already stated in this article.[76]

prove the circumstances under which the note was assigned. His testimony was objected to as calling for a privileged communication. Objection was overruled. In holding this ruling correct, the supreme court uses the language above quoted. Similar view indicated in Copeland *v.* Watts, 1 Stark. (Eng.) 95, 2 E. C. L. 311.

In Clay *v.* Tyson, 19 Neb. 530, 26 N. W. 240, it was held not to constitute reversible error to admit in evidence a letter in which client stated to his attorney that he denies the existence of a certain claim, and stated that he had made certain agreements. The court says that, if there was error in admitting the letter, it was clearly without prejudice.

72. Branford *v.* Branford, 40 L. T. N. S. 659, (Eng.), 48 L. J., P. 40, 4 P. D. 72, 40 L. T. 659.

73. Mayor of Salford *v.* Lever, 62 L. T. N. S. (Eng.) 434. See note 10, under III, 15, B, b, (3.) (H.) (d.), *post,* for distinction between this case and Mayor Swansea *v.* Quick, L. R. 5 C. P. 106, 49 L. J. N. S. C. L. 157, 41 L. T. N. S. 758.

74. Attorney's Testimony Not Competent to Impeach Client. Supplee *v.* Hall, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188.

75. Not Competent as Foundation for Opinion. — Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245.

76. *England.* — Kelway *v.* Kelway, Cary 89, 21 Eng. Reprint 47; Kennedy *v.* Lyell, 23 Ch. D. 387, 48 L. T. N. S. 455, *affirmed* 9 App. Cas. 81.

United States. — Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 U. S. App. 438; Chirac *v.* Reinicker, 11 Wheat. 280, 294; *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591.

California. — Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114; Landsberger *v.* Gorham, 5 Cal. 450; People *v.* Atkinson, 40 Cal. 284; Sharon *v.* Sharon, 79 Cal. 633, 22 Pac. 26, 131; Verdelli *v.* Grays Harbor C. Co., 115 Cal. 517, 47 Pac. 364; Murphy *v.* Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365.

Colorado. — Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848.

Connecticut. — Goddard *v.* Gardner, 28 Conn. 172.

Georgia. — Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; Philman *v.* Marshall, 103 Ga. 82, 29 S. E. 598; Neal *v.* Patten, 47 Ga. 73; Lewis *v.* State, 91 Ga. 168, 16 S. E. 986; Dover *v.* Harrell, 58 Ga. 572; Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952; O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

Illinois. — Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99; Hollenback *v.* Todd, 119 Ill. 543, 8 N. E. 829.

Indiana. — Maas *v.* Block, 7 Ind. 202; Borum *v.* Fouts, 15 Ind. 50; McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, 345.

Iowa. — State *v.* Kidd, 89 Iowa

A. Means of Acquiring, Immaterial. — An attorney's knowl-

54, 56 N. W. 263; Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428.

Kansas. — Sheehan *v.* Allen, 67 Kan. 712, 74 Pac. 245; Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456; State *v.* White, 19 Kan. 445, 27 Am. Rep. 137.

Kentucky. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592.

Louisiana. — Shanghnessy *v.* Fogg, 15 La. Ann. 330.

Maine. — McLellan *v.* Longfellow, 32 Me. 494, 54 Am. Dec. 599; Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604.

Maryland. — Chase's Case, 1 Bland 206, 17 Am. Dec. 277.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415; Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188.

Michigan. — Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609.

Minnesota. — Struckmeyer *v.* Lamb, 75 Minn. 366, 77 N. W. 987.

Mississippi. — Crisler *v.* Garland, 11 Smed. & M. 136, 49 Am. Dec. 49.

Missouri. — Henry *v.* Buddecke, 81 Mo. App. 360.

Montana. — Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

Nebraska. — Basye *v.* State, 45 Neb. 261, 63 N. W. 811.

Nevada. — Mitchell *v.* Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

New Hampshire. — Sleeper *v.* Abbott, 60 N. H. 162; Brown *v.* Payson, 6 N. H. 443.

New Jersey. — Matthews *v.* Hoagland, 48 N. J. Eq. 455, 464, 21 Atl. 1054.

New York. — Coveney *v.* Tannahill, 1 Hill 33, 37 Am. Dec. 287; Crosby *v.* Berger, 11 Paige 377, 42 Am. Dec. 117; Jackson *v.* Burtis, 14 Johns. 391; McPherson *v.* Rathbone, 7 Wend. 216; Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Williams *v.* Fitch, 18 N. Y. 546; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Jackson *v.* French, 3 Wend. 337, 20 Am. Dec. 699.

North Carolina. — Hughes *v.* Boone, 102 N. C. 137, 9 S. E. 286; Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

Ohio. — Benedict *v.* State, 44 Ohio St. 679, 11 N. E. 125.

Pennsylvania. — Beltzhoover *v.* Blackstock, 3 Watts 20, 27 Am. Dec. 330.

South Dakota. — Austin Tomlinson *v.* Webster Mfg. Co. *v.* Heiser, 6 S. D. 429, 437, 61 N. W. 445.

Tennessee. — McMannus *v.* State, 2 Head 213.

Texas. — Hernandez *v.* State, 18 Tex. App. 134, 152.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Virginia. — Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513.

Washington. — Hartness *v.* Brown, 21 Wash. 655, 59 Pac. 491.

West Virginia. — State *v.* Douglas, 20 W. Va. 770, 780.

Wisconsin. — Selden *v.* State, 74 Wis. 271, 12 N. W. 218, 17 Am. St. Rep. 144; Dudley *v.* Beck, 3 Wis. 274, 284; Koeber *v.* Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512; McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922. See also cases under "General Rule," N, 2, III, 1, *ante*, and "Papers," III, 10, E, *post*.

"This protection extends to every communication which the client makes to his legal adviser, for the purpose of professional advice or aid, upon the subject of his rights and liabilities." Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406. See also People *v.* Barker, 56 Ill. 300 and Bigler *v.* Reyher, 43 Ind. 112.

"The relation itself is of a confidential character, and every fact derived through the medium of it, seems to partake of its nature." Crawford *v.* McKissack, 1 Port. (Ala.) 433.

In Wetherbee *v.* Ezekiel, 25 Vt. 47, it was held that an attorney could not testify as to whether or not two certain actions against his client were commenced for the same cause of action. The court says: "In this case, the very point of consultation might have been, and probably was, whether the first suit would abate the second."

edge acquired from his client in course of professional employment, is privileged, irrespective of method of acquisition, whether by oral or written communication, or by observation.[77]

B. CLIENT'S STATEMENTS OF FACT. — Attorney cannot give in evidence any knowledge acquired through statements of his client,

77. *England.* — Nias *v.* Northern & E. R. Co., 3 Myl. & Cr. 355, 40 Eng. Reprint 963; Robson *v.* Kemp, 5 Esp. 52, 4 Esp. 235.

United States. — Liggett *v.* Glenn, 51 Fed. 381, 396, 2 C. C. A. 286, 4 U. S. App. 438.

Georgia. — Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; Philman *v.* Marshall, 103 Ga. 82, 29 S. E. 598.

Illinois. — Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99.

New York. — McClure *v.* Goodenough, 12 N. Y. Supp. 459.

New Jersey. — Matthews *v.* Hoagland, 48 N. J. Eq. 455, 464, 21 Atl. 1054.

Texas. — McIntosh *v.* Moore, 22 Tex. Civ. App. 22, 53 S. W. 611.

"One sense is privileged as well as another. He cannot be said to be privileged as to what he hears, but not as to what he sees, where the knowledge acquired as to both has been from his situation as an attorney." Language of Lord Ellenborough quoted in Dietrich *v.* Mitchell, 43 Ill. 40. In this case defendant was sued as guarantor on a note. Defendant denied the execution of the guaranty, and called an attorney as a witness to show that he, the attorney, had at one time brought a suit on the note, and that when it was in his possession the note bore defendant's endorsement, but no words of guaranty. The supreme court held that this testimony should not have been admitted; that the attorney's knowledge was privileged. The court quotes the language of Lord Ellenborough given above, and adds: "The weight of authority is against the admissibility of the evidence, and this rule is founded in the sounder sense. If the knowledge comes to the attorney through his professional relation to his client, we cannot perceive that it is important whether in the language of Lord Ellenborough, it is by what he sees or what he hears."

"The particular form of the communication is unimportant." Gray *v.* Fox, 43 Mo. 570, 97 Am. Dec. 416. See also Brown *v.* Payson, 6 N. H. 443.

It is immaterial whether the communication be made orally or in writing. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Kennedy *v.* Lyell, 23 Ch. D. 387, 48 L. T. 455, *affirmed* 9 App. Cas. 81.

"I do not find the rule restricted to such matters as may have been communicated in special confidence. The relation itself is of a confidential character, and every fact derived through the medium of it, seems to partake of its nature." Crawford *v.* McKissick, 1 Port. (Ala.) 433. The exact meaning of the expression "special confidence" cannot be gathered from the report.

In Causey *v.* Wiley, 27 Ga. 444, it was held that an attorney could not testify as to the contents of certain interrogatories addressed to his client, although they were read in open court, he having stated that he had acquired his knowledge during, and, as he believed, in consequence of, the relation of attorney and client, and that, but for the existence of that relation he would not have listened to the interrogatories when read, or would not have read them out of court.

Hypothetical Case. — A communication is privileged, although stated to attorney in the form of a hypothetical case, especially if the evidence shows that the attorney had acted as such for person making communication, and connected the hypothetical case with an actual transaction within his knowledge, and which was the basis of an action subsequently instituted. Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

Kind of Money Paid to Attorney. In State *v.* Dawson, 90 Mo. 149, 1 S. W. 827, defendant was charged with stealing one hundred and

made privately, in confidence, and for the purpose of enabling the attorney to render professional service.[78]

C. INSTRUCTIONS. — Neither client nor attorney can be com-

sixty dollars of current silver coin of the United States." The trial court permitted defendant's attorney to testify that defendant had paid him "forty-five dollars in silver, and five dollars in gold." *Held*, that the transaction was a privileged communication, and the admission of the attorney's testimony constituted error. The court uses this language: "The reason of the rule protects a client from a disclosure by his attorney, not only of what he has communicated to his attorney orally or in writing, but of any information derived by the attorney from being employed as such, any information which he has derived from his client, whether by words, signs or acts; and to restrict the privilege to oral or written communications would make the rule infinitely narrower than the reason upon which it is based." For similar case and ruling, see Holden *v.* State, 44 Tex. Crim. 382, 71 S. W. 600.

In Hernandez *v.* State, 18 Tex. App. 134, the statute under consideration provided that "an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship." Code Crim. Proc. art. 733. After quoting common law authorities on the subject the court says:

"Our statute, we think, states the rule more clearly and more comprehensively than any of the authorities to which we have referred. It extends the privilege to *any fact which came to the knowledge of the attorney by reason of such relationship.* There is no qualification except that it must be a fact which he learned by reason of his relationship as an attorney to the business to which such fact has reference. It is not required that information of such fact shall come from the client. It matters not from what source it has been obtained; if it was obtained because of the relationship of attorney in and about that particular business, it is privileged. Now, apply this rule to the testimony of Anderson. He was the attorney of Louis Hernandez in the theft case. As such attorney he was approached by the defendant, and in the capacity of such attorney the defendant made to him, and he received, certain statements having reference to the Louis Hernandez case. All that transpired between Anderson and the defendant had reference to said case, and all the information obtained by said Anderson from the defendant was obtained by reason of his relationship as an attorney in that case."

As to statements made by interpreter in translating communications between attorney and client, see Maas *v.* Block, 7 Ind. 202.

78. Client's Statements. — Attorney for bankrupt cannot testify concerning information received from his client as to client's affairs. *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591.

Possession of Property. — Attorney cannot be compelled to state who was in possession of, managed and received the rents and profits of a certain hereditament, when it appears that all his information on the subject was obtained through professional communications from his client. Parry *v.* Watkins, 9 L. J. O. S. Ch. (Eng.) 63.

Statements While Executing Document. — Attorney cannot give in evidence statements made by his client at the time of executing assignments of contracts. Hollenbeck *v.* Todd, 119 Ill. 543, 8 N. E. 829; or language which attorney understands to be an instruction to take no further action in a certain matter. Clark *v.* Richards, 3 E. D. Smith (N. Y.) 89.

Client's Statements as to His Own Conduct. — Attorney for person charged with murder cannot show statements of his client as to place where client had hidden a pistol claimed to have been used by him in

pelled to testify as to the matter of instructions given by the former to the latter concerning professional employment.[79]

Instructions Showing Nature of Title.— While attorney may be questioned as to fact of employment, he may not be questioned as to authority, if his answer would involve a disclosure of the nature of title claimed by his client to land in question.[80]

D. LETTERS. — Letters exchanged between attorney and client relating to the subject of the latter's professional employment are privileged.[81]

committing the murder in question. State *v.* Douglass, 20 W. Va. 770, 783. Nor can he state where, from directions of his client, he found the pistol. *Ib.*

Pleading Not Read to Client. Attorney cannot be interrogated concerning information obtained for the purpose of preparing a pleading which was not read over to client, or sworn to by him. Armstrong *v.* People, 70 N. Y. 38, 48.

Upon a second trial of a person charged with a crime, his attorney cannot give in evidence statements which at the time of the former trial, his client said he wished to make to the jury; nor can he testify as to his advice to his client as to the propriety of making such statements. Lewis *v.* State, 91 Ga. 168, 16 S. E. 986. The statute under which this testimony was excluded forbade an attorney to testify as to any knowledge acquired from his client, and had been construed to provide that client could not waive the privilege. See O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

79. Client's Instructions. — Attorney cannot show instructions from client to bid at sale in pursuance of foreclosure proceedings conducted by the attorney. Stuyvesant *v.* Peckham, 3 Edw. Ch. (N. Y.) 579. Or at sale conducted by assignee in bankruptcy. *Ex parte* Assignee, 27 L. T. N. S. 460. Or as to instructions to prepare claim in certain bankruptcy proceedings. Lockwood *v.* House, 17 Jones & S. (N. Y.) 500. Or instructions as to attorney's conduct of an action. Smith *v.* Bradhurst, 41 N. Y. Supp. 1002. Or instructions concerning preparation of deed. Fox *v.* Spears (Ark.) 93 S. W. 560; Linthicum *v.* Remington, 5 Cranch C. C. (U. S.) 546; Manser *v.* Dix, 1 Kay & J. 451, 24 L. J. N. S. Eq. (Eng.) 497, 1 Jur. (N. S.) 466, 3 Eq. R. 650, 69 Eng. Reprint 536, Sandforth *v.* Remington, 2 Ves. Jr. 189; 30 Eng. Reprint 587. But in Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Supp. 396, it is held that instructions to attorney as to drawing of deed are not privileged.

Client cannot be asked whether he had communicated certain facts and given certain instructions to his attorney. Birmingham R. & El. Co. *v.* Wildman, 119 Ala. 547, 24 So. 548; Ft. Worth & D. C. R. Co. *v.* Lock, 30 Tex. Civ. App. 426, 70 S. W. 456.

Cause of Accident. — Conversation between attorney and client as to cause of accident to the former, and retainer for damage suit, are privileged, Ney *v.* City of Troy, 3 N. Y. Supp. 679.

80. Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 294. This was an action of trespass for mesne profits. Attorney was asked: "Were you retained, at any time, as attorney or counsellor, to conduct the ejectment suit above mentioned, on the part of the defendant, for the benefit of the said George Reinicker, as landlord of those premises?" *Held,* that the question was improper, as involving a disclosure of the extent or grounds of client's title. To same general effect, see Birmingham R. & El. Co. *v.* Wildman, 119 Ala. 547.

81. *England.* — Greenough *v.* Gaskell, 1 Myl. & K. 98, 39 Eng. Reprint 618; Hughes *v.* Biddulph, 4 Russ. 190, 38 Eng. Reprint 777; Vent *v.* Pacey, 4 Russ. 193, 38 Eng. Reprint 778; Greenlaw *v.* King, 1 Beav. 137; *s. c.* 8 L. J. N. S. Eq. 92, 46 Eng. Reprint 891; Garland *v.* Scott, 3 Sim. 396, 57 Eng. Reprint 1046; Reid *v.* Langlois, 1 MacN. & G. 627, 638, 41 Eng.

a. *Not All Letters.* — Letters are not privileged unless oral communications on the same subject would be so. Consequently, letters are not privileged, if relating to the subject of the attorney's compensation;[82] or if written for the purpose of conferring authority upon the attorney.[83]

b. *Letters, Client to Agent.* — Letters written by client to his agent to be transmitted or shown to counsel are privileged.[84]

c. *Agent to Client.* — Also letters written by agent to client after

Reprint 1408; Goodall *v.* Little, 1 Sim. N. S. 155, 20 L. J. Ch. 132, 61 Eng. Reprint 60; Macfarlane *v.* Rolt, L. R. 14 Eq. 580, 41 L. J. Ch. 649, 27 L. T. N. S. 305; Hamilton *v.* Nott, L. R. 16 Eq. 112; 42 L. J. Ch. 512; Storey *v.* Lord George Lennox, 1 Keen 341, 48 Eng. Reprint 338; Holmes *v.* Baddeley, 1 Phil. 476, 14 L. J. Ch. 113, *reversing s. c.* 6 Beav. 521, 41 Eng. Reprint 713; Parsons *v.* Robertson, 2 Keen 605, 48 Eng. Reprint 761; Hughes *v.* Garnons, 6 Beav. 352, 49 Eng. Reprint 862; Bullock *v.* Corry, 47 L. J. Q. B. 352, 3 Q. B. Div. 356, 38 L. T. N. S. 102; Minet *v.* Morgan, L. R. 8 Ch. App. Cas. 361, 42 L. J. Ch. 627, 28 L. T. N. S. 573; Mornington *v.* Mornington, 2 Johns. & H. 697, 70 Eng. Reprint 1239; Catt *v.* Tourle, 23 L. T. N. S. 485; Boyd *v.* Petrie, 20 L. T. N. S. 934; Mostyn *v.* West Mostyn C. & I. Co., 34 L. T. N. S. 531; Ainsworth *v.* Wilding, 65 L. J. Ch. N. S. 432 [1896] 1 Ch. 673, 74 L. T. 193; Bacon *v.* Bacon, 34 L. T. N. S. 349; Willson *v.* Leonard, 7 L. J. N. S. Ch. 242; MacCorquodale *v.* Bell, 45 L. J. C. P. 329, 1 C. P. D. 471, 35 L. T. N. S. 261; County Council of Kerry *v.* Liverpool S. Assn., Ir. Rep. (1905) Vol. 2, p. 38.

Canada. — Hoffman *v.* Crerar, 17 Ont. Pr. 404.

Georgia. — Five Assn. of Philadelphia *v.* Fleming, 78 Ga. 733, 3 S. E. 420.

Massachusetts. — Rooney *v.* Maryland Casualty Co., 184 Mass. 26, 67 N. E. 882.

New York. — Wilson *v.* Troup, 7 Johns. Ch. 25, 39; *In re* Whitlock, 3 N. Y. Supp. 855, *reversing s. c.* 2 N. Y. Supp. 683; Downey *v.* Owen, 98 App. Div. 411, 90 N. Y. Supp. 280.

In Brigham *v.* McDowell, 19 Neb. 407, 27 N. W. 384, the court says: "Where an attorney is employed to prosecute an action to foreclose a mortgage, and before the final foreclosure is consummated, and during the litigation, the plaintiff denies the authority of his attorney to prosecute a collateral action which, if prosecuted, would work an estoppel on plaintiff; and where in a subsequent action in which the question of the authority of the attorney to act becomes important, for the purpose of determining the rights of parties affected by the first decree, it is not a violation of the law of privileged communications to allow the attorney to testify as to his employment, and as to the instructions given him by his client, or as to his approval of the course pursued by the attorney. Especially is this the case where the relation of attorney and client has ceased and the authority of the attorney is called in question by the client, and in a case where equities of third parties are to be settled without detriment to the rights of the client."

82. Letter from client to attorney offering certain stock as fee is not privileged. Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425.

83. Benton *v.* Benton, 106 La. Ann. 99, 30 So. 137. *Compare* Tays *v.* Carr, 37 Kan. 141, 14 Pac. 456.

So as to letter requesting attorney to represent writer. Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347.

84. Reid *v.* Langlois, 1 Mac. & G. 627, 41 Eng. Reprint 1408; Glyn *v.* Caulfield, 3 Macn. & G. 463, 474, 42 Eng. Reprint 339; Hooper *v.* Gumm, 6 L. T. N. S. 891, 2 Johns. & H. 602, 70 Eng. Reprint 1199.

receipt of advice of counsel, the letters containing reference to counsel's opinion.[85]

d. *Letters Between Attorneys.* — Letters between attorneys who represent the same client, and concerning his business, are privileged.[86]

e. *Letters, Attorney to Third Person.* — It has been held that letters written by a solicitor to a third person, relating to his client's business, in anticipation of litigation, instructing such person to procure evidence, or written for the purpose of obtaining evidence, are privileged.[87] Also letters from attorney to witness,[88] and from witness to attorney,[89] although attorney had made no request for witness' statement and no effort to obtain it.[90]

f. *Anonymous Letter Concerning Testimony.* — An anonymous letter to an attorney concerning testimony in a pending action of his client's is privileged.[91]

g. *Letters Between Client and Non-Professional Agent* in anticipation of litigation and with a view to the prosecution or defense of a claim in dispute are privileged.[92]

h. *Letters Between Parties to Action to be Shown to Attorney.* It has been held that letters written by party to an action to a co-

85. Boughton *v.* Citizens' Ins. Co., 11 Ont. Pr. (Can.) 110.

86. Hughes *v.* Biddulph, 4 Russ. 190, 38 Eng. Reprint 777; Goodall *v.* Little, 1 Sim. N. S. 155, 20 L. J. Ch. 132, 61 Eng. Reprint 60; United States *v.* Six Lots of Ground, 1 Woods C. C. (U. S.) 234; Jones *v.* Nantahala M. & T. Co., 137 N. C. 237, 49 S. E. 94.

Attorney and Clerk. — So as to letters between attorney and his clerk relating to client's affairs. Mostyn *v.* West M. C. & I. Co., 34 L. T. N. S. (Eng.) 531.

87. Steele *v.* Stewart, 13 Sim. 533, 60 Eng. Reprint 207; Greenough *v.* Gaskell, 1 Myl. & K. 98, 39 Eng. Reprint 618; Simpson *v.* Brown, 33 Beav. 482, 55 Eng. Reprint 455; Lafone *v.* Falkland Islands Co., 4 Kay & J. (Eng.) 34, 27 L. J. Ch. 25.

But such letters are not privileged unless it appear that they were written with reference to the dispute involved in the action in which they are offered. Original Hartlepool Co. *v.* Moon, 30 L. T. N. S. (Eng.) 585; *affirming s. c.* 30 L. T. N. S. 193; MacCorquodale *v.* Bell, 45 L. J. C. P. 329, 1 C. P. D. 471, 35 L. T. N. S. 261.

In Wheeler *v.* Le Marchant, 50 L. J. Ch. 793, 17 Ch. D. 675, 44 L. T. N. S. 632, it is held that documents communicated to solicitor by surveyor employed by him upon client's business are not privileged.

88. Curling *v.* Perring, 2 Myl. & K. 380, 4 L. J. Ch. (N. S.) 80, 39 Eng. Reprint 989, is cited to this effect in Betts *v.* Mengies, 26 L. J. N. S. Eq. 528.

89. Young *v.* Holloway, 56 L. J. N. S. Prob. 81, 57 L. T. N. S. 515, 12 P. D. 167.

90. Young *v.* Holloway, 56 L. J. N. S. Prob. 81, 57 L. T. N. S. 515, 12 P. D. 167.

91. Young *v.* Holloway, 56 L. J. N. S. Prob. 81, 57 L. T. N. S. 515, 12 P. D. 167.

92. Client to Agent. — Ross *v.* Gibbs, L. R. 8 Eq. 522, 39 L. J. Ch. 61; MacFarlane *v.* Rolt, 14 L. R. Eq. 580, 27 L. T. N. S. 305, 41 L. J. Ch. 649. See *post* "Communications Between Principal and Agent in View of Litigation."

Opinion of Non-Professional Agent is not privileged. Bustros *v.* White, 45 L. J. Q. B. 642, 1 Q. B. D. 423, *reversing s. c.* 34 L. T. N. S. 835.

party to be communicated to their common attorney are privileged.[93]

Contra. — Also that they are not.[94]

Party Also Lawyer.— Where a party to an action, who is a solicitor, acts as agent for the solicitor of record, communications between him and a co-party are privileged.[95]

E. PAPERS delivered by client to attorney, or by attorney to client in the course of performance of professional duty by attorney are privileged.[96]

a. *Account Book* sent by client to attorney, to be used in prepar-

93. Parties. — Jenkyns *v.* Bushby, 35 L. J. Ch. 820, L. R. 2 Eq. 547, 15 L. T. 310. But to entitle such letters to privilege it must appear that they were intended to be communicated to counsel. Betts *v.* Menzies, 26 L. J. Ch. 528, 3 Jur. N. S. 885.

94. Contra. — Goodall *v.* Little, 1 Sim. N. S. (Eng.) 155, 20 L. J. Ch. 132.

95. Party, Also Lawyer. — Hamilton *v.* Nott, 42 L. J. Ch. 512, L. R. 16 Eq. (Eng.) 112.

96. *England.* — Greenlaw *v.* King, 1 Beav. 137, L. R. 7 Q. B. 769, 8 L. J. Ch. N. S. 92, 48 Eng. Reprint 891; Pearse *v.* Pearse, 1 De G. & Sim. 12, 16 L. J. Ch. 153, 63 Eng. Reprint 950; Nias *v.* N. & E. R. Co., 3 Myl. & Cr. 355, 40 Eng. Reprint 963; *s. c.* 2 Keen 76, *affirmed* 2 Keen 312, 48 Eng. Reprint 557, 649; Greenough *v.* Gaskell, 1 Myl. & K. 98, 39 Eng. Reprint 619; Hughes *v.* Biddulph, 4 Russ. 190, 38 Eng. Reprint 777; Bolton *v.* Corporation of Liverpool, 1 Myl. & K. 88, 39 Eng. Reprint 615, *affirming s. c.* 3 Sim. 467, 57 Eng. Reprint 1073; Volant *v.* Soyer, 13 Com. Bench 231; Bulstrod *v.* Letchmere, (1676) 2 Free. Ch. 5, 22 Eng. Reprint 1019; Flight *v.* Robinson, 8 Beav. 22, 50, 13 L. J. Ch. 425, 8 Jur. 888, 50 Eng. Reprint 9; Woods *v.* Woods, 4 Hare 83, 67 Eng. Reprint 570; Bluck *v.* Galsworthy, 2 Giff. 453, 3 L. T. 399, 7 Jur. N. S. 91, 66 Eng. Reprint 189; Parsons *v.* Robertson, 2 Keen 605, 48 Eng. Reprint 761; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396; Jenkyns *v.* Bushby, 35 L. J. Ch. 820, L. R. 2 Eq. 547, 15 L. T. N. S. 310; Mayor of Bristol *v.* Cox, L. R. 26 Ch. Div. 678, 50 L. T. N. S. 719; Manser *v.* Dix, 1 Kay & J. 451, 69 Eng. Reprint 536, 24 L. J. N. S. Eq. 497; Goldstone *v.* Williams, Deacon & Co., L. R. Ch. Div. 1899, Vol. 1, p. 47, 68 L. J. N. S. Ch. Div. 24, 79 L. T. N. S. 373; Turton *v.* Barber, L. R. 17 Eq. 329; Preston *v.* Carr, 1 Younge & J. 175; Willson *v.* Leonard, 7 L. J. Ch. 242; Wynne *v.* Humberston, 27 Beav. 421, 54 Eng. Reprint 165; Bolton *v.* Corporation of Liverpool, 1 Myl. & K. 88, 39 Eng. Reprint 615; Cleave *v.* Jones, 7 Exch. (Wels. H. & G.) 421; *s. c.* 21 L. J. N. S. Exch. 105, 8 E. L. & Eq. 554; Rex *v.* Inhabitants of N. B., 8 Dowl. & Ryl. 726; Holmes *v.* Baddeley, 1 Phil. 476, 14 L. J. Ch. 113, 41 Eng. Reprint 713; Bate *v.* Kinsey, 1 C. M. & R. 38, 4 Tyr. 662, 3 L. J. Ex. 304; Rex *v.* Dixon, 3 Burr. 1687; Newton *v.* Chaplin, 10 Com. Bench 356, 19 L. J., C. P. 374, 14 Jur. 1121; Blenkinsopp *v.* Blenkinsopp, 10 Beav. 277, 50 Eng. Reprint 589; Brown *v.* Oakshott, 12 Beav. 252, 50 Eng. Reprint 1058; Laing *v.* Barclay, 3 Stark. 38; Marston *v.* Downes, 6 Car. & P. 381; Mills *v.* Oddy, 6 Car. & P. 728; Reg. *v.* Hawkins, 2 Car. & K. 823.

Canada. — Lynch *v.* O'Hara, 6 U. C. C. P. 259.

United States. — Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286, 4 U. S. App. 438.

Connecticut. — Lynde *v.* Judd, 3 Day 499; Supplee *v.* Hall, 75 Conn. 17, 52 Atl. 407, 96 Am. St. Rep. 188.

Georgia. — Dover *v.* Harrell, 58 Ga. 572; Philman *v.* Marshall, 103 Ga. 82, 29 S. E. 598; Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952; Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165.

Iowa. — State *v.* Kidd, 89 Iowa 54, 56 N. W. 263.

Louisiana. — State *v.* Hazleton, 15 La. Ann. 72.

ing a case is privileged.[97] So as to account prepared by attorney, to be used by client in litigation.[98]

b. *Abstract of Client's Deeds* is privileged.[99]

c. *Notes of Testimony. — Trial of Cause.* — Notes of testimony taken upon trial of client's action are not privileged.[1]

Private Examination. — But notes taken by attorney for trustee in bankruptcy at private examination conducted for the purpose of enabling the attorney to advise his client are privileged.[2] So as to copies of testimony taken by assignee under trust deed for benefit of creditors for the purpose of obtaining evidence to be submitted to counsel for advice as to institution of action.[3]

d. *Papers Delivered by Third Person. — Not Agent of Client.* Paper delivered to attorney by a third person, not client's agent, is not privileged, although it relate to client's business.[4]

e. *Delivered by Client and Others.* — When an attorney has in his possession papers relating to his client's business, some of which were delivered by third persons, and some by client, the court will hold some to be privileged and others non-privileged, according to the fact of delivery.[5]

Massachusetts. — Anonymous, 8 Mass. 370.

Missouri. — Ingerham *v.* Weatherman, 79 Mo. App. 480.

New Hampshire. — Brown *v.* Payson, 6 N. H. 443.

New Jersey. — Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054.

New York. — Coveney *v.* Tannahill, 1 Hill 33, 37 Am. Dec. 287; Crosby *v.* Berger, 11 Paige 377, 42 Am. Dec. 117; Jackson *v.* Burtis, 14 Johns. 391; Mallory *v.* Benjamin, 9 How. Pr. 419, 423; Wakeman *v.* Bailey, 3 Barb. Ch. 482, 487; Jackson *v.* Denison, 4 Wend. 559; McPherson *v.* Rathbone, 7 Wend. 316.

Vermont. — Durkee *v.* Leland, 4 Vt. 612; Hick's Estate *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095; State *v.* Squires, 1 Tyler 147.

The case of Selden *v.* State, 74 Wis. 271, 42 N. W. 218, 17 Am. St. Rep. 144, is interesting, as involving a double privilege, the papers there in question being privileged as communications from client to attorney, and from wife to husband. See statement under II, 8, A, b, (1.) note 88 "Husband and Wife," *ante*.

97. Cleave *v.* Jones, 7 Exch. (W. H. & G.) 421, 8 E. L. & Eq. 554, 21 L. J. N. S. Exch. 105.

98. Goldstone *v.* Williams, Deacon & Co., L. R. Ch. Div. 24, 1899, Vol. I, p. 47, 68 L. J. N. S. Ch. Div. 24, 79, L. T. N. S. 373.

99. Rex *v.* Inhabitants of N. B., 8 Dowl. & Ryl. 726, 16 E. C. L. 348.

1. Nicholl *v.* Jones, 2 H. & M. (Eng.) 588; 5 N. R. 361; Rawstone *v.* Mayor of Preston, 52 L. T. N. S. 922, L. R. 30 Ch. Div. 116, 54 L. J. N. S. Ch. Div. 1102; Nordon *v.* Defries, 8 Q. B. D. 508, 51 L. J. Q. B. 415, expresses the contrary view, but is disapproved in Robson *v.* Worswick, 59 L. T. N. S. 399, 58 L. J. Ch. 31, 38 Ch. D. 370.

2. Learoyd *v.* Halifax J. S. B. Co., 62 J. J. Ch. 509, 68 L. T. 158.

3. Fenton *v.* Queen's Ferry W. R. Co., 38 L. J. N. S. Ch. 263.

In Gandee *v.* Stansfeld, 28 L. J. N. S. Ch. 436, 5 Jur. N. S. 778, it was held on appeal, reversing an order of the Master of the Rolls, that copies of such depositions ought not to be produced until hearing of the cause.

4. Delivered by Third Person. Wheeler *v.* LeMarchant, 17 Ch. Div. 675; Davis *v.* New York, O. & W. R. Co., 70 Minn. 37, 72 N. W. 823; Pulford's Appeal, 48 Conn. 247.

5. Delivered by Client and Others. Davis *v.* New York, O. & W. R. Co., 70 Minn. 37, 72 N. W. 823.

f. *Must Relate to Employment.* — To be privileged, papers delivered to attorney must relate to the subject of his employment,[6] and supposed by client to be necessary to enable the attorney to perform his duty.[7]

g. *Good Faith.* — They must be delivered in good faith, and to enable attorney to render the required service.[8]

h. *Attorney Not Compellable to Produce Papers.* — An attorney cannot be compelled to produce his client's papers in evidence, unless his client himself could be compelled to do so.[9]

6. Must Relate to Employment. Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 264. See Reg. *v.* Hayward, 2 Car. & K. (Eng.) 234.

Attorney Ignorant of Nature of Papers delivered to him by client cannot say they were delivered in professional confidence. Mitchell's Case, 12 Abb. Pr. 249, 264.

7. Necessary. — State *v.* Kidd, 89 Iowa 54, 56 N. W. 263. If unnecessary matter is communicated to attorney under the *bona fide* belief that it is necessary, it is privileged. Cleave *v.* Jones, 7 Exch. (W. H. & G.) 421, 8 Eng. L. & Eq. 554, 21 L. J. N. S. Exch. 105.

8. Allen *v.* Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. 955; Reg. *v.* Hayward, 2 Car. & K. (Eng.) 234; Travis *v.* January, 3 Rob. (La.) 227; *In re* Whitlock, 2 N. Y. Supp. 683.

Paper Delivered to Deprive Adversary. — In Trustees of Chester Church *v.* Blount, 70 Ga. 779, it was held that an attorney could be compelled to answer as to his possession of a deed which had been given to him by his client, not for the purpose of preparing a defense, but for the purpose of depriving his adversary of a piece of evidence belonging to it, and that the attorney could be compelled to produce the document in evidence.

As to duty of attorney in regard to producing papers, and as to attempted evasion of this duty, see remarks of court in People *ex rel.* Mitchell *v.* Sheriff, 7 Abb. Pr. (N. Y.) 96. In this case an attorney was adjudged guilty of contempt of court, for declining to obey court's instructions to identify papers, and giving papers to client with instructions to take them out of court.

In Reg. *v.* Hayward, 2 Car. & K. (Eng.) 234, defendant was indicted for forgery of a will. It appeared that defendant, having possessed himself of certain deeds from the home of deceased, placed the forged will among them, and sent them to his attorney for the ostensible reason of asking his advice upon the deeds, but, in reality, that the attorney might find the will among the deeds and act upon it, which the attorney did. *Held,* that the will should be read in evidence. But it has been held that it is sufficient, if client believes that writing delivered to attorney was necessary. Cleave *v.* Jones, 7 Exch. (Welsb. H. & G.) 421; *s. c.* 8 E. L. & Eq. 455, 21 L. J. N. S. Exch. 105.

9. *England.* — Flight *v.* Robinson, 8 Beav. 22, 13 L. J. Ch. 425, 50 Eng. Reprint 9; Wright *v.* Mayer, 6 Ves. Jr. 280, Marston *v.* Downes, 6 Car. & P. 381; Volant *v.* Soyer, 13 Com. Bench 231.

Irish. — Stratford *v.* Hogan, 2 Ball & B. Ir. Eq. 164.

United States. — Liggett *v.* Glenn, 51 Fed. 381, 396, 2 C. C. A. 286, 4 U. S. App. 438.

Minnesota. — Stokoe *v.* St. Paul, M. & M. R. Co., 40 Minn. 545, 42 N. W. 482; Davis *v.* New York, O. & W. R. Co., 70 Minn. 37, 72 N. W. 823.

New York. — Wakeman *v.* Bailey, 3 Barb. Ch. 482; Mallory *v.* Benjamin, 9 How. Pr. 419; McPherson *v.* Rathbone, 7 Wend. 217; Jackson *v.* Denison, 4 Wend. 558; Jackson *v.* Burtis, 14 Johns. 391.

In State *v.* Squires, 1 Tyler 147, it is held that an attorney cannot, upon a rule to show cause, be compelled to deliver to a grand jury certain papers of his client, the court holding that the client himself could not

Required to be Used for Public Prosecution. — Such production cannot be compelled, although paper is required to be used as foundation for a public prosecution,[10] or for other public purpose.[11]

i. *When Attorney Must Produce Papers.* — Under certain circumstances attorney can be compelled to produce his client's papers in evidence.

(1.) Must Produce if Client Compellable. — If the paper is one which the client himself could be compelled to produce in evidence, the attorney must produce it.[12]

be compelled to do so. To same general effect, see Reg. *v.* Hawkins, 2 Carr & P. (Eng.) 392.

Attempt to Lay Foundation by Client. — When a witness is asked as to the contents of a letter written by him to his attorney, for the purpose of laying a foundation for the introduction of the letter, objection to the question should be sustained. Southern R. Co. *v.* White, 108 Ga. 201, 33 S. E. 952.

Pleading Not Filed. — Attorney cannot be compelled to produce draft of a bill in equity prepared for his client, but not filed. Feaver *v.* Williams, 13 L. T. N. S. 270.

10. Coveney *v.* Tannahill, 1 Hill 33, 37 Am. Dec. 287, 299.

11. State *v.* Squires, 1 Tyler (Vt.) 147.

12. Must Produce, if Client Compellable. — Swall *v.* Marwood, 9 Barn. & C. (Eng.) 288; Fenwick *v.* Reed, 1 Meriv. 114, 123, 35 Eng. Reprint 618; *In re* Cameron C. & C. R. Co., 25 Beav. 1, 53 Eng. Reprint 535; Hope *v.* Liddell, 7 De G. & M. & G. 331, 3 Eq. R. 790, 24 L. J. Ch. 691, 44 Eng. Reprint 129; Bursill *v.* Tanner, L. R. 16 Q. B. Div. 1; Furlong *v.* Howard, 2 Schoales & L. (Irish Eq.) 115; Lessee of Rhoades *v.* Selin, 4 Wash. C. C. 715.

"If this were not so, all that a party would have to do to evade the production of papers, would be to put them into the custody of his attorney." Mitchell's Case, 12 Abb. Pr. (N. Y.) 482.

In Andrews *v.* Ohio & M. R. Co., 14 Ind. 169, it was held that when an attorney admits that he has in his possession papers belonging to his client, he can be compelled to produce them in evidence, or testify as to their contents. The court says: "Notice was given during the trial to said attorney to produce the receipts which he refused to do; and objected to testifying as to the contents, on the ground that any and all information he had in relation thereto, was derived from the receipts placed in his hands as attorney in the case.

"The circumstances connected with the payments, were proper evidence to go to the jury, upon the question of the application, or intention to apply, the money so paid.

"The amount of the installments called for, and the amount paid, were proper items of evidence to go to the jury upon that question.

"The notice to the attorney was sufficient, he having stated that he had the receipts then in his possession. As to whether he could be compelled to testify as to the contents, we are of opinion that he could. The party himself might have been compelled, under the statute, to produce the receipts on the trial. He could not defeat the production of that evidence by passing it into the hands of his attorney. He could still have been compelled to produce it. The attorney stood in no more secure position."

Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, 262, is disapproved in Hoyt *v.* Jackson, 3 Dem. (N. Y.) 388, where the opinion of the court seems to be that privilege applies to documents in hands of attorney, although client could be compelled to produce them. But Mitchell's case is approved and followed in *In re* Whitlock, 2 N. Y. Supp. 683.

In Harrisburg Car Mfg. Co. *v.* Sloan, 120 Ind. 156, 21 N. E. 1088, it is said that an attorney who has

(2.) Papers Non-Privileged if Accessible to Public. — Papers delivered to attorney are not privileged, if knowledge of their existence or contents is accessible to others, or to the public, and client or attorney may be compelled to produce them, or give their contents in evidence.[13] But it has been held that if a collection of copies of unprivileged documents made by attorney for client would tend to disclose the attorney's view of the client's case, all such documents will be held privileged.[14]

(3.) Attorney's Duty to Make Public. — Papers which, in the discharge of his duty to his client, the attorney must necessarily make public are not privileged,[15] nor papers the contents of which another person would be entitled to know, as a letter conferring authority to do a certain act.[16]

(4.) Papers to be Sent to Third Person. — Nor does privilege extend to papers which client and attorney prepared to be sent to a third person, and which are sent to such third person.[17]

(5.) Forged Papers. — It has been held in England that attorney must produce in evidence forged papers delivered to him by his client; but in each case the evidence seems to have been held admissible on the ground that it did not appear that the relation of attorney and client existed between witness and person delivering the papers in question.[18]

(6.) Papers of Adversary. — Attorney may be compelled to produce papers of client's adversary which have come into his possession, or

possession of a letter written to defendant by plaintiff may be compelled to produce it. It does not appear from the report that the attorney acted for either party. As to procedure to enforce production of documents by bill of discovery, see English cases cited in this note, and Wakeman *v.* Bailey, 3 Barb. Ch. (N. Y.) 482.

13. Accessible to Public. — Alden *v.* Goddard, 73 Me. 345; Wright *v.* Vernon, 22 L. J. Ch. (Eng.) 447; *s. c.* 1 Drew 344; Tyas *v.* Brown, 42 L. T. N. S. (Eng.) 501.

Copies of Public Record. — In State *v.* Kidd, 89 Iowa 54, it was held that a copy of a public record delivered by client to attorney is not privileged.

In People *v.* Petersen, 60 App. Div. 118, 69 N. Y. Supp. 941, attorney was held compellable to produce original summons and complaint in action instituted for his client.

Contents of Public Record. — Attorney must testify as to identity of public record in his possession, though obtained in discharging his professional duty. Warner Elev. Mfg. Co. *v.* Houston (Tex. Civ. App.), 28 S. W. 405.

14. Lyell *v.* Kennedy, 51 L. J. Ch. 937, 27 Ch. Div. 1, 50 L. T. 730.

15. Caldwell *v.* Meltveldt, 93 Iowa 730, 61 N. W. 1090. In this case it was held that delivery of promissory note to attorney was not privileged, as his duty demanded that he send and cause it to be presented for collection.

16. Letter Conferring Authority. Bay Admr. *v.* Trusdell, 92 Mo. App. 377.

17. Edison Elec. L. L. Co. *v.* United States Elec. L. Co., 44 Fed. 294. In this case it is held that letters prepared by attorney and client to be filed in the United States Patent Office are not privileged.

18. Reg. *v.* Avery, 8 Car. & P. (Eng.) 596; Reg. *v.* Farley, 2 Car. & K. (Eng.) 313. See Reg. *v.* Tyhrey, 3 Cox C. C. 160, 18 L. J. N. S. Mag. Cas. 36.

disclose what he has done with them, or point out where they may be found.[19]

(7.) Must Produce to Partner. — In an action by representative of deceased attorney to obtain accounting of affairs of partnership formerly existing between him and another attorney, defendant may be compelled to produce papers relating to the affairs of clients of the partnership.[20]

(8.) Must Produce for Identification. — Attorney may be compelled to produce his client's paper for purpose of identifying same.[21]

j. *Contents of Papers Privileged.* — Attorney will not be compelled to testify concerning the contents of his client's papers.[22]

19. Attorney may testify concerning condition or contents of papers offered in evidence by client's adversary. Brown *v.* Foster, 1 Hurlst. & N. (Eng.) 736.

Letters sent by third person to client, and by him delivered to attorney are not privileged, and the attorney may be required to produce them in evidence. *In re* Whitlock, 2 N. Y. Supp. 683, *reversed,* 3 N. Y. Supp. 855. In the reversing opinion the supreme court held that the special term erred in ordering attorney called as witness to produce letters from client to witness, and held as to letters from third persons to client, that the order was erroneous because the letters were not material. The court intimates that if such letters were material, their production would be enforced.

In Travis *v.* January, 3 Rob. (La.) 227, the court says: "But where an attorney is in possession of title papers and documents belonging to his client's adversary, or, is called on, after having had such papers and documents in his possession, to disclose what he has done with them, or to point out where they can be found, we think the rule does not apply; and that the attorney may be as properly called on to produce the papers and documents necessary to establish the rights of the adverse party, if they be in his possession, or interrogated as to the facts which may lead to a discovery of the place where they can be procured, as his client himself could be under our laws. Code of Pract. arts. 140, 473. In this case, it is clear that the document sought to be produced did not belong to the plaintiff; that the plaintiff, or his counsel, have no right to keep it in their possession; and that, as a muniment of the defendant's title, keeping it from the rightful owner, contrary to his consent, would amount to a gross fraud upon him. In vain would be contended that the paper in question was secretly and confidentially placed in the possession of the counsel by their client; for, if such a proposition were to be for a moment adhered to, it would often be used as a shield under which parties litigant would be enabled to commit the grossest and most flagrant frauds to the prejudice of their adversaries. We must say that a proposition so unreasonable in itself, and so contrary to law, cannot in any manner be countenanced by us, as its absurdity is fully demonstrated by the injurious effect its consequences would have on the legal rights of those who are compelled to seek justice at our hands. Comstock et al. *v.* Paie and Smith, 18 La. 479."

20. Attorney Must Produce to Partner. — Brown *v.* Perkins, 2 Hare 540, 8 Jur. 186, 67 Eng. Reprint 223. See *ante,* III, 5, "To Whom Privilege Belongs."

21. Phelps *v.* Prew, 3 El. & Bl. (Eng.) 430, 23 L. J. Q. B. 140, 2 C. L. R. 1422, 18 Jur. 249.

22. *England.* — Marston *v.* Downes, 6 Car. & P. 381; Davies *v.* Waters, 9 Mees. & W. 607.

Canada. — Lynch *v.* O'Hara, 6 U. C. C. P. 259, 265.

Minnesota. — Stokoe *v.* St. Paul, M. & M. R. Co., 40 Minn. 545, 42 N. W. 482.

Must Name Trustee Appointed by Deed. — But it has been held in England that an attorney can be compelled to state the names of trustees appointed by a certain deed, as, by so doing, he does not state a material part of the deed.[23]

k. *Client Not Compellable to Produce.* — **(1.) Papers Delivered Between Himself and Attorney.** — Nor can client be compelled to produce papers delivered to him by his legal adviser in the course of professional employment, or papers prepared by himself and submitted to his attorney.[24]

New Hampshire. — Brown *v.* Payson, 6 N. H. 443.

New York. — Jackson *v.* Denison, 4 Wend. 558; Coveney *v.* Tannahill. 1 Hill 33. 37 Am. Dec. 287; Kellogg, *v.* Kellogg, 6 Barb. 116. 131; Wakeman *v.* Bailey, 3 Barb. Ch. 482.

Vermont. — Arbuckle *v.* Templeton. 65 Vt. 205, 25 Atl. 1095.

Answers to Interrogatories prepared by adversary, it being claimed that such answers were sent by client to attorney, but it not appearing that they were filed. Rooney *v.* Maryland Casualty Co., 184 Mass. 26. 67 N. E. 882. where it also appears to be held that the fact of delivery of such answers was privileged.

Books of Client. — An attorney cannot testify to knowledge gained from an examination of his client's account books. Ingerham *v.* Weatherman. 79 Mo. App. 480. If client intrust account book to solicitor to be by him used in preparing a case to be submitted to counsel. solicitor cannot. in an action brought by him against client to recover money lent by him to client. introduce this book to show an entry taking plaintiff's case out of the statute of limitations. Cleave *v.* Jones, Exrx., 7 Exch. (Welsb. H. & G.) 421, 8 E. L. & Eq. 554. 21 L. J. N. S. C. L. 105. Or to matters discovered in examining a title for his client. Charman *v.* Tatum, 54 App. Div. 61. 66 N. Y. Supp. 275.

Papers. — Nor to knowledge obtained from an inspection of documents submitted to him by client in course of professional employment. Matthews *v.* Hoagland, 48 N. J. Eq. 455. 464.

Abstract of Client's Deeds prepared by solicitor's clerk under instructions from his employer is privileged. King *v.* Inhabitants of U. B., 8 Dowl. & Ryl. (Eng.) 726.

Pleading Not Filed. — An attorney cannot be compelled to testify to contents of answer sworn to by his client and left with the attorney to be filed or not as the attorney should deem best. but which was not filed. Neal *v.* Patten. 47 Ga. 73; Burnham *v.* Roberts. 70 Ill. 19.

Papers on Motion. — Nor can attorney who has been employed to make a motion for a new trial testify to contents of papers left with him by client to be used in presenting motion. and which had been lost. irrespective of the question whether or not he had participated in the trial. Philman *v.* Marshall, 103 Ga. 82. 29 S. E. 598.

Insurance Policy. — Nor can attorney employed to collect an insurance policy be required to testify as to the terms of the policy, the identity of the beneficiary, or payment of proceeds to client. Freeman *v.* Brewster, 93 Ga. 648. 21 S. E. 165.

23. Bursill *v.* Tanner, 55 L. J. Q. B. 53. 16 Q. B. Div. 1. But see Lynch *v.* O'Hara, 6 U. C. C. P. 259, where testimony as to parties to the deeds and the contents of them was held properly excluded.

24. In Glegg *v* Legh, 4 Madd. 193, 56 Eng. Reprint 678, it is said that a person "is not protected from answering as to his own admissions of facts, although they were contained in a case stated by him for the opinion of counsel."

In Preston *v.* Carr, 1 Younge & J. (Eng.) 175, it was held that client could be compelled to produce case submitted to counsel.

Advertisement prepared by client

(2.) Papers to be Submitted to Attorney. — Client cannot be compelled to produce documents containing evidence and statements

and submitted to solicitor for advice as to whether or not it contained libelous matter, is privileged. Lowden *v.* Blakey, 58 L. J. Q. B. 617, 23 Q. B. Div. 332, 61 L. T. N. S. 251.

Instructions to attorney as to draft of deed are privileged. Manser *v.* Dix, 24 L. J. Ch. N. S. (Eng.) 497, 1 Kay & J. 451, 1 Jur. N. S. 466, 3 Eq. R. 650.

Written Evidence, or Copies. Copies of foreign patents procured by solicitor for client, to be used in litigation are privileged, and client cannot be compelled to produce them. Guelph C. Co. *v.* Whitehead, 9 Ont. Pr. (Can.) 509.

Reports of Agents prepared for purpose of submission to counsel for use in pending or contemplated litigation are privileged. MacDonald *v.* Norwich Union F. Ins. Co., 10 Ont. Pr. (Can.) 501. So as to report of physician as to condition of person injured by railway train, procured by solicitor to be used as evidence in damage suit by injured person against railway company. Pacey *v.* Metropolitan Tramways Co., 46 L. J. N. S. Exch. & C. P. 698.

Pleading prepared by attorney, but not filed. Belsham *v.* Harrison, 15 L. J. N. S. C. (Eng.) 438.

Opinion of Attorney. — Client cannot be compelled to produce his attorney's opinion upon facts submitted to him. Woods *v.* Woods, 4 Hare 83, 67 Eng. Reprint 570; Bluck *v.* Galsworthy, 2 Gif. 453, 66 Eng. Reprint 189; Parsons *v.* Robertson, 2 Keen 605, 48 Eng. Reprint 761; Richards *v.* Jackson, 18 Ves. Jr. 472, 34 Eng. Reprint 396; Jenkins *v.* Bushby, L. R. 2 Eq. 547, 35 L. J. Ch. 400, 14 L. T. N. S. 431; Willson *v.* Leonard, 7 L. J. Ch. 242.

Notes and Opinion Upon Instructions Submitted. — Mostyn *v.* W. M. C. & I. Co., 34 L. T. N. S. (Eng.) 531.

Opinion in Letter Between Agents of Client. — Letters between two agents of client containing opinion of client's attorney are privileged. Merchants' Bank *v.* Moffatt, 6 Ont. Pr. (Can.) 348.

In Mayor of Bristol *v.* Cox, L. R. 26 Ch. Div. 678, 50 L. T. N. S. 719, it is held that the fact that a party to an action by a city is a ratepayer, and as such, contributes to the salary of the city solicitor does not entitle him to production of an opinion given by such solicitor to the city.

Document Executed by Attorney to Client. — Genet *v.* Ketchum, 62 N. Y. 626. In this case attorney executed a bond of indemnity to his client. Its production was demanded but was not allowed. In holding this ruling correct the court of appeals says: "If the bond simply indemnified said defendant against an adverse result of the litigation, it was immaterial and irrelevant. If there were contained therein statements and recitals of fact, which if made by Ketchum would have been available to plaintiff, then they were communications between client and counsel, and privileged."

Draft of Deed prepared by counsel with his marginal notes and opinion. Manser *v.* Dix, 24 L. J. Ch. 497, 1 Kay & J. 451, 3 Eq. R. 650, 69 Eng. Reprint 536.

Account prepared by attorney to be used in litigation. Goldstone *v.* Williams Deacon & Co., L. R. Ch. Div. 1899, Vol. 1, p. 47, 68 L. J. N. S. Ch. Div. 24, 79 L. T. N. S. 373.

Cost Bill delivered to client by attorney. Turton *v.* Roberts, L. R. 17 Eq. 329.

Attorney's Books. — Client cannot be compelled to produce his attorney's books of account or letter books. Flight *v.* Robinson, 8 Beav. 22, 50, 13 L. J. Ch. 425, 8 Jur. 888, 50 Eng. Reprint 9.

Case Submitted to Attorney. — Client cannot be required to produce case submitted by him to his attorney. Wynne *v.* Humberston, 27 Beav. 421, 54 Eng. Reprint 165; Holmes *v.* Baddeley, 1 Phil. 476, 6

of facts which were prepared for the purpose of being submitted to his attorney, although they had not, at time production was demanded, been so submitted.[25]

(A.) Privileged In Subsequent Action. — Such documents are privileged in a subsequent action, although the action in which they were intended to be used was never brought, and the parties in the subsequent action are not the same as in that contemplated.[26]

(B.) That Documents Not Submitted, Immaterial. — The privilege is not affected by the fact that such documents were not actually submitted to the attorney.[27]

(C.) That Document Identified By Client In Another Case, Immaterial. — The privilege when claimed in a certain case is not affected by the fact that client, when a witness in a previous case, identified the document claimed to be privileged, but such document was not filed in evidence.[28]

(3.) Documents Lent by Attorney for Person Having Common Interest With Client. — If attorneys send case and opinion of counsel to attorneys of another person whose interests are, as against a third person, almost identical with the interests of the client of the first

Beav. 521, 14 L. J. Ch. 113, 9 Jur. 289, 41 Eng. Reprint 713; Combe *v.* Corporation of London, 1 Young & C. (Eng.) 631, 650, 15 L. J. Ch. 80, 10 Jur. 57, 62 Eng. Reprint 1048; Nias *v.* Northern & E. R. Co., 3 Myl. Cr. 355, 40 Eng. Reprint 963; *s. c.* 2 Keen 76, 48 Eng. Reprint 557, *affirmed* 2 Keen 312, 48 Eng. Reprint 649; Storey *v.* Lennox, 1 Keen 341, 48 Eng. Reprint 338; Bolton *v.* Corporation of Liverpool, 1 Myl. & K. 88, 99, 39 Eng. Reprint 614, *affirming s. c.* 3 Sim. 467, 57 Eng. Reprint 1073; Pearse *v.* Pearse, 1 De G. & Sm. 12, 63 Eng. Reprint 950; Beadon *v.* King, 17 Sim. 34, 60 Eng. Reprint 1039.

25. *England.* — Friend *v.* L. C. & D. R. Co., 46 L. J. Ex. 696, 2 Exch. Div. 437, 36 L. T. 729; Pacey *v.* London Tramways Co., L. R., 2 Exch. Div. 440; Collins *v.* London Gen. Om. Co., 68 L. T. 831, 63 L. J. N. S. Q. B. 428; Wright *v.* Vernon, 1 Drew, 344; *s. c.* 22 L. J. Ch. N. S. 447; The Theodor Korner, 47 L. J. P. 85, 38 L. T. 818.

Pennsylvania. — Davenport Co. *v.* Pennsylvania R. Co., 166 Pa. St. 480.

In Southwark & V. W. Co. *v.* Quick, L. R. 3 Q. B. Div. 315, 47 L. J. Q. B. 258, 38 L. T. N. S. 28, the court says: "I can see no distinction between information obtained upon the suggestion of a solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. Again, I see no distinction between the information so voluntarily procured for that purpose and actually submitted to the solicitor, and that so procured but not yet submitted to him. If the court or the judge at chambers is satisfied that it was bona fide procured for the purpose, it appears to me that it ought to be privileged."

It is sufficient if such paper was prepared in anticipation of litigation, although none be pending at the time of preparation. Collins *v.* London Gen. Om. Co., 63 L. J. N. S. Q. B. 428, 68 L. T. 831.

26. Pearce *v.* Foster, L. R. 15 Q. B Div. 114; *s. c.* 52 L. T. N. S. 886. To same effect, see Canadian P. R. Co. *v.* Conmee, 11 Ont. Pr. (Can.) 297, also Goldstone *v.* Williams, Deacon & Co., L. R. Ch. Div. 1899, Vol. 1. p. 47, 68 L. J. N. S. Ch. Div. 24, 79 L. T. N. S. 373.

27. Southwark & V. W. Co. *v.* Quick, L. R. 3 Q. B. Div. 315, 47 L. J. Q. B. 258, *affirming s. c.* 38 L. T. N. S. 28.

28. Goldstone *v.* Williams, Dea-

attorneys, such documents are privileged against such third person.[29]

(4.) Essential to Claim of Privilege for Documents Intended to be Used as Evidence. — It has been held in England that client cannot claim privilege for documents in possession of his attorney to be used as evidence, unless it appear that they came into existence for the purposes of the action in which they are proposed to be used.[30]

l. *Attorney's Possession of Papers No Excuse for Non-Production by Client.* — When client is compellable to produce a certain document in evidence, the fact that he has delivered it to his attorney does not justify his refusal to comply with a *subpoena duces tecum* requiring its production.[31]

m. *Attorney's Lien No Excuse for Client or Attorney.* — The fact that attorney has a lien upon a document, production of which is demanded, does not justify refusal of production by client,[32] or by attorney.[33]

n. *Paper Not Under Client's Control.* — Client cannot be compelled to produce documents which are in possession of his attorney but not under client's control.[34]

con & Co., L. R. Ch. Div. 1899, Vol. I, p. 47, 79 L. T. N. S. 373, 68 L. J. N. S. Ch. Div. 24.

29. Enthoven *v.* Cobb, 2 De G. M. & G. (Eng.) 632.

30. Chadwick *v.* Bowman, L. R. 16 Q. B. Div. 561, 54 L. T. N. S. 16. This case was an action for price of goods. Defendant had written to third persons and received answers, and it appeared that it depended upon the terms of these letters and answers whether defendant had authorized his correspondents to order the goods in question. Defendant's solicitor obtained copies of these letters. Held, that plaintiff was entitled to production of such copies. The court says, *per* Denman, J.: "I am of opinion that this order was rightly made. The originals of these documents would have been admissible in evidence against the defendant, and it seems to me that there is nothing in the circumstances under which the copies came into existence to render them privileged against inspection."

Per Mathew, J. "I am of the same opinion. I think that danger would follow if the privilege against inspection were made to cover such a case as this. It does not appear to me that these documents really came into existence for the purposes of the action within the true meaning of the rule upon which the defendant's counsel relied."

31. Edison El. L. Co. *v.* United States El. L. Co., 44 Fed. 294. See quotation in note under note 33, *post.*

32. Rodick *v.* Gandel, 10 Beav. 270, 50 Eng. Reprint 586. In this case the court says that if attorney claim a lien on client's papers, client is not thereby justified in refusing to produce them, as the court will give him an opportunity to take proceedings against the attorney to compel their production.

33. Hope *v.* Liddell, 20 Beav. 438, 52 Eng. Reprint 672; *s. c.* 7 De G. M. & G. 331, 44 Eng. Reprint 129; *In re* Cameron's C. & R. Co., 25 Beav. 1, 53 Eng. Reprint 535; Furlong *v.* Howard, 2 Sch. & L. (Irish Ch.) 115.

In M'Cann *v.* Beere, 1 Hogan (Irish) 129, it was moved that a party and his solicitor be required to bring into court certain deeds. The Master of the Rolls said: "I will give you an order on the defendant, and if the deeds are in the hands of his solicitor, it is the same as if they were in his own possession, and he will be bound to produce them; but I will not make any order on the solicitor, who may have a lien on them as against his client."

34. Palmer *v.* Wright, 10 Beav. 234, 50 Eng. Reprint 572. In this case an executor of whom production of documents was demanded, stated that his solicitors had in their

o. *Custody of Paper Lost.* — It has been held that privilege attaches to papers only while they remain in the hands of attorney or client.[35] But the contrary has been held.[36]

p. *What Facts Concerning Papers May Be Testified to by Attorney.* — An attorney may give in evidence his knowledge of certain facts concerning his client's documents; thus he may be compelled to testify that a certain instrument was executed,[37] or as to the existence of a certain document,[38] but not if all his knowledge on the subject was acquired through confidential communications of client.[39] He may testify to the fact that a certain document is in his possession,[40] how it came into his possession,[41] whether or not a certain deed was antedated[42] or was delivered at the time attorney subscribed it as witness,[43] delivery of deed,[44] purpose of delivery,[45] location of a document at a certain time,[46] that he wrote a certain document, which his client signed,[47] contents of notice prepared by him to be served by client upon third person,[48] what disposition he made of client's notes, checks or evidences of indebt-

possession certain documents relating to his testator's estate, but that such documents were not under his control. *Held,* that he could not be compelled to produce them.

35. Written statement prepared by person accused of crime which he intended to give to his counsel, but which was taken from his possession after arrest, is not a privileged communication. Renfro *v.* State, 42 Tex. Crim. 393, 56 S. W. 1013, 1 Whart on Ev. 586.

36. Liggett *v.* Glenn, 51 Fed. 381, 396, 2 C. C. A. 286, 4 U. S. App. 438.

37. Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Gower *v.* Emery, 18 Me. 79; Patten *v.* Moor, 29 N. H. 163; Harkless *v.* Smith, 115 Ga. 350, 41 S. E. 634; Vaillant *v.* Dodemead, 2 Atk. 524, 26 Eng. Reprint 715; Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587.

38. Coveney *v.* Tannahill, 1 Hill 33, 37 Am. Dec. 287; Kington *v.* Gale, Finch (Eng.) 259. Brandt *v.* Klein, 17 Johns. (N. Y.) 335.

39. Murray *v.* Dowling, 1 Cranch C. C. (U. S.) 151.

40. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Stokoe *v* St. Paul M. & M. R. Co., 40 Minn. 545, 42 N. W 482; Wakeman *v.* Bailey, 3 Barb. Ch. (N. Y.) 482, 487; Zabel *v.* Schroeder, 35 Tex. 308; Lessee of Rhoades *v.* Selin, 4 Wash. C. C. (U. S.) 715; Dwyer *v.* Collins, 7 Exch. Wels. H. & G. (Eng.) 639; Coates *v.* Birch, 2 Ad. & El. (Eng.) 252, 1 G. & D. 647, 2 Q. B. 252, 11 L. J. Q. B. 1, 5 Jur. 540; Bevan *v.* Waters, 1 Moody & M. (Eng.) 235, 3 Car. & P. 520; Brandt *v.* Klein, 17 Johns. (N. Y.) 335.

41. Allen *v.* Root, 39 Tex. 589.

42. Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Rundle *v.* Foster, 3 Tenn. Ch. 658.

43. Bank of Utica *v.* Mesereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

44. Rosseau *v.* Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578; Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867.

45. Rosseau *v.* Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578.

46. Jackson *v.* M'Vey, 18 Johns. (N. Y.) 330; *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552; Banner *v.* Jackson, 1 De G. & S. 472, 63 Eng. Reprint 1154; Kington *v.* Gale, Finch (Eng.) 359.

47. Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273; *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591.

48. Collins *v.* Johnson, 16 Ga. 458.

edness,[49] when he last saw a certain document[50] and in whose custody,[51] who owned a certain note sold by him,[52] whether or not he had ever seen a certain paper,[53] or to whom,[54] on what occasion[55] and for what purpose[56] he parted with certain papers of his client's; also that a certain paper was received by him from his client,[57] whether or not he was present when a certain paper was signed,[58] when, where and in whose presence a certain paper was signed.[59]

q. *Condition or Appearance of Papers.* — As to whether or not attorney's knowledge of the condition or appearance of his client's papers is privileged, the authorities are conflicting.[60]

r. *Admissibility of Paper Not Dependent Upon Manner of Possession.* — The admissibility of a paper containing communications between client and attorney is not dependent upon the manner in which possession thereof was obtained by the attorney, but upon the inherent character of the communication itself.[61]

s. *Consequence of Refusal to Produce.* — If attorney, after notice to produce and demand, refuses to produce a paper of his client's, the opposite side may make secondary proof of its contents.[62]

F. Reasons for Attorney's Conduct. — An attorney cannot be

49. State *ex rel v.* Gleason, 19 Or. 159, 23 Pac. 817.

50. Kington *v.* Gale, Finch (Eng.) 259.

51. Kington *v.* Gale, Finch (Eng.) 259.

52. De Witt *v.* Perkins, 22 Wis. 473.

53. *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591; O'Gorman *v.* M'Namara, Hayes Exch. (Irish) 174.

54. Banner *v.* Jackson, 1 De G. & S. 472, 63 Eng. Reprint 1154; Kington *v.* Gale, Finch (Eng.) 259.

55. Banner *v.* Jackson, 1 De G. & S. 472, 63 Eng. Reprint 1154.

56. Banner *v.* Jackson, 1 De G. & S. 472, 63 Eng. Reprint 1154.

57. Ericke *v.* Nokes, 1 Moody & M. (Eng.) 303.

58. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

59. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

60. **Knowledge Privileged.** Gray *v.* Fox, 43 Mo. 570, 97 Am. Dec. 416; Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99; Brown *v.* Payson, 6 N. H. 443; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

Attorney cannot testify whether or not a note was stamped when shown to him by his client. Wheatley *v.* Williams, 1 Mees. & W. (Eng.) 533; or as to whether or not when he first saw a certain account of client's, an acknowledgement of settlement was indorsed upon it. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

Indorsement on Note. — Attorney cannot be compelled to testify as to indorsements upon notes concerning which he advised his client. Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99; Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

Knowledge Non-Privileged. Stoney *v.* M'Neil, Harp L. (S. C.) 557, 18 Am. Dec. 660; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Brandt *v.* Klein, 17 Johns. (N. Y.) 335.

Indorsement on Deed. — An attorney may be compelled to show his client's deed to permit inspection of an endorsement thereon for purpose of identification. Phelps *v.* Prew, 3 El. & Bl. (Eng.) 430, 2 C. L. R. 1422, 23 L. J. Q. B. 140.

61. Liggett *v.* Glenn, 51 Fed. 381, 396, 2 C. C. A. 286, 4 U. S. App. 438.

62. Stokoe *v.* St. Paul M. & M. R. Co., 40 Minn. 545, 42 N. W. 482; Marston *v.* Downes, 6 Car. & P. (Eng.) 381, 3 L. J. K. B. 158, 4 N. & M. 861.

compelled to state his reasons for managing a case in a certain way, or his reasons for not taking certain proceedings,[63] or client's reason for a certain act.[64]

G. Attorney's Inferences. — Client is not bound to disclose his attorney's statements as to inferences he has drawn from facts ascertained in collecting evidence.[65]

H. Client's Belief. — Nor his own belief concerning matters stated to him by his attorney.[66]

I. Privilege Extends to Third Persons, to Whom Attorney Referred. — Privilege extends to information obtained from third persons to whom attorney is referred by client for information concerning client's affairs.[67]

J. Not Limited to Litigation. — As all matters confidentially communicated between attorney and client are privileged, it follows that the privilege is not limited to statements of client, or advice or statements of attorney, made or given with reference to pending or expected litigation, but extends to all communications made in the course of seeking or rendering services as attorney.[68]

63. Austin T. & W. Mfg. Co. *v.* Heiser, 6 S. D. 429, 437, 61 N. W. 445. But see Sloan *v.* Pelzer, 54 S. C. 314, 32 S. E. 431.

64. Client's Reason. — Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587.

65. Attorney's Inferences. Kennedy *v.* Lyell, L. R. 23 Ch. Div. 387, 408 (*affirmed*, see 9 App. Cas. 81, 50 L. T. N. S. 277). In this case the court said: "Having regard to the way in which the solicitor was employed on behalf of his client for the purpose of protecting his interests and obtaining evidence for his defense, I am of opinion that the client is not bound to disclose any information given him by his solicitor as to the inferences drawn by him, or as to the effect on his mind of what he has seen or heard, any more than he would be bound to produce as a whole the confidential reports made to him, whether in writing or verbally, by his solicitor, as to the result of the inquiries which the solicitor has made."

66. Kennedy *v.* Lyell, L. R. 23 Ch. Div. 387; *s. c. affirmed* 9 App. Cas. 81, 50 L. T. N. S. 277.

67. *In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591.

68. *England.* — Minet *v.* Morgan, L. R. 8 Ch. 361, 42 L. J. N. S. Ch. 627, 28 L. T. N. S. 573; Herring *v.* Clobery, 1 Phil. 91, 41 Eng. Reprint 565; Lowden *v.* Blakey, L. R. 23 Q. B. D. 332, 58 L. J. Q. B. 617, 61 L. T. N. S. 251; Greenough *v.* Gaskell, 1 Myl. & K. 98, 39 Eng. Reprint 618; Cromack *v.* Heathcoate, 2 Brod. & B. 4, 6 E. C. L. 1; Lawrence *v.* Campbell, 4 Drew. 485, 28 L. J. N. S. Ch. 780, 5 Jur. N. S. 1071, 62 Eng. Reprint 186; Lord Walsingham *v.* Goodricke, 3 Hare 122, 67 Eng. Reprint 322; Manser *v.* Dix, 24 L. J. N. S. Ch. 497, 1 Kay & J. 451, 1 Jur. (N. S.) 466, 3 Eq. 650, 69 Eng. Reprint 536; Boyd *v.* Petrie, 20 L. T. N. S. 934; Eadie *v.* Addison, 52 L. J. N. S. Ch. 80, 47 L. T. N. S. 543; Mostyn *v.* West M. C. & I. Co., 34 L. T. N. S. 531; Carpmael *v.* Powis, 9 Beav. 16, 50 Eng. R. 248; 1 Phil 687, 41 Eng. R. 794; *affirmed* 15 L. J. N. S. Ch. 275; O'Shea *v.* Wood, 60 L. J. P. 83, 65 L. T. N. S. 30; Reece *v.* Trye, 9 Beav. 316, 50 Eng. Reprint 365; Penruddock *v.* Hammond, 11 Beav. 59, 50 Eng. Reprint 739; Calley *v.* Richards, 19 Beav. 401, 52 Eng. Reprint 406; Jones *v.* Pugh, 1 Phil. 96, 12 Sim. 470, 11 L. J. Ch. 323, 41 Eng. Reprint 567; Walker *v.* Wildman, 6 Madd. 47, 56 Eng. Reprint 1007; Wilson *v.* N. & B. R., L. R. 14 Eq. 477, 27 L. T. N. S. 507; Turton *v.* Barber, L. R. 17 Eq. 329, 43 L. J. Ch. 468. *Contra.* — Flight *v.* Robinson, 8 Beav. 22, 36,

13 L. J. Ch. 425, 8 Jur. 888, 50 Eng. Reprint 9; Wadsworth *v.* Hamshaw, 2 Brod. & B. 2, 6 E. C. L. 2; Broad *v.* Pitt, 3 Car. & P. 518, 14 E. C. L. 423.

Irish. — Rex *v.* Haydn, 2 Fox & S. (K. B.) 379.

Canada. — Hamelyn *v.* White, 6 Ont. Pr. 143, where the court declines to follow McDonald *v.* Putnam, 11 Grant's Ch. Rep. 258, which announced the contrary doctrine, and follows Minet *v.* Morgan, L. R. 8 Ch. 361, 42 L. J. Ch. 627, 28 L. T. N. S. 573.

United States. — Alexander *v.* United States, 138 U. S. 353.

Alabama. — Crawford *v.* McKissack, 1 Port. 433; State *v.* Marshall, 8 Ala. 302; Parish *v.* Gates, 29 Ala. 254.

Arkansas. — Bobo *v.* Bryson, 21 Ark. 387, 76 Am. Dec. 406; Andrews Admx. *v.* Simms, 33 Ark. 771.

Connecticut. — Brown *v.* Butler, 71 Conn. 576, 42 Atl. 654.

Illinois. — People *v.* Barker, 56 Ill. 300.

Indiana. — Borum *v.* Fouts, 15 Ind. 50; Bowers' Admr. *v.* Briggs, 20 Ind. 139; Bigler *v.* Reyher, 43 Ind. 112; Oliver *v.* Pate, 43 Ind. 132.

Kentucky. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592.

Massachusetts. — Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415.

Mississippi. — Crisler *v.* Garland, 11 Smed. & M. 136, 49 Am. Dec. 49; Jones *v.* State, 66 Miss. 380, 6 So. 231, 14 Am. St. Rep. 570.

Montana. — Davis *v.* Morgan, 19 Mont. 141, 47 Pac. 793.

Nebraska. — Brady *v.* State, 39 Neb. 529, 58 N. W. 161.

Nevada. — Gruber *v.* Baker, 20 Nev. 453, 462, 23 Pac. 858, 9 L. R. A. 302.

New Hampshire. — Chamberlain *v.* Davis, 33 N. H. 121, 131.

New York. — Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Britton *v.* Lorenz, 45 N. Y. 51; Carnes *v.* Platt, 15 Abb. Pr. N. S. 337; Graham *v.* People, 63 Barb. 468, 483; Clark *v.* Richards, 3 E. D. Smith 89; Carnes *v.* Platt, 15 Abb. Pr. N. S. 337; Bartlett *v.* Bunn, 10 N. Y. Supp. 210, 31 N. Y. St. 319; Gage *v.* Gage, 13 App. Div. 565, 43 N. Y. Supp. 810; Kaufman *v.* Rosenshine, 97 App. Div. 514, 90 N. Y. Supp. 205; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Pearsall *v.* Elmer, 5 Redf. 181; Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64.

Contra, in New York. — Whiting *v.* Barney, 30 N. Y. 330, 86 Am. Dec. 385; Rochester City Bank *v.* Suydam, 5 How. Pr. 254; Peck *v.* Williams, 13 Abb. Pr. 68; Matter of Bellis & Milligan, 38 How. Pr. 79; McTavish *v.* Denning, Anthon 113; March *v.* Ludlum, 3 Sandf. Ch. 35, 49, recognizes the principle as applying "where there is a dispute, though no litigation actual or contemplated," but does not define the extent of the privilege.

Pennsylvania. — Beltzhoover *v.* Blackstock, 3 Watts 20, 27 Am. Dec. 330; Moore *v.* Bray, 10 Pa. St. 519.

Tennessee. — McMannus *v.* State, 2 Head 213; Lockhard *v.* Brodie, 1 Tenn. Ch. 384.

Texas. — Slaven *v.* Wheeler, 58 Tex. 23.

Vermont. — Durkee *v.* Leland, 4 Vt. 612. *Compare* Dixon *v.* Parmelee, 2 Vt. 185.

Wisconsin. — Dudley *v.* Beck, 3 Wis. 274, 284.

In Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513, F. had conveyed certain property to his daughter, free from the control of her husband or his creditors. The deed of conveyance was sought to be set aside by husband's creditors on the ground that the property conveyed had at the time of marriage been given to him by parol gift. The deposition of the attorney who drew the deed was taken. It was held that his testimony as to statements made to him when deed was drawn was not admissible. The court uses this language: "This court understands it to be the settled law, that counsel and attorneys ought not to be permitted to give evidence of facts imparted to them by their clients, when acting in their professional character; that they are considered as identified with their clients, and of necessity intrusted with their secrets, which, therefore, without a dangerous breach of confidence, cannot be revealed; that this obligation of se-

crecy continues always, and is the privilege of the client, and not of the attorney. The court is also of opinion that this restriction is not confined to facts disclosed in relation to suits actually depending at the time, but extends to all cases in which a client applies, as aforesaid, to his counsel or attorney for aid in the hire of his profession. If the principle was confined to causes actually depending at the time, there would be no safety for a person consulting counsel as to the expediency of bringing suit or of compromising one which is contemplated to be brought against him. When such suit should be afterwards instituted, all his disclosures previously made, with a view to obtain counsel and avoid litigation, would be given in evidence against him. The same necessity exists in both cases; and there is in principle no difference between them."

In Root *v.* Wright, 84 N. Y. 72, 38 Am. Rep. 495, three persons, having made a verbal agreement, employed an attorney to reduce it to writing. By advice of the attorney the agreement was changed. In an action between a third person and one of the parties to the agreement the attorney was permitted to testify as to a conversation between himself and the parties to the agreement at the time it was drawn. *Held*, that the admission of this testimony was erroneous. The court says: "The rule that an attorney cannot disclose communications made to him by his clients, is not, as now understood, confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subjects of professional employment." *Citing* Williams *v.* Fitch, 18 N. Y. 546; Yates *v.* Olmsted, 56 N. Y. 632.

In Johnson *v.* Sullivan, 23 Mo. 474, the court says: "Now from a careful examination of numerous authorities—decisions of the English and American Courts—we think the conclusion may be fairly drawn, that there is no necessity 'that any judicial proceedings should have been commenced or contemplated. It is enough if the matter in hand, like every other human transaction, may, by possibility, become the subject of judicial inquiry. Greenl. Ev. sec. 240.'"

In Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400, Shaw, C. J., uses this language: "The rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defect of title by obtaining a release, to avoid litigation by compromise; to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes not connected with a suit in court." See also McLellan *v.* Longfellow, 32 Me. 494, 54 Am. Dec. 599.

Attorney Applying for Pension. Communications to an attorney by person for whom he is applying for a pension are privileged. Mutual L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

Development of Rule. — The English cases noted above as stating the rule to be contrary to that stated in the text are not cited to show an existing conflict of authority upon this subject, but to illustrate the history of this principle. Early English cases limited the application of the rule to communications made with reference to litigation. A masterly exposition of the development of the rule on this subject in England will be found in 4 Wigmore on Evidence, secs 2294, 2295. In the case of Minet *v.* Morgan, above referred to Lord Chancellor Selborne reviews the English cases on this subject, and concludes that privilege extends to all cases in which a person seeks professional advice from a lawyer. The leading American case which collates and reviews English authorities on this subject is Foster *v.* Hall, 12 Pick. (Mass.) 89, 22

Am. Dec. 400, decided prior to Minet *v.* Morgan, in which the same conclusion is reached. The first English cases limited the privilege to communications made in regard to, and after the commencement of the action in which they were offered to be proven. The rule was later extended to include communications relating to and made in anticipation of the action in which they were offered. Again, the privilege was so extended that communications were held privileged, if relating to litigation, not only in the action concerning which they were made, but in any subsequent litigation between the same parties and respecting the same subject-matter. Holmes *v.* Baddeley, 1 Phil. 476, 14 L. J. Ch. 113, 9 Jur. 289, *reversing* 6 Beav. 521, 41 Eng. Reprint 713. Further extensions applied the rule to communications which "related to a cause existing at the time of the communication, or then about to be commenced." (Williams *v.* Mudie, 1 Car. & P. 158, Ry. & M. 34). It was later held that the privilege applied to communications made in contemplation of a suit, or made after dispute, though not directly with a view to litigation. In Cromack *v.* Heathcote, 2 Brod. & B. 4, 6 E. C. L. 1, it was held that communications to an attorney in regard to the preparation of a deed were privileged, the judges stating that the rule was not limited to litigated matters. The rule in chancery, applied in ruling upon applications for discovery of documents, underwent a similar development. Minet *v.* Morgan has settled all doubt as to the extent of this rule, and is referred to in later English cases as finally settling the law on this subject.

In Clagett *v.* Phillips, 2 Younge & C. 82, 7 Jur. 31, 63 Eng. Reprint 36, it is said that communications are privileged if they relate to and were made in the course of the dispute which is the subject of the suit.

In England it is held that communications between attorney and client relating to litigation are privileged, not only in the case concerning which they were made, but in any subsequent litigation between the same parties respecting the same subject-matter. Thompson *v.* Falk, 1 Drew 21, 61 Eng. Reprint 359.

In Bluck *v.* Galsworthy, 2 Giff. 453, 3 L. T. 399, 66 Eng. Reprint 189, it is held that confidential statements made by a client to his legal adviser before the institution of any suit are not privileged, but that advice given in writing to client upon such statement is a document the production of which will not be compelled. To same general effect, see Beadon *v.* King, 17 Sim. 34, 13 Jur. 550, 60 Eng. Reprint 1039.

In Bolton *v.* Corporation of Liverpool, 3 Sim. 467, 1 L. J. Ch. (N. S.) 166; 1 My. & K. 88, 57 Eng. Reprint 1073, the court holds that party to an action is entitled to an inspection of cases submitted by his opponent to counsel for opinion, but which were not prepared with reference to the action in which discovery is sought. This case was appealed to the Lord Chancellor, and judgment affirmed, but this question not discussed. See *s. c.* 1 Myl. & K. 88, 39 Eng. Reprint 614. Similar opinion indicated in Beadon *v.* King, 17 Sim. 34, 3 Jur. 550, 60 Eng. Reprint 1039.

Distinction Between Protection Afforded to Clients and Solicitors. In MacDonald *v.* Putnam, 11 Grant Ch. Rep. (U. C.) 258, the court makes a distinction between client and attorney as to *ante litem* communications, holding that an attorney cannot be compelled to disclose such communications, but that his client can be so compelled. The court reviews English decisions on the subject, and decides that client can be compelled to produce in evidence correspondence had with his attorneys in regard to matters which were not the subject of pending or contemplated litigation. McDonald *v.* Putnam *disapproved*. See Hamelyn *v.* Whyte, 6 Ont. Pr. (Can.) 143. See case of Radcliffe *v.* Fursman, 2 Brown P. C. (Eng.) 514, commented upon and explained in Pearse *v.* Pearse, 1 De G. & S. 12, 16 L. J. Ch. 153, 11 Jur. 52, 63 Eng. Reprint 950, and in Minet *v.* Morgan, L. R. 8 Ch. 361. Further as to distinction between protection afforded to client and that afforded to attorney, see

K. Part Privileged, All Privileged. — If an attorney is questioned in regard to a conversation part of which is admitted to have been confidential, but part of which is claimed to have been non-confidential, the entire conversation should be excluded.[69]

11. What Matters Not Privileged. — Privilege does not extend to all facts connected with professional employment, nor to all knowledge obtained by attorney from his client, or in regard to his affairs, in rendering legal services.

A. Existence of Relation Non-Privileged. — The fact that

Greenlaw *v.* King, 1 Beav. 137, 8 L. J. Ch. N. S. 92, 48 Eng. Reprint 891.

United States. — In a few cases in the United States it has been held that only such communications as were made in regard to litigation are privileged.

New York. — From language used in opinion in McTavish *v.* Denning, Anthon 113, it would seem that the court was inclined to limit the rule to communications made concerning litigation. The court says: "He (attorney) is exempted from disclosing any confidential communications made to him as counsel in any cause then actually commenced or expected to be commenced."

In Whiting *v.* Barney, 30 N. Y. 330, 86 Am. Dec. 385, it is *held* that privilege extends to such communications only as relate to an action or other judicial proceeding pending or in contemplation. The court in this case states that the foundation of the rule of privilege was the principle that no man could be a witness against himself; that in early days suitors conducted their own cases; that the increasing volume and importance of litigation rendered the employment of attorneys necessary, but that people hesitated to employ them, as their communications could be compelled to be disclosed, and parties, therefore, compelled to testify against themselves, and that to encourage the employment of attorneys, the rule as to privileged communications was adopted.

After a review of English cases on the subject the court concludes that "the protection should only be held to extend to such communications as have relation to some suit or other judicial proceeding either existing or contemplated."

In Rochester City Bank *v.* Suydam, 5 How. Pr. (N. Y.) 254, the supreme court of New York applies the same reasoning as that applied in Whiting *v.* Barney, and reaches the same conclusion as to the law.

In Peck *v.* Williams, 13 Abb. Pr. (N. Y.) 68, it was held that documents in the hands of an attorney are not privileged unless a controversy was, at least, expected to arise out of the transaction in connection with which they were delivered. See also Matter of Bellis & Milligan, 38 How. Pr. (N. Y.) 79, in which Whiting *v.* Barney is cited in support of the proposition that, to be privileged, communications must be limited to litigation pending or contemplated. Whiting *v.* Barney is criticized in Brand *v.* Brand, 39 How. Pr. (N. Y.) 193, and in Graham *v.* People, 63 Barb. (N. Y.) 468, 483, and later decisions by the court of appeals have refused to follow it on this question.

From language used in the opinion in Dixon *v.* Parmelee, 2 Vt. 185, it would seem that the supreme court of Vermont inclined to limit the rule to cases of pending or contemplated litigation. But the testimony there in question was admissible on another ground. See note 42, *ante*.

In Durkee *v.* Leland, 4 Vt. 612, the supreme court of Vermont recognizes the rule as stated in the text.

69. Maas *v.* Bloch, 7 Ind. 202; Churton *v.* Frewen, 2 Drew & S. 390, 62 Eng. Reprint 669. See opinion in Lodge *v.* Pritchard, 4 De G. & S. 587, 64 Eng. Reprint 969.

the relation of attorney and client exists between certain persons is not privileged.[70]

Time of Retainer Privileged. — It has been held that an attorney cannot be questioned concerning the time when he was retained.[71]

B. By Whom Attorney Employed. — Attorney may be required to state by whom he was employed.[72] But not if his answer would involve a disclosure of the nature of the transaction in which he was engaged for his client.[73]

C. Fact That Communication Was Made. — Client can be compelled to testify that he made communications to his attorney.[74]

D. Time of Making Communication. — Client may be compelled to state at what time he made a communication, the making of which he had testified to.[75]

E. Whether Certain Subject Discussed. — It has been held that an attorney will not be required to state whether or not he discussed with his client the question whether or not the execution of a certain deed prepared by attorney for client imposed personal liability upon the latter.[76]

F. Ordinary Observation. — Knowledge of his client's affairs

70. Existence of Relation Not Privileged. — Mobile & M. R. Co. *v.* Yeates, 67 Ala. 164; Harriman *v.* Jones, 58 N. H. 328; Brown *v.* Payson, 6 N. H. 443; Beckwith *v.* Benner, 6 Car. & P. (Eng.) 681; Forshaw *v.* Lewis, 10 Exch. Hurlst. & G. (Eng.) 712; *Ex parte* The Assignee, 27 L. T. N. S. (Eng.) 460. See remarks of Justice Story in Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 294.

Fact of Employment. — White *v.* State, 86 Ala. 69, 5 So. 674; Hampton *v.* Boylan, 46 Hun (N. Y.) 151; Beeson *v.* Beeson, 9 Pa. St. 279; *In re* Seip's Estate, 163 Pa. St. 423, 432, 30 Atl. 226, 43 Am. St. Rep. 803; Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347.

Through whose agency, in what manner, and at what time employed. Shanghnessy *v.* Fogg, 15 La. Ann. 330.

71. Foote *v.* Hayne, 1 Car. & P. 545, 11 E. C. L. 466. See remarks of Parke, B. on this subject in Forshaw *v.* Lewis, 10 Exch. (Hurlst. & G.) 712.

72. *United States.* — United States *v.* Lee, 107 Fed. 702.

Alabama. — Mobile & M. R. Co. *v.* Yeates, 67 Ala. 164.

California. — Satterlee *v.* Bliss, 36 Cal. 489.

Connecticut. — Appeal of Turner, 72 Conn. 305, 318, 44 Atl. 310.

Iowa. — Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673.

Louisiana. — Shanghnessy *v.* Fogg, 15 La. Ann. 330.

New Hampshire. — Brown *v.* Payson, 6 N. H. 443; Harriman *v.* Jones, 58 N. H. 328.

Pennsylvania. — *In re* Seip's Estate, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803.

Washington. — Stanley *v.* Stanley, 27 Wash. 570, 68 Pac. 187.

Contra. — Jones *v.* Pugh, 1 Phil. 96, 41 Eng. Reprint 567, 12 Sim. 470, 59 Eng. Reprint 1213; Levy *v.* Pope, Moody & M. 410, 22 E. C. L. 343.

73. *In re* Shawmut Min. Co. 94 App. Div. 156, 87 N. Y. Supp. 1059.

74. Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922. In this case it is held that client may be compelled to state whether or not his attorneys interrogated him as to certain matters, and their questions and his answers were reduced to writing.

75. Tibbet *v.* Sue, 125 Cal. 544, 58 Pac. 160.

76. Rogers *v.* Lyon, 64 Barb. (N. Y.) 373. In this case the issue was: Did a certain deed impose a personal liability upon grantors—defendants?

not confidentially communicated to an attorney is not privileged, although acquired during the existence of their relationship. Consequently, knowledge of client's affairs which attorney acquired by exercise of ordinary observation is not privileged.[77] Nor is

Defendants claimed that the clause creating personal liability was inserted in the deed without their knowledge. Defendants' attorney was called as a witness by plaintiff and asked, "Was the question up, then, as to whether these parties would be personally liable on that deed?" Also, "Was the deed read over to them?" Questions objected to as calling for privileged communications. Objections overruled. On appeal the action of the court in overruling objections was held to constitute error. *Compare In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591, where it is held that attorney may be required to state whether or not client's indebtedness to a certain person was mentioned by client during consultation in regard to client's bankruptcy; also whether subject of client's inability to meet his obligations was discussed.

77. *England.* — Eicke *v.* Nokes, 1 M. & M. 303, 22 E. C. L. 314; Studdy *v.* Sanders, 2 Dowl. & Ryl. 347, 16 E. L. L. 93.

Irish. — O'Gorman *v.* M'Namara, Hayes Rep. 174.

Alabama. — Johnson *v.* Cunningham, 1 Ala. 249.

California. — Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114.

Colorado. — Cole *v.* Cheovenda, 4 Colo. 17.

Illinois. — Funk *v.* Mohr, 185 Ill. 395, 57 N. E. 2.

Louisiana. — Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233.

Maryland. — Fulton *v.* MacCracken, 18 Md. 528, 81 Am. Dec. 620.

Massachusetts. — Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415.

New York. — Baker *v.* Arnold, 1 Caines 258; Jackson *v.* M'Vey, 18 Johns. 330; Coveney *v.* Tannahill, 1 Hill 33, 37 Am. Dec. 287; Crosby *v.* Berger, 11 Paige 377, 42 Am. Dec. 117.

Ohio. — Rogers *v.* Dare, Wright 136.

Tennessee. — Lang *v.* Ingalls Zinc Co. (Tenn. Ch. App.) 49 S. W. 288.

Texas. — Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

Vermont. — State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429.

Condition or Appearance of Document. — "As when the question is about the erasure in a deed or will, the attorney may be asked whether he had ever seen such deed or will in other plight, for that is a fact in his own knowledge, though he is not to discover any confessions made by his client on such head." Brandt *v.* Klein, 17 Johns. (N. Y.) 335. In this case an attorney was called as a witness to show that a certain will was in his possession and in court, but refused to answer, on the ground that his knowledge as to the existence and situation of the will was derived from what had been entrusted to him by his client. The trial court held that the attorney must answer the question. On appeal this ruling was held correct. Thus, an attorney may testify to the physical condition or appearance of a document at a given time, although the document may have been prepared by him for a client, or delivered to him by a client. Stoney *v.* McNeil, Harp. L. (S. C.) 557, 18 Am. Dec. 666. Or as to whether or not there had been an endorsement or memorandum on the back of a certain deed. Crawford *v.* McKissack, 1 Port. (Ala.) 433.

Mental Condition. — Attorney may testify concerning client's mental condition at a certain time. Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397; Daniel *v.* Daniel, 39 Pa. St. 191, 210; although his observation was made while receiving client's instructions as to the performance of professional service. Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397.

"If a lawyer learns from profes-

knowledge acquired from the mere fact of his having been brought to a certain place by the circumstance of being attorney for a certain person, but which knowledge might have been obtained by any person there present.[78]

G. Facts Non-Confidential. — Nor his knowledge of ordinary facts, to the comprehension of professional learning and skill were not necessary, and which he could have acquired without the opportunities afforded by the relation.

Facts Not Confidential in Nature are not privileged.[79]

a. *Name of Client.* — Thus, attorney may be required to give the name of his client, and state whether a certain name indicates a real or fictitious person.[80]

b. *Identity.* — He may also testify as to identity of client, and fact that a certain name designated his client.[81] But he cannot be examined in regard to communications with client in order to show identity.[82]

c. *Residence.* — He may also be required to state his client's residence.[83]

(1.) When Knowledge of Residence Privileged, but not if his client's address has been communicated as a matter of professional confidence, and client and attorney are not engaged in the commission of an illegal act.[84]

(2.) Purpose of Inquiring as to Residence, nor if information is sought for the purpose of serving client with process in criminal proceeding;[85] or for the purpose of serving him with *subpoena duces tecum*.[86]

sional visits that he has a fool for a client, whether he acquires the knowledge by the want of intelligent answers, or by study of phrenological developments, the fact is competent evidence in a proper case, and no rule of law forbids the lawyer from delivering it." Daniel *v.* Daniel, 39 Pa. St. 191.

Appearance of Client. — Daniel *v.* Daniel, 39 Pa. St. 191.

Handwriting. — An attorney is a competent witness to prove his client's handwriting, although his knowledge was acquired while acting as attorney. Johnson *v.* Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198.

Entry in Client's Book. — Attorney may testify whether or not a certain entry was shown by his client's books at a stated time. Brown *v.* Foster, 1 Hurlst. & N. (Eng.) 736, 26 L. J. N. S. C. L. 249.

78. Greenough *v.* Gaskell, 1 Myl. & K. 98, 39 Eng. Reprint 618.

79. Cobden *v.* Kendrick, 4 Durnf. & E. 431; Home Fire Ins. Co. of Omaha *v.* Berg, 46 Neb. 600; Schaaf *v.* Fries, 77 Mo. App. 346.

80. United States *v.* Lee, 107 Fed. 702; Brown *v.* Payson, 6 N. H. 443; Martin *v.* Anderson, 21 Ga. 301; *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552; Parkhurst *v.* Lowten, 2 Swanst. (Eng.) 194, 36 Eng. Reprint 589; Bursill *v.* Tanner, 16 Q. B. Div. 1.

81. Com. *v.* Bacon, 135 Mass. 521; Studdy *v.* Sanders, 2 Dowl. & Ryl. 347, 16 E. C. L. 93.

82. Parkins *v.* Hawkshaw, 2 Stark. 239, 3 E. C. L. 333.

83. *Ex parte* Campbell, 5 Ch. App. 703, 23 L. T. N. S. 289; Cox *v.* Bockett, 18 C. B. (N. S.) 239, 34 L. J. N. S. C. P. 125, 11 L. T. 629; Alden *v.* Goddard, 73 Me. 345.

84. *In re* Arnott, 60 L. T. N. S. (Eng.) 109.

85. Harris *v.* Holler, 7 D. & L. 319, 19 L. J. N. S. Q. B. 62.

86. Heath *v.* Crealock, L. R. 15

d. *Handwriting.* — He may also be required to give testimony to prove his client's handwriting.[87]

e. *Location and Character of Estate,* or show the character and location of the estate of a deceased client.[88]

H. Sources Other Than Client. — Nor does the privilege extend to knowledge derived from sources other than client, although acquired while the attorney is engaged in the conduct of his client's business.[89]

Eq. 257, 42 L. J. N. S. Ch. 455, 28 L. T. 101.

87. Gower *v.* Emery, 18 Me. 79; Johnson *v.* Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; Holthausen *v.* Pondir, 23 Jones & S. (N. Y.) 73; Thomson *v.* Perkins, 39 App. Div. 656, 57 N. Y. Supp. 810; Oliver *v.* Cameron, McArthur & M. (D. C.) 237; Hurd *v.* Moring, 1 Car. & P. 372, 11 E. C. L. 425; Bawles *v.* Stewart, 1 Sch. & L. (Irish) 209, 226.

88. King *v.* Ashley, 96 App. Div. 143, 89 N. Y. Supp. 482, *affirmed* 179 N. Y. 281, 72 N. E. 106. *Ex parte* Gfeller, 178 Mo. 248, 269.

89. *England.* — Brown *v.* Foster, 1 Hurlst. & N. 736, 26 L. J. N. S. C. L. 249; Bulstrod *v.* Letchmere, (1676) 2 Free. Ch. 5 (case 4), 22 Eng. Reprint 1019; Ford *v.* Tennant, 32 Beav. 162, 32 L. J. N. S. Ch. 465, 7 L. T. 733, 9 Jur. (N. S.) 292, 55 Eng. Reprint 63; Marsh *v.* Keith, 1 Drew. & S. 342, 30 L. J. Ch. 127, 3 L. T. 498, 62 Eng. Reprint 410; Spenceley *v.* Schulenburgh, 7 East 357; Dwyer *v.* Collins, 7 Exch. (Wels. H. & G.) 639; Desborough *v.* Rawlins, 3 Myl. & C. 515, 40 Eng. Reprint 1025; Sawyer *v.* Birchmore, 3 Myl. & K. 572, 4 L. J. Ch. (N. S.) 249, 40 Eng. Reprint 218.

United States. — Lessee of Rhoades *v.* Selin, 4 Wash. C. C. 715; *In re* O'Donohoe, 18 Fed. Cas. No. 10,435, 2 Hask. 17, 7 Fed. Cas. No. 3,990; Randolph *v.* Quidnick Co., 23 Fed. 278; General Elec. Co. *v.* Jonathan Clark & Sons Co., 108 Fed. 170.

Alabama. — Kling *v.* Tunstall, 124 Ala. 268, 27 So. 420.

California. — Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114; Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

Georgia. — Skellie *v.* James, 81 Ga. 419, 8 S. E. 607.

Illinois. — Chillicothe F. R. & B. Co. *v.* Jameson, 48 Ill. 281.

Minnesota. — Davis *v.* New York, O. & W. R. Co., 70 Minn. 37, 72 N. W. 823.

New Hampshire. — Patten *v.* Moor, 29 N. H. 163.

New York. — Bogert *v.* Bogert, 2 Edw. Ch. 399.

Pennsylvania. — Barnes *v.* M'Clinton, 3 Pen. & W. 67, 23 Am. Dec. 62.

South Carolina. — Stoney *v.* McNeil, Harp. L. 557, 18 Am. Dec. 666.

Attorney may produce in evidence abstract of deeds, it appearing that the abstract was delivered to him by attorney for person with whom his client had a business transaction. Doe d. Earl of Egremont *v.* Langdon, 12 Ad. & El. N. S. 711, 64 E. C. L. 710.

King *v.* Ashley, 96 App. Div. 143, 89 N. Y. Supp. 482, *s. c. affirmed* 179 N. Y. 281, 72 N. E. 106. In this case it was held that an attorney could be compelled to state the character and location of the estate of a deceased client, it appearing that his information was obtained by his own investigations, and not through communications from client.

Act of Official. — Attorney may show official action of court clerk in regard to paper placed in his hands by attorney in the course of an action. Swaim *v.* Humphreys, 42 Ill. App. 370.

"The privilege only extends to information derived from his client, as such, either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel. Information derived from other persons or other sources, although such information is derived

Own Knowledge. — An attorney may testify to facts concerning his client which he knows of his own knowledge.[90]

Notice Served by Third Person. — Attorney may prove the contents of a written notice served on him by third person, although relating to client's business.[91]

Letter From Third Person. — He may also be compelled to produce letter written to him by third person.[92]

Communications With Client's Adversary. — He may also prove communications between himself and client's adversary in the action.[93]

Other Party to Transaction, or between himself and person with whom he transacts business for his client.[94]

or obtained while acting as attorney or counsel, is not privileged. The object of the rule, protecting privileged communications from being disclosed by the attorney or counsel, is to secure to parties who have confided the facts of their cases to their professional advisers, as such, the benefit of secrecy in relation to such communications, so that the client may disclose the whole of his case to his professional adviser, without any danger that the facts thus communicated to his attorney or counsel will be used in evidence against him, without his own consent. But the principle of the rule does not apply to the discovery of facts within the knowledge of the attorney or counsel, which were not communicated or confided to him by his client, although he became acquainted with such facts while engaged in his professional duty as the attorney or counsel of his client." Crosby *v.* Berger, 11 Paige (N. Y.) 377, 42 Am. Dec. 117, *affirming s. c.* 4 Edw. Ch. 254.

Name of Person Delivering Paper. An attorney may testify as to name of person from whom a document was received, although the document be used in conduct of a case conducted by attorney, it not appearing that it was received from the client or his agent. Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233.

Whence Papers Obtained. — In Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233, plaintiff's attorney was asked where he had obtained certain vouchers which had been given him, and which were used in support of plaintiff's case. He declined to answer, on the ground that he knew nothing but what had been communicated to him in professional confidence. The court sustained him. Defendant excepted. It was shown that the attorney did not receive the papers from plaintiff, nor from one of plaintiff's agents, and it did not appear that he had received them from another agent. *Held*, that as the papers had not been received from client or his agent the name of the person delivering them could not be a professional secret.

90. Attorney's Own Knowledge. Hebbard *v.* Haughian, 70 N. Y. 54, 62, cited and followed in Brennan *v.* Hall, 59 Hun. 583, 14 N. Y. Supp. 864; Gage *v.* Gage, 13 App. Div. 565, 43 N. Y. Supp. 810; Heister *v.* Davis, 3 Yeates (Pa.) 4.

91. Barnes *v.* M'Clinton, 3 Pen. & W. (Pa.) 67, 23 Am. Dec. 62.

92. Sawyer *v.* Birchmore, 3 Myl. & K. 572, 4 L. J. Ch. (N. S.) 249, 40 Eng. Reprint 218; Ford *v.* Tennant, 32 Beav. 162, 55 Eng. Reprint 63, 32 L. J. N. S. Ch. 465, 7 L. T. N. S. 733.

93. Hill *v.* Elliott, 5 Car. & P. 436, 24 E. C. L. 399.

94. *England.* — Marston *v.* Downes, 6 Car. & P. 381, 25 E. C. L. 448.

United States. — Randolph *v.* Quidnick Co., 23 Fed. 278; Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644.

Delaware. — Jolls *v.* Keegan, 4 Pen. 21, 55 Atl. 340.

Missouri. — Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552.

New York. — Woodruff *v.* Hurson, 32 Barb. 557, 563; *In re* Mellen, 63 Hun 632, 18 N. Y. Supp. 515.

Tennessee. — Henry *v.* Nubert

Attorney for Such Person. — Or between himself and the attorney for such person.[95]

Information From Other Sources and Client. — The mere fact that client has made a confidential communication to his solicitor does not protect the latter from disclosing the matter communicated, if he had acquired the same knowledge before or after such confidential communication from other sources. The fact that the attorney had made confidential communications to him does not merge the other sources of information.[96]

Knowledge Acquired by Ordinary Observation and From Privileged Source. — It has been held that if discovery is sought of matters of fact patent to the senses, it must be made, although the disclosure involved the disclosing of confidential communications.[97]

"Matter of Fact" and Privileged Communication. — As to difference between calling upon a person to answer as to matters of fact and being called to answer as to matters of confidential communications, see cases cited in note.[98]

I. ACTS OF ATTORNEY OR CLIENT. — Privilege does not extend to acts done by client or attorney.[99]

(Tenn. Ch. App.), 35 S. W. 444; Cummings *v.* Irvin (Tenn. Ch. App.), 59 S. W. 153.

Virginia. — Hall *v.* Rixey, 84 Va. 790, 6 S. E. 215.

Wisconsin. — Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

95. Ford *v.* Tennant, 32 Beav. 162, 32 L. J. N. S. Ch. 465, 7 L. T. 733, 9 Jur. (N. S.) 292, 55 Eng. Reprint 63, 32 L. J. N. S. Ch. 465, 7 L. T. N. S. 733; Schaaf *v.* Fries, 77 Mo. App. 346, 359.

96. Lewis *v.* Pennington, 29 L. J. N. S. Ch. 670, 6 Jur. (N. S.) 478.

97. Canadian Pac. R. Co. *v.* Conmee, 11 Ont. Pr. (Can.) 297. The privilege claimed in this case related to reports of agents to principal made for purpose of litigation. The court cites cases involving privilege of communication between attorney and client. The court says: "What is sought is information as to the matters of fact patent to the senses on which the company seek to recover the moneys paid by them. This may involve the disclosing of matters of fact derived from privileged communications, but it is no breach of the rule which protects documents so privileged. The distinction was adverted to in Kennedy *v.* Lyell, 23 Ch. D., by Baggallay, L. J., at pp. 401, 402, as one between a person being called upon to answer as to matters of fact, and being called upon to answer as to matters of confidential communication.

The same point of distinction is also marked by Cotton, L. J., in Southwark *v.* Quick, 3 Q. B. Div. 315, where he distinguishes between different modes of discovery and speaks of a case where officers of a company may have to disclose knowledge obtained from a communication though the communication itself may be a privileged document."

98. Kennedy *v.* Lyell, 23 Ch. Div. 387, 48 L. T. 455, *affirmed* 9 App. Cas. 81. See citation of this case, and attempt at distinction on this subject. See Canadian Pac. R. Co. *v.* Conmee, 11 Ont. Pr. (Can.) 297.

99. Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587; Kelly *v.* Jackson, 13 Irish Eq. 129.

Whether or Not Attorney Acted in Certain Suit. — An attorney may be compelled to state whether or not he acted for a certain person in a certain action. Mobile & M. R. Co. *v.* Yeates, 67 Ala. 164.

Delivery of Papers to Client. An attorney's clerk may be compelled to testify whether or not he delivered certain papers to his employer's client. Chillis *v.* Chapman, 7 N. Y.

Privileged if Disclosure Involved. — But attorney may not testify as to act of himself or client, if his testimony would necessarily involve the disclosure of privileged communication or knowledge.[1]

J. ATTORNEY AS SUBSCRIBING WITNESS. — An attorney who, as subscribing witness, attests the execution of his client's deed, is not prevented by the rule of privilege, from testifying as to the fact of execution, and it has been held that his testimony may go beyond the fact of execution.[2]

Supp. 78, 25 N. Y. St. Rep. 1038, or received papers from such client. Eicke *v.* Nokes, 1 M. & M. 303, 22 E. C. L. 314.

Signing of Note by Client. — Attorney may testify that his client signed a certain note. Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273.

Or Execution of Deed. — See note 37, under III, 10, E, p. *ante*.

Letter Written by Attorney for Client's Opponent. — Writing of letter by attorney at request of client's opponent, is an act to which attorney may testify. Shore *v.* Bedford, 5 Man. & G. 271, 44 E. C. L. 149.

Payment of Money by Attorney to Client. — Also, that he paid client money in his possession as attorney. Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273.

Client may be compelled to state whether or not he received from his attorney money paid in settlement of a claim concerning which the attorney had authority to negotiate. Koeber *v.* Somers, 108 Wis. 497, 511, 84 N. W. 991, 52 L. R. A. 512.

Meetings of Parties. — Attorney may state whether or not he attended any meeting of parties to a certain action, or their solicitors, concerning matters pleaded in that action. Sawyer *v.* Birchmore, 3 Myl. & K. 572, 4 L. J. Ch. (N. S.) 249, 40 Eng. Reprint 218.

Fact of Interview Between Attorney and Opponent. — Client may be compelled to state whether or not his solicitor had had interviews with client's opponent in a case. Foakes *v.* Webb, 54 L. J. Ch. 262, 28 Ch. Div. (Eng.) 287, 51 L. T. 624.

Acts of Client. — An attorney is competent to prove acts of his client. Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911. In this case a certain order had been prepared by an attorney for his client to sign. Client denied having signed it. *Held*, that his attorney could testify to the fact of signature. See also Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

Acts of Attorney. — In Fulton *v.* Maccracken, 18 Md. 528, 81 Am. Dec. 620, it is held that an attorney may testify that he had brought suit for a client, recovered judgment, collected money and turned it over to his client.

1. Rogers *v.* Lyon, 64 Barb. (N. Y.) 373. See statement in note under "WHETHER CERTAIN SUBJECT DISCUSSED." III, 11 E, *ante*.

In *In re* O'Neil's Estate, 7 N. Y. Supp. 197, 26 N. Y. St. Rep. 242, which was a will contest, the court says: "The testimony of the attorney who drew the paper propounded is largely incompetent. Any act or word of the testator to his attorney, on the subject of his will or its execution, I hold to be improperly proved by the attorney himself. Communications from client to attorney, necessary for the business in hand, are inadmissible. Section 835, Code Civil Proc. Such communications may be the acts of the client as well as words spoken by him. Practically, all that a man may say to an attorney who is employed by him to draw his will and to superintend its execution, upon that subject, and all he may say to anybody else in the attorney's presence and hearing at the time, cannot be lawfully disclosed by the attorney."

See also State *v.* Dawson, 90 Mo. 149, 1 S. W. 827. See statement in note 77, under III, 10, A, *ante*.

2. **Subscribing Witness. — Attorney Competent.** — McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

In Robson *v.* Kemp, 5 Esp. 52, 8 Rev. Rep. 831, Lord Ellenborough

K. Attorney Party to Transaction. — In cases where the attorney is a party to the transaction in regard to which communications were made, the rule does not apply.[3]

uses this language: "It is very settled law that an attorney is not bound to disclose facts communicated to him by his client; but if an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it; upon such matters he has a right to be silent. It has been said by the defendants' counsel, that no one has a right to call upon the attorney, except the party to whom it is executed; but I think otherwise; and am of opinion, that every person who claims an interest in the property, has a right to call upon the attorney, as being the attesting witness." Crawcour *v.* Salter, 51 L. J. Ch. 495, 18 Ch. Div. 30, 45 L. T. 62, follows and quotes Robson *v.* Kemp, *supra.*

"By attesting an instrument, a man pledges himself to give evidence of it, whenever he is called upon." Lord Mansfield in Doe d. Jupp *v.* Andrews, 1 Cowp. (Eng.) 845.

In Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189, it is held that attorney's testimony cannot go beyond the mere fact of execution; and that he cannot testify as to his client's object in executing the instrument. The same effect is Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587.

In Lessee of Devoy *v.* Burke, 2 Fox & S. (Irish K. B.) 191, *held,* that attorney who becomes subscribing witness to deed may be called to prove its execution and its contents, if deed should be lost.

In Monaghan Bay Co. *v.* Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704, *held,* that attorney who becomes subscribing witness may state "what occurred at time of its execution."

In Brazel *v.* Fair, 26 S. C. 370, 386, 2 S. E. 293, *held,* that attorney as subscribing witness may testify as to the consideration for the execution of the instrument in question.

Strickland *v.* Capital City Mills (S C.), 54 S. E. 220, *held,* "The fact that one of the attorneys was a witness to the instrument would undoubtedly render such attorney competent to testify as to its execution, consideration, and the circumstances attending the execution in his presence."

"An attorney preparing a paper or contract, and witnessing it as an attesting witness is entitled to state what occurred at the time of its execution." Lang *v.* Ingalls Zinc Co. (Tenn. Ch. App.), 49 S. W. 288.

3. *England.* — Gresley *v.* Mousley, 2 Kay & J. 288, 69 Eng. Reprint 789; Davis *v.* Parry, 27 L. J. Ch. 294, 4 Jur. (N. S.) 431; Duffin *v.* Smith, Peake (N. P.) 108.

United States. — *In re* Bellis, 3 Ben. 386, 3 Fed. Cas. No. 1,274.

Georgia. — Rodgers *v.* Moore, 88 Ga. 88, 13 S. E. 962.

Illinois. — Funk *v.* Mohr, 185 Ill. 395, 57 N. E. 2.

Missouri. — Arbuthnot *v.* Brookfield L. & B. Assn., 98 Mo. App. 382, 72 S. W. 132.

Nebraska. — Brigham *v.* McDowell, 19 Neb. 407, 27 N. W. 384.

New York. — Rochester City Bank *v.* Suydam, 5 How. Pr. 254, 262; Foster *v.* Wilkinson, 37 Hun 242; *In re* Merriam, 27 App. Div. 112, 50 N. Y. Supp. 114.

Attorney Also Trustee. — But where attorney acts as trustee for his client, while he may be compelled in action against himself growing out of the subject of the trust, to produce papers relating to the trust estate, he cannot be compelled to produce communications had with him as attorney and relating to the litigation. Few *v.* Guppy, 13 Beav. 457, 1 My. & C. 487, 51 Eng. Reprint 176.

Interest in Action. — Attorney may be asked whether or not he has an interest in the recovery in the action in which he testifies. Eastman *v.* Kelly, 49 Hun 607, 1 N. Y. Supp. 866.

Communications as to Fee. — Communications between attorney and client in regard to the attorney's fee are not privileged.[4]

Contra. — But in some cases communications in regard to fee have been held privileged.[5]

Cost Bill. — Attorney's bill of costs, received by client, has been held to be privileged.[6]

L. Actions Between Attorney and Client. — In actions between attorney and client the attorney may testify to professional communications when his testimony is necessary to show the terms of his employment, or the nature or value of services rendered,[7] or the nature of transaction between himself and client.[8]

Action by Attorney to Recover Money Lent to Client. — It has been held that if an attorney lend money to his client, he cannot in an action to recover the sum lent, introduce in evidence account books

4. Strickland *v.* Capital City Mills (S. C.), 54 S. E. 220; Smithwick *v.* Evans, 24 Ga. 461.

5. **Contra.** — Holden *v.* State, 44 Tex. Crim. 382, 71 S. W. 600. So held in this case on the ground that the attorney's testimony as to fee would involve disclosure of facts of confidential nature. To same effect, see State *v.* Dawson, 90 Mo. 149, 1 S. W. 827.

6. **Cost Bill.** — Turton *v.* Barber, L. R. 17 Eq. 329, 43 L. J. N. S. Ch. 468.

7. Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604; Minard *v.* Stillman, 31 Or. 164, 49 Pac. 976, 65 Am. St. Rep. 815.

Attorney Against Client. — In Mitchell *v.* Bromberger, 2 Nev. 345, 90 Am. Dec. 550, the supreme court of Nevada, after stating the general rule as to communications between attorney and client, uses this language: "But the claims of justice dictate some exceptions to this rule. It would be a manifest injustice to allow the client to take advantage of it to the prejudice of his attorney; or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. It is therefore held that in such cases he is exempted from the obligations of secrecy. Rochester City Bank *v.* Suydam, 5 How. Pr. 254. In the opinion in that case, Mr. Justice Selden says: 'But independent of this reasoning, and admitting all the previous conclusions to be erroneous, there is still another ground upon which, in my judgment, this motion must be denied. I think that where the attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his personal rights, he must of necessity and in reason be exempted from the obligations of secrecy. For instance, suppose a client makes a private and confidential statement of facts by letter to an attorney employed to conduct a suit, inducing him to take a particular course with the suit, which proves eminently disastrous, and he is afterwards prosecuted by his client for unskillful management of the cause. — can it be claimed that he cannot produce the letter in his justification? I apprehend not.'

We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection."

Client Against Attorney. — Communications not privileged in action by client versus attorney for unskillful management of case. Nave *v.* Baird, 12 Ind. 318.

8. Davis *v.* Parry, 27 L. J. N. S. Ch. (Eng.) 294, 4 Jur. (N. S.) 431; Gresley *v.* Mousley, 2 Kay & J. 288, 69 Eng. Reprint 789.

which his client delivered to him to be used in preparing a case for the opinion of counsel.[9]

Limits to Attorney's Testimony. — When, for the protection of his own rights, an attorney is permitted to testify to matters communicated to him by his client, he should not disclose more than is necessary for his own protection.[10]

Evidence Involving Charge Against Attorney. — If client, or his representative charge attorney with fraud or unprofessional conduct, attorney may testify concerning communications made by his client in regard to the matter wherein he is charged with wrongful conduct.[11]

M. Communications to Common Attorney When Non-Privileged. — a. *Action Between Clients.* — When two or more persons consult an attorney as their common or joint adviser, communications between them and such attorney are not privileged in actions among themselves, and any one of them may require the attorney to testify as to such communications.[12]

9. Cleaves *v.* Jones, Exrx., 7 Exch. (Wels H. & G.) 421, 21 L. J. N. S. Exch. 105. In this case a solicitor had made a loan to his client. While acting as her solicitor, he requested her to make him a statement of debts owing by her husband at the time of his death, together with statement of sums paid thereon, by whom paid, and from what fund, statements to be submitted to counsel for opinion. In response to this request client gave solicitor her account book. Subsequently, the solicitor sued his client to recover the amount of his loan. To meet client's plea of the statute of limitations, plaintiff offered his client's account book showing an entry as follows: "1843. Cleave's interest on 350*l*, 17*l*., 10*s*." *Held*, the book was not admissible. The court says: "This book would never have been in the hands of the attorney, except for the purpose of his preparing a case for counsel. The document was the property of the client, in the same way that deeds deposited with the attorney by the client do not cease to be the property of the latter. The attorney in this case would not have been possessed of them but for the confidence reposed in him by the client that the communication was necessary for the purpose of being laid before counsel."

10. In Mitchell *v.* Bromberger, 2 Nev. 345, 90 Am. Dec. 550, attorneys brought suit to recover fees for services. Upon the trial one of plaintiffs testified as to the manner in which he and his partner were employed, detailed the services rendered, and stated the advice given. The defendant moved to strike out a large portion of this testimony, on the ground that, being information acquired by plaintiff while acting as counsel for defendant, it was privileged. This motion was denied. The supreme court held that the refusal to strike out the testimony was proper. After stating the general rule, and that it did not apply in actions between attorney and client, the supreme court says: "He (the attorney) should not, however, disclose more than is necessary for his own protection." Defendant contended that the attorney had disclosed more than was necessary to his own protection, that, as defendant had consulted plaintiff for the purpose of giving defendant's brother preference over other creditors, the disclosure of this fact would prejudice defendant before the jury. The supreme court held that this position was not well taken, that defendant's disposition toward his creditors could not diminish or increase the value of plaintiff's services.

11. **Attorney Charged With Wrongful Conduct.** — Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 51.

12. *England.* — Warde *v.* Warde,

(1.) Husband and Wife. — It has been held in England that if a woman takes certain action relying upon the advice of her hus-

3 Macn. & G. 365, 42 Eng. Reprint 301, *reversing* 1 Sim. (N. S.) 18; Glyn *v.* Caulfield, 3 Macn. & G. 463, 473, 42 Eng. Reprint 339; Ross *v.* Gibbs, L. R. 8 Eq. 522, 39 L. J. Ch. 61; Macfarlane *v.* Rolt, L. R. 14 Eq. 580, 41 L. J. Ch. 649, 27 L. T. 305; Chant *v.* Brown, 9 Hare 790, 12 L. & Eq. 299, 68 Eng. Reprint 735; Reynell *v.* Spyre, 10 Beav. 51, 50 Eng. Reprint 501; Doe d. Salt *v.* Carr, 1 Car. & M. 123, 41 E. C. L. 73; Perry *v.* Smith, 1 Car. & M. 554, 41 E. C. L. 301; *s. c.* 9 Mees. & W. 681, 11 L. J. N. S. Exch. 269; Attorney-General *v* Berkeley, 2 Jac. & W. 291.

Canada. — Walton *v.* Bernard, 2 Grant Ch. 344, 363; Holmes *v.* Matthews, 3 Grant Ch. 379.

Alabama. — Parish *v.* Gates, Admr., 29 Ala. 254.

California. — *In re* Bauer, 79 Cal. 304, 21 Pac. 759; Harris *v.* Harris, 136 Cal. 379, 69 Pac. 23.

Illinois. — Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Lynn *v.* Lyerle, 113 Ill. 128; Griffin *v.* Griffin, 125 Ill. 430, 17 N. E. 782.

Indiana. — Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782.

Kentucky. — Rice *v.* Rice, 14 B. Mon. 417.

Massachusetts. — Thompson *v.* Cashman, 181 Mass. 36, 62 N. E. 976.

Michigan. — Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

Minnesota. — Shove *v.* Martine, 85 Minn. 29, 88 N. W. 254, 412.

Nevada. — Haley *v.* Eureka County Bank, 21 Nev. 127, 139, 26 Pac. 64, 12 L. R. A. 815; Livingston *v.* Wagner, 23 Nev. 53, 42 Pac. 290.

New Jersey. — Gulick *v.* Gulick, 39 N. J. Eq. 516, *affirming* 38 N. J. Eq. 402.

New York. — Hurlburt *v.* Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482; Hard *v.* Ashley, 63 Hun 634, 18 N. Y. Supp. 413, *affirmed* without opinion, 136 N. Y. 645, 32 N. E. 1015; Sanford *v.* Sanford, 5 Lans. 486, 497; Root *v.* Wright, 21 Hun 344, *reversed* 84 N. Y. 72, 38 Am. Rep. 495, on ground that as against all but clients, communications to common attorney are privileged. Sherman *v.* Scott, 27 Hun 331; Sandiford *v.* Frost, 9 App. Div. 55, 41 N. Y. Supp. 103; Holmes *v.* Bloomingdale, 72 App. Div. 627, 76 N. Y. Supp. 182; rule recognized in Doheny *v.* Lacy, 168 N. Y. 213, 224, 61 N. E. 255, though not necessary to decision.

North Carolina. — Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577.

Oregon. — Minard *v.* Stillman, 31 Or. 164, 49 Pac. 976, 65 Am. St. Rep. 815.

Pennsylvania. — Appeal of Goodwin Gas Stove & M. Co., 117 Pa. St. 514, 12 Atl. 736, 2 Am. St. Rep. 696; *In re* Seip's Estate, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803; Brown *v.* Moosic Mt. Coal Co., 211 Pa. St. 579, 61 Atl. 76; Mitchell *v.* Mitchell, 212 Pa. St. 62, 61 Atl. 570.

South Carolina. — Wilson *v.* Gordon, 73 S. C. 155, 53 S. E. 79; Moffatt *v.* Hardin, 22 S. C. 9.

Texas. — Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

Wisconsin. — Dunn *v.* Amos, 14 Wis. 106.

In Dennis *v.* Codrington, Cary (Eng.) 100, 21 Eng. Reprint 53, decided in 1579-1580, it is said that counsel "shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he, the said Mr. O. was of counsel, either by the indifferent choice of both parties, or with either of them by reason of any annuity or fee." See also Gibbon *v.* Strathmore, 11 L. J. N. S. Ch. 366, where demurrer of witness to interrogatories on ground of confidential communication was allowed, although he had acted professionally for both plaintiff and defendant in the transaction which was involved

band's attorney, such attorney will, in a subsequent dispute between husband and wife growing out of the transaction in which she acted upon his advice be deemed to have been the common attorny of husband and wife and can be compelled by either to testify concerning communications made by either.[13]

(2.) Husband and Wife, Interests Adverse, Privileged. — A married woman living apart from her husband must, as between herself and him, or those claiming under him, disclose all correspondence with her solicitor which relates to business in which she and her husband were mutually interested, and in which there was nothing adverse to him.[14] But when her interest is adverse to her husband, she acts as a feme-sole, her communications and correspondence with her solicitor are privileged.[15]

b. *Action Between Representatives of Clients.* — In contest among personal representatives or heirs of persons who consult common attorney, any party may require the attorney to testify concerning matters communicated to him by any of his clients.[16]

c. *Action Between One Client and Attorney.* — In an action between one client and attorney, the latter cannot refuse to testify to communications on the ground that his answer would violate professional confidence of another client, when it appears that he acted as attorney for all parties to the transaction out of which the action arose.[17]

in the action wherein his testimony was sought.

In Hull *v.* Lyon, 27 Mo. 570, it is held that where two persons having conflicting interests in the same matter consult the same attorney, neither can compel him to testify to communications made by the other.

13. Husband and Wife. — Warde *v.* Warde, 3 Macn. & G. 365, 42 Eng. Reprint 301, *reversing* 1 Sim. (N. S.) 18.

14. Ford *v.* De Pontes, 29 L. J. N. S. Ch. 883, 32 L. T. 383, 5 Jur. (N. S.) 993.

15. Ford *v.* De Pontes, 29 L. J. N. S. Ch. 883, 32 L. T. 383, 5 Jur. (N. S.) 993.

16. Common Attorney Non-Privileged — Representatives of Clients. Hurlburt *v.* Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482.

17. Minard *v.* Stillman, 31 Or. 164, 49 Pac. 976, 65 Am. St. Rep. 815. In this case client sued attorney for money collected for client and not paid to him. The attorney claimed that he had used the proceeds of collection in settling claims against his client, but refused to state to whom he had paid the money, on the ground that he was attorney for payees as well as for plaintiff, and that his acts in making payment were privileged. Defendant's counsel contended that, as regarding the transaction of collection and payment, the attorney stood in the position of a stranger. The court says: "In this view we cannot concur. If it was matter of common knowledge between the parties to the settlement as pertains to the persons to whom this balance was paid, the knowledge or the communications by which it was obtained by all cannot be considered as privileged in so far as the parties are concerned, and the attorney is not inhibited by any duty devolving upon him from communicating such knowledge from one to the other. The knowledge would be matter common to all, the attorney included, and for that reason is not privileged, as it concerns them all. So that in a controversy between one of the parties and the attorney the communication would be a matter of common knowledge between parties to that controversy,

d. *Relation to Both Parties Must Clearly Appear.* — Before attorney can be compelled to testify to a certain communication on the ground that he was acting for both parties in the transaction in which it was made, it must clearly appear that he was acting for both parties.[18]

Parties Not Having Common Interest. — Attorney who acts for two parties whose interests in the subject of employment are not common cannot be compelled to disclose to one of them matters communicated by the other.[19]

N. Communications to Common Attorney Privileged Against Persons Other Than Clients. — But as against all persons other than his clients, communications made by persons who consult an attorney as their common legal adviser, are privileged; and such attorney cannot in an action between his clients, or one of them, and an outsider, be compelled to testify as to matters communicated to him by his clients.[20]

O. Persons Claiming Under Common Grantor. — In contest between persons claiming under common grantor, correspondence between such grantor and his solicitor in regard to property con-

and the reason assigned why it is not privileged as between the parties to the settlement is equally as strong and has like application as between one of the parties and the attorney."

18. Lamb *v.* Almy, 19 R. I. 586, 36 Atl. 1132.

19. *Ex parte* The Assignee, 27 L. T. N. S. (Eng.) 460. See also Hull *v.* Lyon, 27 Mo. 570.

In Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557, it is said, on the authority of Doe d. Strode *v.* Seaton, 2 Ad. & El. 171, 29 E. C. L. 62, an attorney employed by vendor and purchaser, or employed by one and paid by both in equal proportions, will not be permitted to disclose the communications made to him by either to enable him to prepare the deed of conveyance; nor will he be permitted to produce the deed in evidence without the consent of both.

20. Common Attorney Privileged Against Others. — *England.* — Doe d. Strode *v.* Seaton, 2 Ad. & El. 171, 29 E. C. L. 62; Enthoven *v.* Cobb, 2 De G. M & G. 632, 42 Eng. Reprint 1019.

California. — *In re* Bauer, 79 Cal. 304, 21 Pac. 759; Murphy *v.* Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365; Harris *v.* Harris, 136 Cal. 379, 69 Pac. 23.

Kansas. — Sparks *v.* Sparks, 51 Kan. 195, 32 Pac. 892.

Kentucky. — Rice *v.* Rice, 14 B. Mon. 417; Taylor *v.* Roulstone, 22 Ky. L. Rep., 61 S. W. 354, 60 S. W. 867; Smick's Admr. *v.* Beswick's Admr., 113 Ky. 439, 24 Ky. L. Rep. 276, 68 S. W. 439.

Louisiana. — Succession of Harkins, 2 La. Ann. 923.

Nevada. — Gruber *v.* Baker, 20 Nev. 453, 463, 23 Pac. 858, 9 L. R. A. 302.

New York. — Root *v.* Wright, 84 N. Y. 72, 38 Am. Rep. 495; Hurlburt *v.* Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482; Richards *v.* Moore, 60 Hun. 577, 14 N. Y. Supp. 851.

North Carolina. — Hughes *v.* Boone, 102 N. C. 137, 159, 9 S. E. 286; Carey *v.* Carey, 108 N. C. 267, 12 S. E. 1038.

Oregon. — Minard *v.* Stillman, 31 Or. 164, 49 Pac. 976, 65 Am. St. Rep. 815.

Pennsylvania. — *In re* Seip's Estate, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803.

Texas. — Harris *v.* Daugherty, 74 Tex. 1, 11 S. W. 921, 15 Am. St. Rep. 812.

cerned in the action in which the evidence is offered is not privileged.[21]

P. Issue, Good Faith and Advice. — When the issue is, did a person take certain action in good faith and upon the advice of counsel, such person may be compelled to testify as to statements made by himself and his attorney.[22]

Q. Testamentary Communications. — Directions in regard to the preparation of his will which a testator gives to his attorney are not privileged, if offered by devisees or legatees in a contest among themselves.[23]

21. Platt *v.* Buck, 4 Ont. L. Rep. (Can.) 421.

22. Charles City Plow & Mfg. Co. *v.* Jones, 71 Iowa 234, 32 N. W. 280.

23. *England.* — Russell *v.* Jackson, 9 Hare 387, 21 L. J. Ch. 146, 15 Jur. 1117, 68 Eng. Reprint, 558. See Jones *v.* Goodrich, 5 Moore, P. C. 16, 13 Eng. Reprint 394.

United States. — Blackburn *v.* Crawford's Lessee, 3 Wall. 175; Glover *v.* Patten, 165 U. S. 394. *Contra.* held in Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, applying statute of New York.

Colorado. — *In re* Shapter's Estate, 85 Pac. 688.

District of Columbia. — Olmstead *v.* Webb, 5 App. Cas. 38.

Indiana. — Kern *v.* Kern, 154 Ind. 29, 55 N. E. 1004.

Massachusetts. — Worthington *v.* Klemm, 144 Mass. 167, 10 N. E. 522.

Minnesota. — *In re* Layman's Will, 40 Minn. 371, 42 N. W. 286; Coates *v.* Semper, 82 Minn. 460, 85 N. W. 217.

Missouri. — Graham *v.* O'Fallon, 4 Mo. 338.

South Carolina. — Wilson *v.* Gordon, 73 S. C. 155, 53 S. E. 179.

Wisconsin. — *In re* Downing's Will, 118 Wis. 581, 95 N. W. 876.

In Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188, which involved a contested probate of a will, an attorney was permitted to testify as to what was said to him by testator in giving instructions as to preparation of his will. *Held,* that the testimony was properly admitted. The court says: "Undoubtedly, while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as a matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator. The reasoning of Vice-Chancellor Turner appears to us to be sound; and we are of opinion that the case does not fall within the reason of the rule relating to privileged communications. We need not, therefore, consider whether the case might rest on the ground that an intent to waive the privilege might be inferred from the will, as was held in Blackburn *v.* Crawford's Lessee, 3 Wall (U. S.) 175." The "reasoning of Vice-Chancellor Turner" referred to by the court is contained in the case of Russell *v.* Jackson, 9 Hare (Eng.) 387, 21 L. J. Ch. 146, 15 Jur. 1117, 68 Eng. Reprint 558, above cited.

In Davis *v.* Davis, 123 Mass. 590, attorney who drew a will testified to conversation between testator and himself as to the form and provisions of the will. It does not appear from the report that his testimony was objected to as calling for disclosure of privileged communication. The case is cited as authority in Doherty *v.* O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188. So as to Worthington *v.* Klemm, 144 Mass. 167, 10 N. E. 522, attorney gave similar testimony, and no objection appears. Case cited in Doherty *v.* O'Callaghan.

In O'Brien v. Spalding, 102 Ga. 490,

a. *Contra.* — But in some courts the contrary has been held[24]
b. *Conflict in New York.* — The decisions of New York courts

31 S. E. 100, 66 Am. St. Rep. 202, an attorney who drew a will was offered by propounder as a witness to show what passed between him and testatrix when he read over her will to her. Contestant, an heir at law, whose objection to the testimony of this witness was overruled by the trial court, admitted, in his argument on appeal, that, at common law such communications were not privileged, but contended that the common law rule had been changed by the Georgia statute which provided as follows: "No attorney shall be competent or compellable to testify in any court in this state, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner." The court held that this statutory provision did not change or modify the common law rule, and that the communications in question were not privileged. This ruling was not based on the ground of waiver, because the court states that, under the law of Georgia, a waiver is a legal impossibility. The decision was made on the ground that the proceeding in which the testimony was offered was not for or against the interest of the client or his estate, but, as the court says: "On the contrary the proceeding is simply one in which certain persons claiming under, and not adversely to the client seek to have an investigation made into the circumstances attending the execution of the instrument offered for probate, in order that their rights in the premises may, as against the persons represented by the propounder, be finally adjudicated. It is a proceeding provided for and sanctioned by law, in which it is necessarily contemplated that the whole truth shall be elicited from every reliable source, to the end that full and complete justice may be done, not only to the living, but to the dead."

Waiver.— In McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828, such communications were held competent on the ground of waiver implied from the act of testator in requesting attorney who prepared will to sign it as subscribing witness. See under "Testamentary Communications—Attorneys Subscribing Witness," *post.* So in Blackburn *v.* Crawford's Lessee, 3 Wall. (U. S.) 175, the testimony of an attorney as to his client's testamentary directions and as to declarations made in the course of giving those directions was held admissible on the ground of waiver. The court says: "The waiver may be express or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its object, and in direct conflict with the reasons upon which it is founded."

24. Testamentary Communications Privileged. — See Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279. This case is distinguished in Kern v. Kern, 154 Ind. 29, 55 N. E. 1004, in which such communications are held non-privileged, and where the court says: "While the rule announced by the court in Gurley *v.* Park is doubtless the correct one in disputes between the client's representatives on the one hand, and strangers on the other, we do not think it applies where both the litigating parties claim under the client. The attention of the court does not appear to have been called to this distinction, and none of the cases bearing upon it is referred to in the opinion. We regard this qualification of the general

on this subject are conflicting, the latest decisions of the court of appeals holding such communications to be privileged.[25]

rule as a very material one, and, to the extent that the opinion in Gurley *v.* Park conflicts with the view we have expressed, that case is overruled." See also Inlow *v.* Hughes (Ind. App), 76 N. E. 763; Matter of Coleman, 111 N. Y. 220, 19 N. E. 71; Loder *v.* Whelpley, 111 N. Y. 239, 248, 18 N. E. 874. Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, decides upon construction of New York statute.

In matter of Coleman, 111 N. Y. 220, 19 N. E. 71, communications in regard to the preparation of a will were held privileged; but the attorney's testimony was held admissible on the ground of their having been subscribing witnesses to the will in question.

In Fayerweather *v.* Ritch, 90 Fed. 13, it is held that an attorney cannot be compelled to testify concerning conversations and transactions in regard to the preparation of a will, but can be required to testify concerning the destruction and contents of a will. It does not appear from the report whether the execution or validity of the will was in issue between heirs and devisees, or between devisees and strangers. But in Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, the circuit court of appeals held that attorney who prepared a will, not being a subscribing witness thereto, could not under New York statute, be compelled to testify concerning its contents in case of its loss. Whether the proceeding before the court in Butler *v.* Fayerweather grew directly out of that in question in Fayerweather *v.* Ritch does not appear from the report, but the same will and the same testimony are undoubtedly involved in the two cases.

25. New York.—Privileged. Renihan *v.* Dennin, 103 N. Y. 573, 9 N. E. 320, 57 Am. Rep. 770; Matter of Coleman, 111 N. Y. 220, 19 N. E. 71; Loder *v.* Whelpley, 111 N. Y. 239, 248, 18 N. E. 874; Mason *v.* Williams, 53 Hun. 398, 6 N. Y. Supp. 479; *In re* O'Neil's Will, 7 N. Y. Supp. 197, 26 N. Y. St. Rep. 242; *In re* McCarthy's Will, 59 Hun 66, 14 N. Y. Supp. 2, *s. c.* 65 Hun 624, 20 N. Y. Supp. 581; *In re* Smith's Will, 61 Hun 101, 15 N. Y. Supp, 425; *In re* Sears's Estate, 33 Misc. 141, 68 N. Y. Supp. 363; Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120 (construing New York statute).

In *In re* McCarthy's Will, 55 Hun 7, 8 N. Y. Supp. 578, the court held that an attorney might testify that he received certain instructions from testator relating to the provisions of a will, on the ground that the instructions were not confidential, as they were intended to be communicated, through the medium of the will, to legatees and heirs at law. Upon second appeal, the court says:

"On the second hearing the learned surrogate, in supposed deference to certain intimations contained in the opinion delivered at general term, not necessary to the decision actually made, admitted the testimony of the witness Nicholas as to all the communications made by him to the testator, not in the presence of the subscribing witnesses or of any third person, relating to the disposition of the testator's property. This ruling, which was excepted to by the contestants, was in apparent violation of the rule declared by the court of appeals in the two cases of *In re Coleman,* 111 N. Y. 220, 19 N. E. Rep. 71, and *Loder v. Whelpley,* 111 N. Y. 239, 18 N. E. Rep. 874; and it was, as the surrogate states in his opinion, upon the evidence so received that the second decree was based. For the error of the reception of the evidence last mentioned the decree now appealed from must be reversed." In this case it was claimed that the attorney could testify because testator's statements to him were made in the presence of the subscribing witnesses, and in *s. c.,* 14 N. Y. Supp. 2, and 20 N. Y. Supp. 581, the court says that such communications would not be privileged if made in presence of witnesses.

c. *Privileged, Unless Will Made.* — But if no will was in fact made, and testimony is offered, not for the purpose of ascertaining and effectuating testator's intention, but to show his relations toward a certain person, or some previous disposition of property, testamentary communications are privileged.[26]

d. *Privileged Against Adverse Claimants.* — Testamentary statements, instructions and advice are privileged as against persons whose claims against devisees or legatees are not based upon their relation to testator.[27]

e. *Lost Will.* — It has been held that an attorney who prepared a will for his client may, in case of its loss, testify as to its contents.[28]

f. *Revoked Will as Memorandum.* — Also that an attorney will be compelled to produce in evidence a will prepared by him for his client, from which the signature had been torn, which client

Presence of Witnesses Immaterial. — But in *In re* Sears' Estate, 33 Misc. 141, 68 N. Y. Supp. 363, it is held that testamentary communications between attorney and client are privileged, as to the attorney, although made in the presence of the subscribing witnesses. To same effect, see Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120.

Non-Privileged. — Sanford *v.* Sanford, 61 Bar (N. Y.) 293, 305, 5 Lans. 486, 497. See Sheridan *v.* Houghton, 16 Hun 628, *affirmed* 84 N. Y. 643; Matter of Chapman, 27 Hun 573; Matter of Austin, 42 Hun 516; Whelpley *v.* Loder, 1 Dem. (N. Y.) 368, 376. On appeal in this case the court of appeals held that the admission of the attorney's testimony as to testamentary communications was erroneous, but affirmed the judgment, on the ground that appellant had not been necessarily prejudiced by its admission.

The statute applied in Matter of Coleman, Loder v. Whelpley, Renihan *v.* Dennin, and Butler *v.* Fayerweather, *supra*, provides as follows: "An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment." Sec. 835, Bliss, New York Ann. Code.

26. Sweet *v.* Owens, 109 Mo. 1, 18 S. W. 928.

In Pearsall *v.* Elmer, 5 Redf. Sur. (N. Y.) 181, it was held that an attorney could not testify in regard to codicil to client's will which was prepared, but not executed.

Testator's Relations With Certain Person. — In Lorimer *v.* Lorimer, 124 Mich. 631, 83 N. W. 609, it was attempted to show by testamentary directions given to his attorney that testator sustained certain relations with a certain person. *Held,* that the attorney could not testify. In this case the court shows that the doctrine of Blackburn *v.* Crawford's Lessee, Greenough *v.* Gaskell, and Wilson *v.* Rastall, does not apply to a case in which a will was not, in fact, made.

Prior Disposition of Estate. — In Sweet *v.* Owens 109 Mo. 1, 18 S. W. 928, a party offered to show by testator's attorney that in the course of testamentary communication, testator stated how much land he had intended to convey by deed made prior to that time. *Held,* that the evidence was inadmissible.

27. Emerson *v.* Scott (Tex. Civ. App.), 87 S. W. 369.

28. Attorney who prepared a will for his client, may, its loss having been proven, testify as to its contents. Kern *v.* Kern, 154 Ind. 29, 55 N. E. 1004. *Contra.* — Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120.

had left with him to be used as memorandum for the preparation of a new will.[29]

g. *Attorney Subscribing Witness to Will.* — An attorney who becomes a subscribing witness to his client's will may testify to all circumstances attending its execution.[30]

(1.) Waiver — By requesting his attorney to become a subscribing witness to his will, testator waives privilege as to his attorney's testimony concerning testamentary communications.[31]

(2.) Injunction of Secrecy Ineffectual. — If attorney who prepares will becomes, at his client's request, a subscribing witness, he may testify concerning testamentary instructions, notwithstanding the

29. Matter of Chapman, 27 Hun (N. Y.) 573. The issue in this case was, mistake in will. The court says that: "On an allegation of fraud, forgery or mistake, instructions received by an attorney for making the will are not privileged communications within any just and proper construction or understanding of the law." *Citing* Sheridan *v.* Houghton, 16 Hun (N. Y.) 628.

The cases in this note and in that immediately preceding must be considered in connection with the rule now established in New York to the effect that testamentary communications are privileged.

30. **Attorney Subscribing Witness.** — *California.* — *In re* Mullin's Estate 110 Cal. 252, 42 Pac. 645; *In re* Wax's Estate 106 Cal. 343, 39 Pac. 624.

Indiana. — Pence *v.* Waugh, 135 Ind. 143, 152, 34 N. E. 860.

New York. — Matter of Coleman, 111 N. Y. 220, 19 N. E. 71; Matter of Elston, 5 Dem. 154; *In re* Lumb's Will, 18 N. Y. Supp. 173; *In re* Gagan's Will, 20 N. Y. Supp. 426, 47 N. Y. St. Rep. 444, *affirmed*, see 21 N. Y. Supp. 350, 49 N. Y. St. Rep. 366.

Wisconsin. — McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828.

In O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202, the court holds that an attorney is competent as subscribing witness to a will prepared by him for his client, saying that, as he was as competent as any other witness to testify to his client's condition, his signature as subscribing witness was as effective as that of any person. The court says that, by accepting her attorney's services as a subscribing witness the testatrix evidently did so under the belief and with the desire that, after her death, he would truly state all that occurred in connection with the execution of her will. The attorney may also testify to testator's knowledge of contents of will, and all other pertinent facts attending the signature and execution of the instrument.

The attorney who prepared the will may testify as to testator's mental condition. Denning v. Butcher, 91 Iowa 425, 435, 59 N. W. 69.

31. *In re* Mullin's Estate 110 Cal. 252, 42 Pac. 645; *In re* Wax's Estate, 106 Cal. 343, 39 Pac. 624; Matter of Coleman, 111 N. Y. 220, 19 N. E. 71; *In re* Lum's Will, 18 N. Y. Supp. 173; *In re* Gagan's Will, 20 N. Y. Supp. 426, 47 N. Y. St. Rep. 444; Denning v. Butcher, 91 Iowa 425, 434, 59 N. W. 69.

Attorney Reading Will to Witnesses. — If attorney reads over to the subscribing witnesses the attestation and revocation clauses of a will with testator's consent and approval, and asks testator in presence of these witnesses if he acknowledged execution, it is *held* that such conduct by testator constitutes waiver of privilege. *In re* Barnes' Will, 70 App. Div. 523, 75 N. Y. Supp. 373.

Effect of Such Waiver. — The effect of such waiver is to dissolve the relation of attorney and client so far as relates to the execution of the will. *In re* Gagan's Will, 20 N. Y. Supp. 426, 47 N. Y. St. Rep. 444. See "Waiver," *post.*

fact that testator requested him not to disclose such instructions.[32]

R. COMMUNICATIONS AS TO CRIME. — Communications made to an attorney before commission of a crime, and for the purpose of receiving guidance or assistance in its commission are not privileged.[33]

32. *In re* Lumb's Will, 18 N Y. Supp. 173. In this case testator who caused attorney to act as subscribing witness to his will, requested him to consider as confidential his instructions as to its terms. *Held,* that his requesting his attorney to sign as witness operated as a waiver, notwithstanding his injunction as to secrecy. On this subject the court says: "Mr. Davis, the attorney who drew the paper, was produced for examination as a subscribing witness. He was asked on cross-examination whether the decedent said anything to him in respect to the son who is disinherited. The witness declined to answer, stating that the communications between them were confidential, and that the decedent made the request that they be so regarded. On the part of the decedent there is an express non-waiver of the privilege in respect to the instructions. The language of section 835 of the Code, strictly construed, does not admit of a lawyer testifying to the facts attending the execution of a will drawn by him for his client. The court of appeals has not only relaxed that rule when the lawyer is a subscribing wit ness, but holds that he may testify to antecedent communications with his client in respect thereto. The objection was not well taken. A testator can not waive the privilege in respect to proving the facts that occurred on the execution of a will, and maintain it in respect to the instruction given for its preparation. It must apply to all communications and transactions had between the testator and his attorney having reference to the paper under consideration. To hold otherwise would embarrass the administration of justice." *In re* Lumb's Will, 18 N. Y. Supp. 173.

33. *England.* — See Reg. *v.* Hayward, 2 Car. & K. 234, 61 E. C. L. 234; The Queen *v.* Tylney, 18 L. J. Mag. Cas. 36, and cases there cited; Reg. *v.* Downer, 14 Cox. C. C. 486, 43 L. T. N. S. 445.

United States. — Alexander *v.* United States, 138 U. S. 353; *In re* Cole, 6 Fed. Cas. No. 2, 975.

Missouri. — State *v.* McChesney, 16 Mo. App. 259, 269; Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39. (On hearing *en banc* in this case it was held that error in sustaining objection to attorney's testimony was obviated by the fact that the party questioning him did not proceed to show that witness would testify to any material fact. See 123 Mo. 165, 27 S. W. 440); State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116, 131.

New York. — People *v.* Blakeley, 4 Park. Crim. 176; People *v.* Petersen, 60 App. Div. 118, 69 N. Y. Supp. 941.

North Carolina. — Hughes *v.* Boone, 102 N. C. 137, 160, 9 S. E. 286.

Texas. — Orman *v.* State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662; Everett *v.* State, 30 Tex. Crim. 682.

Utah. — People *v.* Mahon, 1 Utah 205.

So held in McMannus *v.* State, 2 Head (Tenn.) 213, although not necessary to decision. The Queen *v.* Cox, 14 Q. B. Div. 153, 15 Cox. C. C. 611, 52 L. T. N. S. 25, overrules Cromack *v.* Heathcote, 2 Br. & B. 4, 6 E. C. L. 1, 22 R. R. 638, and Doe *v.* Harris, 5 Car & P. 592, 24 E. C. L. 468, which hold all communications privileged, without regard to purpose. On this subject the supreme court of Connecticut in State *v.* Barrows, 52 Conn. 323 says: "It would seem to be required by principle that an attorney knowing, no matter from what source, that his client is about to commit a crime, should be holden to owe a higher duty to society, and especially to the intended victims of his client's crime, than even that which he owes to him. But it seems to us that if this exception to the rule is

a. *Criminal Intent Must Appear.* — Before a communication can be held to be within the exception excluding from the general rule communications as to crime, it must clearly appear that client intended the commission of a crime.[34]

b. *Act Must be Malum In Se.* — It has been said that an attorney may testify to any communication made to him to obtain assistance as to the commission of a felony or other crime which is *malum in se*.[35]

c. *Mere Charge of Criminal Intent Insufficient.* — It has been held

to be made, it should apply only to such statements of the client as offered reasonable evidence of his guilty intent. The absence of guilty intent, if none existed, could only be made to appear by a cross-examination, which would, in many cases, lead to a disclosure of all the statements of the client."

In People *v.* Alstine, 57 Mich. 69, 23 N. W. 594, we find this language: "But there are exceptions to the general rule, based upon public policy and public security. Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases." For an extended discussion of this subject, see Hamil & Co. *v.* England, 50 Mo. App. 338. See also remarks of Chancellor Walworth in Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189. In this case the Chancellor felt bound by authority to hold such communications privileged, but expressed regret at the compulsion.

In State *v.* Kidd, 89 Iowa 54, 63, 56 N. W. 263, it is said that communications in connection with an unlawful act are not privileged. But in the same case the court uses language which indicates the opposite view. In that case K. had been indicted for forging certain special findings of a jury, the forgery consisting in changing the findings after their having been filed. He had sent a copy of these findings to his counsel, and afterwards requested its return. The court says that had defendant stated that he desired the return of this copy in order that he might change it to conform with the original, it might hold the communication privileged. In making this statement, the court probably proceeded upon the theory that a statement as to having changed the original would be an admission or confession of an accomplished crime, and, therefore not proper to be shown by counsel.

34. State *v.* Barrows, 52 Conn. 323.

In Rex *v.* Haydn, 2 Fox & S. (Irish K. B.) 379, a person submitted a manuscript to his solicitor for advice as to whether or not its publication would subject the author to criminal prosecution. In suit for damages alleged to have been caused by statements contained in the manuscript, the solicitor was offered as a witness to prove its contents. *Held,* that the communication was privileged; and that it was not within the exception as to communications made for purposes of crime, as the client consulted his solicitor, nor for the purpose of obtaining assistance in committing a crime, but to refrain from doing a certain act should client be advised of its criminality.

35. People *v.* Blakeley, 4 Park. Crim. (N. Y.) 176, 184. See statement of court in Hughes v. Boone, 102 N. C. 137, 160, 9 S. E. 286.

that the mere charge of criminal intent in the making of the communication in question is insufficient to let in the attorney's testimony.[36]

d. *Court to Find Intent,* and that the court will look into the circumstances of each case to determine the *bona fides* of the alleged consultation.[37]

e. *Limitation of Rule.* — The rule that communications in regard to crime may be testified to by an attorney is limited to cases in which the person making the communication is being tried for the crime in furtherance of which it was made.[38]

Communication Requiring Assumption of Another Crime, Privileged. When a professional communication is harmless on its face, and it is only by assuming that the maker was guilty of one crime that the communication can be made to refer to another, the exception to the general rule of privilege does not apply.[39]

f. *Communication Must Relate to Crime Intended.* — To be admissible, it must be shown that the communication in question related to a crime proposed to be committed by client. It is not sufficient that the communication was made at or near the time of commission of crime.[40]

36. State *v.* McChesney, 16 Mo. App. 259, 268.

37. State *v.* McChesney, 16 Mo. App. 259, 268.

38. Alexander *v.* United States, 138 U. S. 353. In this case defendant was indicted for murder, deceased and defendant having been partners in business. An attorney was permitted, against defendant's objection, to testify that, after the time of the murder, defendant consulted witness professionally; that defendant had stated that his partner (deceased) was missing, and defendant had not heard from him for some time; also that defendant desired advice as to the means of securing a claim he had to certain partnership property which had been in his partner's possession. This testimony was offered as an admission by defendant that he had been concerned in the murder, or as contradictory to a statement he had made on the stand. It was contended that this testimony was not privileged, as it related to the commission of a crime, to wit: the crime of defrauding defendant's partner. *Held,* that as defendant was not on trial for defrauding his partner, the exception to the general rule did not apply, and the communication was privileged. The court distinguishes Reg. *v.* Cox, 14 Q. B. Div. 153, the distinguishing feature of that case being that there defendant was on trial for the offense in regard to which the communication was made.

39. Alexander *v.* United States, 138 U. S. 353. See statement in note next preceding. The court held that defendant's communication was harmless on its face, and that it was "only by assuming that defendant had committed the murder in question that a scheme to defraud his partner became manifest."

40. Graham *v.* People, 63 Barb. (N. Y.) 468, 484. In this case defendant was tried for murder. Prosecution attempted to show by an attorney that he (attorney) had drawn certain papers relating to business transactions between deceased and defendant. The attorney's evidence was admitted against defendant's objection. This ruling was held erroneous, and judgment of conviction reversed. The court uses this language: "The advice sought of the attorney, and the instruments procured to be drawn by him, were in themselves wholly irrelevant, and in no manner necessarily connected with the perpetration of any crime; nor

g. *Attorney Without Fault, Immaterial.* — This rule is not affected by the fact that the attorney is wholly without blame.[41]

S. COMMUNICATIONS AS TO FRAUD. — As to whether communications between attorney and client relating to the perpetration of a fraud are privileged, the authorities are conflicting.

a. *Non-Privileged.* — It has been held that such communications are not privileged, and that either client[42] or attorney[43] may be

could they, of themselves, in any way aid in the commission of any fraud or crime. In fact the assumption that the prisoner has committed or contemplated any crime, in connection with the instruments which he employed Mr. Viele to draw, is merely conjectural, and itself founded upon an inference drawn from the inadmissible testimony of the attorney, to wit, that on a certain day and hour the prisoner applied to him to draw those instruments."

41. Orman *v.* State, 22 Tex. App. 604, 3 S. W. 468, 58 Am. Rep. 662.

42. **Communications as to Fraud Non-Privileged. — Client Bound to Testify.** — Weinstein *v.* Reid, 25 Mo. App. 41. See decision in Foster v. Wilkinson, 37 Hun (N. Y.) 242; The Queen *v.* Cox, 14 Q. B. Div. 153, 164; *In re* Postlethwaite, L. R. 35 Ch. Div. 722 (where it is held that where client and his attorney are charged with fraud, letters between them relating to the act in question must be produced,); Williams *v.* Quebrada R. L. & C. Co., 65 L. J. Ch. 68, [1895,] 2 ch. p. 751, 73 L. T. 397, where a corporation charged with fraud was compelled to produce opinions of counsel relating to the transaction complained of. See Kelly *v.* Jackson, 13 Irish Eq. 129; Matter of Bellis & Milligan, 38 How. Pr. (N. Y.) 79, although the decision that attorney's evidence was competent was not based specifically on this ground.

43. **Attorney May Testify.**— Reynell *v.* Spyre, 10 Beav. (Eng.) 51; *s. c.* and same ruling, 11 Beav. 618, 50 Eng. Reprint 501; Russell *v.* Jackson, 9 Hare 387, 21 L. J. Ch. 146, 15 Jur. 1117, 68 Eng. Reprint, 558; Taylor v. Evans (Tex. Civ. App.), 29 S. W. 172. See Kelly *v.* Jackson, 13 Ir. Eq. 129; Foster *v.* Wilkinson, 37 Hun (N. Y.) 242.

In Hamil & Co. *v.* England, 50 Mo. App. 338, an attorney was compelled to state what transpired between himself and client at a consultation when he advised and prepared a bill of sale intended to defraud client's creditors.

In Brigham *v.* McDowell, 19 Neb. 407, 415, 27 N. W. 384, the court holds that, if excluding certain testimony as privileged would have the effect of perpetuating a fraud upon those who had relied upon the conduct of client and that of attorney, the communication will be held non-privileged. The court says: "The rule applicable to privileged and professional communications is intended for a shield to protect the confidence of a client reposed in his attorney, and not as an implement by the use of which he can defraud others."

See remarks of judges in Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

In Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054, the court uses this language: "In order that the rule may apply, there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. As I understand the case, the rule, in its different phases and the

compelled to give such communications in evidence, or produce letters exchanged between themselves in the course of a fraudulent transaction.[44]

(1.) Acts. — Client's acts done in the presence of his attorney toward perpetration of fraud are non-privileged, and may be testified to by attorney.[45]

So as to attorney's acts.[46]

(2.) Fraudulent Character Must Appear. — If bill seeking discovery of documents does not state facts which constitute fraud, communications between attorney and client concerning matters set forth in the bill will be protected.[47]

reasons, may be thus stated. If the client consults the lawyer with reference to the perpetration of a crime, and they co-operate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime—he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the co-operation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy, which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offence. If the client discloses his fraudulent purpose and the attorney does not join in the scheme, but repudiates all connection with it, there cannot be, properly speaking, professional employment to effect such purpose, and consequently there is no privilege; if the client does not frankly and freely disclose his object and intention, as well as the facts, there is no professional confidence, and consequently no privilege. The application of the rule proceeds on the ground that the privilege is that of the client, and bases his right to claim it, or liability to lose it, on his own conduct; if that has been such that his criminal and fraudulent object and purpose puts him beyond the pale of the law's protection, or if, to conceal his purpose, he has not reposed full confidence in his counsel, he cannot invoke a rule which the law has created, as Lord Brougham said, in Greenough *v.* Gaskell, 1 Myl. & K. 98, 'out of regard to the interests and the administration of justice.'" See also Dunn *v.* Amos, 14 Wis. 106; Dudley *v.* Beck, 3. Wis. 274.

Assistant Client to Evade Bankruptcy Laws. — When an attorney receives conveyance of client's land, and at once conveys the same land to his client's wife, the attorney, in a proceeding in bankruptcy in which this transaction is attacked by the husband's creditors, must testify as to all the circumstances of the two conveyances. In the matter of Bellis & Milligan, 38 How. Pr. (N. Y.) 79.

44. Letters as to Fraud. — Brigham *v.* McDowell, 19 Neb. 407, 27 N. W. 384. (See quotation in note 81 under III, 10, D.)

45. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

In Trustees of Chester *v.* Blount, 70 Ga. 779, it is held that when a client gives his attorney a deed, not for the purpose of preparing a defense, but to deprive his adversary of a piece of evidence, the attorney may be compelled to testify to his possession of the deed, and to produce it in evidence.

46. Kelly *v.* Jackson, 13 Irish Eq. 129.

47. Fraud Must Appear. — Higbee *v.* Dresser, 103 Mass. 523.

Test of Question of Privilege. "This is the account of the transaction, as stated both in the bill and the answer; and, in my opinion, this was not a fraud according to any definition of fraud which can be recognized in this Court. The transaction, as stated on this bill, is one as to which it was perfectly lawful

(3.) Limit of Rule. — But the rule that statements of client to attorney in regard to fraud are not privileged is limited to cases of contemplated fraud, and where the fraud has been consummated, statements in regard thereto between attorney and client are privileged.[48]

(4.) Attorney May Claim Privilege if Not Charged With Participation. It has been held in England that communications in regard to contemplated fraud are not privileged, but that attorney may claim privilege unless he be charged with participating in his client's fraud.[49]

b. *Privileged.* — It has also been held that such communications are privileged.[50]

for the client to ask, and the solicitor to give professional advice. And this seems to me to be the true test, in a case like the present, as to whether what has passed is or is not privileged. It is distinctly sworn that the documents in question, contain or relate to advice so asked for and given, with reference to the very question now in dispute; and the case, therefore, is one which I consider as coming within the admitted rule of privilege." Follett *v.* Jefferyes, 1 Sim. N. S. (Eng.) 3, 20 L. J. Ch. 65, 15 Jur. 118.

In Reg. *v.* Bullivant, 69 L. J. Q. B. 657, 70 L. J. N. S. K. B. 645, the Lord Chancellor says: "I think the broad propositions may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no Court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding. Those are the two principles, and of course it would be possible to make both propositions absurd, as is very often the case with all propositions, by taking extreme cases on either side. If you are to say, 'I will not say what these communications are because until you have actually proved me guilty of a crime they may be privileged as confidential, the result would be that they could never be produced at all, because until the whole thing is over you cannot have the proof of guilt. On the other hand, if it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing which he is so endeavoring to inquire into may have been illegal or not, the privilege in all cases disappears at once. The line which the Courts have hitherto taken, and I hope will preserve, is this: that in order to displace the *prima facie* right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." See also Mornington *v.* Mornington, 2 Johns & H. 697, 70 Eng. Reprint, 1239.

48. **Consummated Fraud.** — In Hartness *v.* Brown, 21 Wash. 655, 668, 59 Pac. 491, the communications in question were made in regard to a deed which had been fully executed at the time communications were made. *Held,* that communications were privileged.

49. **Attorney Protected if Not Participant.** — Charlton *v.* Coombes, 4 Giff. 372, *s. c.* 32 L. J. N. S. Ch. 284, 8 L. T. 81, 9 Jur. (N. S.) 534, 66 Eng. Reprint 751.

50. **Communications as to Fraud Privileged.** — Crisler *v.* Garland, 11 Smed. & M. (Miss.) 136, 49 Am. Dec. 49; Peck *v.* Williams, 13 Abb. Pr. (N. Y.) 68, appears to hold that while communications as to crime are not privileged, the same does not apply to communications as to

T. Illegal Act. — Communications by client for the purpose of obtaining advice as to manner of evading a duty imposed by law are not privileged.[51]

U. Wrongful Act. — When an attorney and client both engage in committing a wrongful act, the client cannot prevent a disclosure of the transactions by the attorney, on the ground that the latter became acquainted with the facts connected with it as his attorney.[52]

V. Communication of Knowledge by Person in Contempt of Court. — An attorney may be compelled to state the address of his client, who, in defiance of an order of court, conceals herself and children, who are wards in chancery, although his knowledge was obtained from client's letters to him.[53]

W. Matters Concerning Which Attorney May Testify.

fraud; *citing* Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189 as authority.

51. Reg. *v.* Bullivant, 70 L. J. N. S. K. B. (Eng.) 645, 1900, Vol. 2, p. 163, Q. B. Div. In this case it is held that confidential communications between a person and his solicitor for the purpose of drawing conveyances made to evade the payment of succession duties are not privileged. This case was reversed by the House of Lords upon the ground that the pleadings did not make a specific allegation of fraud or illegal conduct. See *s. c.* 70 L. J. N. S. K. B. (Eng.) 645, A. C. 1901, 196. But the principle announced by the lower court is not disputed. See note on p. 221 of 2 Swanst. (Eng.).

52. Russell *v.* Jackson, 9 Hare 387, 21 L. J. Ch. 146, 15 Jur. 1117, 68 Eng. Reprint 558.

In Dudley *v.* Beck, 3 Wis. 274, 286, action was brought to forclose mortgage. Defense of usury was made. It was attempted to show by mortgagee's attorney, who negotiated the loan, that it was his custom to charge mortgagor a certain percentage as attorney's fee, the greater part was to be paid to mortgagee as interest in addition to that called for by the mortgage. The trial court excluded the testimony. *Held,* that this ruling was erroneous.

53. Client in Contempt. — Burton *v.* Earl of Darnley, 2 L. R. Eq. 576, 21 L. T. 292.

In Ramsbotham *v.* Senior, L. R. 8 Eq. (Eng.) 575, the court says: "I have expressed, in the case of Burton *v.* Earl of Darnley, a very decided opinion, which the argument I have now heard has made still more decided, that no person, be he solicitor or not, can have any privilege whatever in doing, or abstaining from doing, that which has the effect of concealing the residence of a ward of this Court, and thereby preventing the Court exercising its due control over the ward. I have invited counsel to tell me whether any case is to be found in the reports or books which shows that this Court has ever sanctioned the principle that any person whatever (I care not whether a professional man, or officer of this Court, or not) can conceal the residence of a ward, or do anything which will prevent the Court having access to its wards and putting them under proper protection. . . . I am of the opinion that I made the right order in Burton *v.* Earl of Darnley, when I directed the solicitor, who did not know the address of another lady who is keeping a ward out of the way of the Court, to answer the question where she was. Mr. Paterson has told me in Chambers that he does not know the residence of Mrs. Senior. If he had known it, I should have told him, as I told Mr. Markby in the other case, to disclose it. He does not know it, but he is in possession of documents which may by possibility lead to its being ascertained. Those documents, for the reasons I have already stated, I am clearly of opinion he is bound to produce."

In the notes is given a list of matters which have been decided properly given in evidence by attorneys, although the knowledge testified to was acquired in the course of professional employment.[54]

54. What Attorney May Testify to. — Limit of Attorney's Testimony. In Wheeler *v.* Hill, 16 Me. 329, the court says that an attorney's testimony must be limited to a statement of his client's name. The court says: "It is sufficient that the relation of client and attorney subsisted between them to throw around the proceeding an impenetrable veil of secrecy, excepting only if it should become necessary, *it might be communicated that Burr employed him.* Not a syllable more which he said on his case can lawfully be divulged."

Facts of Employment. — White *v.* State, 86 Ala. 69, 5 So. 674; Hampton *v.* Boylan, 46 Hun (N. Y.) 151; Beckwith *v.* Benner, 6 Car. & P. 25 E. C. L. 595, 681; Beeson *v.* Beeson, 9 Pa. St. 279; *In re* Seip's Estate, 163 Pa. St. 423, 432, 30 Atl. 226, 43 Am. St. Rep. 803; Eickman *v.* Troll, 29 Minn. 124, 12 N. W. 347. Through whose agency, in what manner, and at what time he was employed (Shaughnessy *v.* Fogg, 15 La. Ann. 330.)

By Whom He Was Employed. Mobile & M. R. Co. *v.* Yeates, 67 Ala. 164; Satterlee *v.* Bliss, 36 Cal. 489; Appeal of Turner, 72 Conn. 305, 318, 44 Atl. 310; Shangnessy *v.* Fogg, 15 La. Ann. 330; Brown *v.* Payson, 6 N. H. 443; Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673; Harriman *v.* Jones, 58 N. H. 328; *In re* Seip's Estate, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803; Beeson *v.* Beeson, 9 Pa. St. 279.

By Whom Employed. — Stanley *v.* Stanley, 27 Wash. 570, 68 Pac. 187. *Contra,* Jones *v.* Pugh, 1 Phil. 96, 12 Sim. 470, 11 L. J. Ch. 323, 41 Eng. Reprint, 567; Levy *v.* Pope, 1 Moody & M. 410, 22 E. C. L. 343. But not if the answer would involve a disclosure of the nature of the transaction in which he was engaged for client. *In re* Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. Supp. 1059. What affairs of client were the subject of discussion between them. (*In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591.) Whether client's indebtedness to a certain person was mentioned by client in consultation in regard to client's bankruptcy proceedings. (*In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591; or whether subject of client's inability to meet his obligations was discussed. *Ib.*) Whether or not the relation of attorney and client existed between him and a certain person (Alger *v.* Turner, 105 Ga. 178, 31 S. E. 423; Leindecker *v.* Waldron, 52 Ill. 283; Bank *v.* McDowell, 7 Kan. App. 568, 52 Pac. 56.) That he advised his client in relation to a certain document (Nixon *v.* Goodwin (Cal. App., 85 Pac. 169).

Facts as to Client. — Name of client, and whether name indicated a real or fictitious person. Martin *v.* Anderson, 21 Ga. 301; *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552. As to name, see United States *v.* Lee, 107 Fed. 702; Brown *v.* Payson, 6 N. H. 443.

Name of Client. — Parkhurst *v.* Lowten, 2 Swanst. 194, 36 Eng. Reprint 589; Bursill *v.* Tanner, 16 Q. B. Div. 1; U. S. *v.* Lee, 107 Fed. 702. Name of person who intrusted him with a certain document (Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233; Cox *v.* Bockett, 34 L. J. N. S. C. P. (Eng.) 125, 11 L. T. 629, 11 Jur. (N. S.) 88). Identity of client, and fact that a certain name designated his client (Com. *v.* Bacon, 135 Mass. 521; Studdy *v.* Sanders, 2 Dowl. & Ryl. 347, 8 E. C. L. 93.) Attorney cannot be examined in regard to communications with client in order to show identity (Parkins *v.* Hawkshaw, 2 Stark. 239, 3 E. C. L. 333).

Residence of Client. — Attorney may be compelled to disclose his client's residence (Alden *v.* Goddard, 73 Me. 345; United States *v.* Lee, 107 Fed. 702; Cox *v.* Bockett, 18 C. B. (N. S.) 239, 34 L. J. N. S. C. P. 125, 11 L. T. 629). But power to compel him to do so must be exercised during the pendency of the action in which he acted, and

while relation exists (Walton *v.* Fairchild, 4 N. Y. Supp. 552, 24 N. Y. St. Rep. 314; United States *v.* Lee, 107 Fed. 702).

Where He Last Saw Client. — *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552.

Address of Client. — But it has been held that when an address is communicated to attorney as a matter of professional confidence, and attorney and client are not engaged in the commission of an illegal act, the communication is privileged. *In re* Arnott, 60 L. T. N. S. 109. *Ex parte* Campbell, 5 Ch. App. 703, 23 L. T. N. S. 289. See also Harris *v.* Holler, 7 D. & L. 319, 19 L. J. N. S. Q. B. 62, in which it is said that court will not compel attorney to disclose his client's residence, if the information is sought for the purpose of bringing a criminal proceeding against client. See also Heath *v.* Crealock, L. R. 15 Eq. 257, 42 L. J. N. S. Ch. 455, 28 L. T. 101, where it is held that attorney cannot be compelled to give his client's address in order that *subpœna duces tecum* may be served upon him.

Handwriting of Client. — Gower *v.* Emery, 18 Me. 79; Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Johnson *v.* Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; Holthausen *v.* Pondir, 23 Jones & S. (N. Y.) 73; Thomson *v.* Perkins, 39 App. Div. 656, 57 N. Y. Supp. 810; Oliver *v.* Cameron, McArthur & M. (D. C.) 237; Hurd *v.* Moring, 1 Car. & P. 372, 11 E. C. L. 425; Bowles *v.* Stewart, 1 Schoales & L. (Irish) 209, 226.

Location and character of estate of deceased client (King *v.* Ashley, 96 App. Div. 143, 89 N. Y. Supp. 482; *s. c. affirmed* 179 N. Y. 281, 72 N. E. 106.) What property he had of his client's and what disposition he made of it (*Ex parte* Gfeller, 178 Mo. 243, 77 S. W. 552.)

Facts as to Authority. — Nature and extent of authority, and purpose for which employed in a certain case. Security L. & T. Co. *v.* Estudillo, 134 Cal. 166, 66 Pac. 257; Nave *v.* Tucker, 70 Ind. 15; Koeber *v.* Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512; Williams *v.* Blumenthal, 27 Wash. 24, 67 Pac. 393. But not, if answer would disclose extent or grounds of title claimed by client. Chirac *v.* Reinicker, 11 Wheat. (U. S.) 280, 294.

Character in Which Employed. Satterlee *v.* Bliss, 36 Cal. 489; Appeal of Turner, 72 Conn. 305, 318, 44 Atl. 310.

But the situation may be such that an attorney cannot be asked whether he was employed to represent his client as an individual or in a representative capacity. Doe *v.* Mattox, 37 Ga. 289. In this case plaintiff brought ejectment, alleging one demise in his own name, and one as administrator. On the trial defendant asked plaintiff's attorneys whether they were not employed by plaintiff to bring the suit for him in his individual capacity. The question was objected to, and objection overruled. This ruling was held erroneous. The court uses this language: "If the question propounded had stopped with the simple inquiry, whether they had been employed by John U. Stephens to bring this ejectment suit, it could not be affirmed that a direct answer to it would involve a breach of professional confidence; but when it seeks to elicit as a fact that they were employed to maintain the *individual* claim of John U. Stephens to the land, and *not his right as administrator* of Thomas Stephens, in whom a demise is laid in the declaration, we are strongly impressed that such enquiry does involve the disclosure of a confidential communication for the question seeks covertly a disclosure of a disclaimer of title for the estate he represents. As well might the attorneys have been asked whether John U. Stephens had not said to them that the estate of Thomas Stephens had no claim or title to the land sued for, as the question put and allowed. No one, it is apprehended, will insist that the form of question just stated could legally have been put; substantially and in effect they are same, and the answers would furnish disclosures of communications which are under rule held inviolable." Doe *v.* Mattox, 37 Ga. 289.

Whether or not he had authority

from a client to sign a certain pleading. Brown *v.* Jewett, 120 Mass. 215.

Amount of Fee and Terms of Payment. — Smithwick *v.* Evans, Exr., 24 Ga. 461. To effect that attorney must produce letter from client relating to payment of fee, see Curry *v.* Charles Warner Co., 2 Marv. (Del.) 98, 42 Atl. 425.

As to Papers of Client. — That he prepared a document for client. Chapman *v.* Peebles, 84 Atl. 283; Barry *v.* Coville, 53 Hun 620, 7 N. Y. Supp. 36.

Existence of a certain document. Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Stokoe *v.* St. Paul M. & M. R. Co., 40 Minn. 545, 42 N. W. 482; Schattman *v.* American Credit Ind. Co., 34 App. Div. 392, 54 N. Y. Supp. 225. Location of deed at time of trial (Jackson *v.* M'Vey, 18 Johns. (N. Y.) 330; *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552). That a certain document is in his possession (Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Stokoe *v.* St. Paul M. & M. R. Co., 40 Minn. 545, 42 N. W. 482; People *v.* Sheriff, 7 Abb. Pr. (N. Y.) 96; Wakeman *v.* Bailey, 3 Barb. Ch. (N. Y.) 482, 487; Lessee of Rhoades *v.* Selin, 4 Wash. C. C. 715). Whether certain document is in possession of himself or client (Zabel *v.* Schroeder, 35 Tex. 308). How a certain document came into his possession (Allen *v.* Root, 39 Tex. 589). Whether or not he had ever seen a certain paper (*In re* Aspinwall, 7 Ben. 433, 2 Fed Cas. No. 591). Whether or not a certain deed was antedated (Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Rundle *v.* Foster, 3 Tenn. Ch. 658). That client signed a certain document (Chapman *v.* Peebles, 84 Ala. 283; Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Gower *v.* Emery, 18 Me. 79). That client acknowledged deed before witness as notary public (Mutual L. Ins. Co. *v.* Corey, 54 Hun 493, 7 N. Y. Supp. 939). That he was subscribing witness to deed of client (Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287). Whether deed was delivered at the time attorney subscribed it as a witness (Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189). That deed was delivered to him to be delivered to another person (Rosseau *v.* Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578; Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867). That papers prepared by him were delivered between client and another person (Rosenburg *v.* Rosenburg, 40 Hun (N. Y.) 91, 100; Schattman *v.* American Cred. Ind. Co., 34 App. Div. 392, 54 N. Y. Supp. 225; Turner *v.* Warren, 160 Pa. St. 336, 28 Atl. 781). Purpose for which deed was delivered to him, unless it appears that the document was received from client or his agent for the purpose of prosecuting or establishing the client's rights (Reynolds *v.* Rowley, 3 Rob. (La.) 201, 38 Am. Dec. 233). Contents of instrument executed by client and delivered to third party (Schattman *v.* American Credit Ind. Co., 34 App. Div. 392, 54 N. Y. Supp. 225). Contents of lost deed, when proper foundation laid (Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287). Contents of notice served for client (Collins *v.* Johnson, 16 Ga. 458).

Physical Appearance or Condition of Document of Client. — Stoney *v.* McNeil, Harp. L. (S. C.) 557, 18 Am. Dec. 666; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Turner *v.* Warren, 160 Pa. St. 336, 28 Atl. 781.

Contra. — Dietrich *v.* Mitchell, 43 Ill. 40, 92 Am. Dec. 99, where it is held that attorney cannot testify as to whether or not a certain indorsement was on a note there in question. See also Gray *v.* Fox, 43 Mo. 570, 97 Am. Dec. 416.

Facts as to Pleading. — Fact that client signed pleading (Alden *v.* Goddard, 73 Me. 345). Fact that client swore to pleading (Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Gower *v.* Emery, 18 Me. 79). Action of court clerk in regard to paper filed for client in an action (Swaim *v.* Humphreys, 42 Ill. App. 370, 374). Service of notice by client as indorsee of draft to another indorsee (Collins *v.* Johnson, 16 Ga.

458). Character of pleading directed by client to be filed (Cormier *v.* Richard, 7 Mart. N. S. (La.) 177).

Statements of Client. — Statement made by client for the purpose of obtaining information as to a matter of fact (Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415). Conversation between clients at the time he drew document for them (Corbett *v.* Gilbert, 24 Ga. 454). Conversation between client and another party to an action (Allen Admr. *v.* Morgan, 61 Ga. 107). Conversation between client and another party to a transaction (Brennan *v.* Hall, 131 N. Y. 160, 29 N. E. 1009; *s. c.* 14 N. Y. Supp. 864; 39 N. Y. St. Rep. 130; Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557; Prouty *v.* Eaton, 41 Barb. (N. Y.) 409; Adler & Sons Cloth. Co. *v.* Hellman, 55 Neb. 266, 288, 75 N. W. 877). Statements of client in conferring authority to make an agreement with a third person (Burnside *v.* Terry, 51 Ga. 186; Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563). Fact that several persons whom he represented made a settlement, and terms of settlement (*In re* Seip's Estate, 163 Pa. St. 423, 30 Atl. 226, 43 Am. St. Rep. 803). Whether or not his client's testimony upon preliminary examination of criminal charge differed from his testimony on the trial (Com. *v.* Goddard, 14 Cray (Mass.) 402). Statements of client intended to be communicated to another person (White *v.* State, 86 Ala. 69, 5 So. 674; Oliver *v.* Cameron, McA. & M. (D. C.) 237; Burnside *v.* Terry, 51 Ga. 186; Scott *v.* Harris, 113 Ill. 447, 455; Bruce *v.* Osgood, 113 Ind. 360, 14 N. E. 563; Martin *v.* Platt, 51 Hun. 429, 4 N. Y. Supp. 359; Collins *v.* Robinson, 72 Hun 495, 25 N. Y. Supp. 268; Doheny *v.* Lacy, 168 N. Y. 213, 61 N. E. 255, *affirming s. c.* 42 App. Div. 218, 59 N. Y. Supp. 724), or matters intended to be made public (Waldo *v.* Beckwith, 1 N. M. 182). Statements made by client's adversary in attempting to settle a litigated case (Thayer *v.* McEwen, 4 Ill. App. 416); or statements of adversary in regard to client's cause of action (Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64); conduct of person upon whom he serves papers in action by client; also contents of such papers (State *v.* Snowden, 23 Utah 318, 65 Pac. 479). Communications between himself and person with whom he transacts business for his client (Woodruff *v.* Hurson, 32 Barb. (N. Y.) 557; *In re* Mellen, 63 Hun 632, 18 N. Y. Supp. 515; Hall *v.* Rixey, 84 Va. 790, 6 S. E. 215; Jolls *v.* Keegan, 4 Pen. (Del.) 21, 55 Atl. 340). Statements of person with whom he transacts business for his client (Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922; Henry *v.* Nubert (Tenn. Ch. App.), 35 S. W. 444; Cummings *v.* Irvin (Tenn. Ch. App.), 59 S. W. 153; Gerhardt *v.* Tucker, 187 Mo. 46, 85 S. W. 552; Randolph *v.* Quidnick Co., 23 Fed. 278; Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644; Marston *v.* Downes, 6 Car. & P. 381, 25 E. C. L. 448.

He may also testify that he repeated to his client statements of an opposing attorney (Schaaf *v.* Fries, 77 Mo. App. 346, 359). That he paid certain purchase money for his client (Chapman *v.* Peebles, 84 Ala. 283, 4 So. 273). That client gave him a check to be used in paying certain charges, and that he paid such charges (Aultman & Co. *v.* Ritter, 81 Wis. 395, 51 N. W. 569). What money he received for client, how much and to whom paid out for him (Shanghnessy *v.* Fogg, 15 La. Ann. 330; Comstock *v.* Paie, 18 La. (O. S.) 479; State *v.* Gleason, 19 Or. 159, 23 Pac. 817; Phoebus *v.* Webster, 40 Misc. 528, 82 N. Y. Supp. 868; Oliver *v.* Cameron, McA. & M. (D. C.) 237). When summoned as garnishee, attorney may be compelled to testify where he deposited his client's money (William Bros. *v.* Young, 46 Iowa 140; Shanghnessy *v.* Fogg, 15 La. Ann. 330; Comstock *v.* Paie, 18 La. Ann. (O. S.) 479). Whether witness received checks drawn to order of client by certain person, and disposition made of same (*In re* Aspinwall, 7 Ben. 433, 2 Fed. Cas. No. 591). Knowledge acquired before formation or after termination of relation (See notes under III, 7, D, a, b.). Knowledge of transaction to which attorney was a party (See notes under III, 11, K, *ante*). Acts and statements of parties to a transaction in which attor-

12. Limit of Privilege. — Privilege is limited to communications between attorney and client, and their necessary intermediaries, agents or assistants, and does not extend to matters communicated by other persons to either attorney or client.[55]

13. To Whom Privilege Extends. — The privilege is applied in favor of client, and extends to his attorney and necessary intermediaries between attorney and client.[56]

Not to Third Persons. — Consequently, privilege does not extend to third persons whose action is not necessary to transmit communications between attorney and client, and such person may give in evidence such professional communications as may come to their knowledge.[57]

14. Duration of Privilege. — Confidential communications are not to be revealed at any time.[58]

ney did not act for either (Rodgers *v.* Moore, 88 Ga. 88, 13 S. E. 962). Facts coming to his knowledge while securing a debt of his client, when he is called as witness in a contest in which his client has no interest (Payne *v.* Miller, 103 Ill. 442).

Client's Mental Condition.— Brand *v.* Brand, 39 How. Pr. (N. Y.) 193, 263.

As to whether or not witness is interested in the result of an action to the extent of a share in the recovery. Eastman *v.* Kelly, 49 Hun 607, 1 N. Y. Supp. 866.

55. Limit of Privilege. — Greenlaw *v.* King, 1 Beav. 137, 48 Eng. Reprint 891, 8 L. J. N. S. Ch. 92; Ford *v.* Tennant, 32 Beav. 162, 32 L. J. Ch. 465, 7 L. T. 733, 55 Eng. Reprint 63; Brown *v.* Foster, 1 Hurlst. & N. (Eng.) 736, 26 L. J. N. S. C. L. 249. See "Ordinary Observation," *ante* III, 11, F; "Sources Other Than Client," *ante,* III, 11, H.

56. In Whose Favor. — See "To Whom Belongs," III, 5, *ante.*

Attorney. — See "Attorney." III, 7, A, *ante.*

Intermediaries. — See "Clerk," "Agent," "Interpreter," etc. *ante,* III, 7, A, i, j, k.

57. See "Private, Third Persons," III, 7, G, *ante.*

58. *England.* — Bullock *v.* Corry, 47 L. J. Q. B. 352, 3 Q. B. Div. 356, 38 L. T. 102; Wilson *v.* Rastall, 4 T. R. 754, 2 R. R. 515; Chant v. Brown, 7 Hare 79, 68 Eng. Reprint 32; Pearce *v.* Foster, L. R. 15 Q. B. Div. 114, 54 L. J. Q. B. 432, 52 L. T. N. S. 886.

Irish. — Hutchins *v.* Hutchins, 1 Hogan 315.

Illinois. — Granger *v.* Warrington, 8 Ill. 299, 308.

Maryland. — Chase's Case, 1 Bland Ch. 206, 17 Am. Dec. 277, 288.

New Hampshire. — Sleeper *v.* Abbott, 60 N. H. 162.

New York. — Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

Virginia. — Parker *v.* Carter, 4 Munf. 273, 6 Am. Dec. 513.

"Once privileged, always privileged." Cockburn, C. J., in Bullock *v.* Corry, L. R. 3 Q. B. Div. 356.

"He (attorney) should keep his lips sealed with the solemn seal of silence to the last moment of his life; he should never communicate; he should never divulge; he should keep buried in his breast that of which he has obtained the knowledge in the exercise and discharge of his profession." Tindal, C. J. in Taylor *v.* Blacklow, 3 Bing. N. C. (Eng.) 235, 3 Scott 614, 2 Hodges 224, 6 L. J. N. S. C. P. 14.

"The seal of the law once fixed upon them, remains forever, unless removed by the party himself in whose favor it was there placed." Bush *v.* McComb, 2 Hous. (Del.) 546.

Letters regarding suit which is compromised and dismissed are privileged in action subsequently arising between the same parties and relating to the same subject-matter. Hughes

A. Survives Action. — The existence of the privilege is not dependent upon the continuance of the action in regard to which communication was made, and continues after the termination of such action.[59]

B. Survives Relation. — Privilege also survives the relation of attorney and client between whom the communication in question was made.[60]

C. Attorney Afterwards Executor. — But it has been held that if an attorney, after acting as such, becomes his client's ex-

v. Garnons, 6 Beav. 352, 49 Eng. Reprint 862; Holmes *v.* Baddeley, 1 Phil. 476, *reversing s. c.* 6 Beav. 521, 41 Eng. Reprint 713.

Communications from client to attorney may not be given in evidence at any future time, nor can it be given in any suit, although client who makes it is not a party to that suit. Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

"The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor or counselor from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law." Weidekind *v.* Water Co., 74 Cal. 386, 19 Pac. 173, 5 Am. St. Rep. 445. Same language used in *In re* Cowdery, 69 Cal. 32, 50, 10 Pac. 47, 58 Am. Rep. 545. To same effect, see Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627.

Compare. — Snow *v.* Gould, 74 Me. 540, 43 Am. Rep. 604, where the court says: "And privileged communications may lose their privileged character by the lapse of time. That which may be private at a time may not be private at an after-time. Directions to an attorney to make a certain contract a confidential communication before, but not after the contract is made. A solicitor cannot be compelled to disclose the contents of an answer in equity before it is filed, but may be afterward."

In a contest between legatees of client and persons claiming under deed executed by client, the attorney who prepared the deed may testify as to statements made by client showing what he intended by the deed. But in a contest between those claiming under client and persons claiming adversely to client, such statements are privileged. Scott v. Harris, 113 Ill. 447.

59. Calcraft *v.* Guest, L. R. Q. B. 1898, Vol. 1, p. 759; Chase's Case, 1 Bland Ch. (Md.) 206, 17 Am. Dec. 277; Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Clark *v.* Richards, 3 E. D. Smith (N. Y.) 89.

Matters privileged in an action are privileged in a subsequent action between the same parties and relating to the same subject-matter. Hughes *v* Garnons, 6 Beav. 352, 49 Eng. Reprint 862; Holmes *v.* Baddeley, 1 Phil. (Eng.) 476, *reversing s. c.* 6 Beav. 521, 41 Eng. Reprint 713.

Documents privileged in an action are privileged in a cross action. Bullock *v.* Corry, 3 Q. B. Div. 356, 47 L. J. Q. B. 352, 38 L. T. N. S. 102, cited as authority in Pearce *v.* Foster, L. R. 15 Q. B. Div. 114, 54 L. J. Q. B. 432, L. T. N. S. 886.

60. *Colorado.* — Denver Tramway Co. *v.* Owens, 20 Colo. 107, 128, 36 Pac. 848.

Delaware. — Bush *v.* McComb, 2 Hous. 546.

Illinois. — Granger *v.* Warrington, 8 Ill. 299, 308.

Kentucky. — Carter *v.* West, 93 Ky. 211, 19 S. W. 592.

Louisiana. — Morris *v.* Cain's Exrs., 39 La. Ann. 712, 726, 1 So. 797, 2 So. 418; Hart *v.* Thompson's Exr., 15 La. 88.

Minnesota. — Struckmeyer *v.* Lamb, 75 Minn. 366, 77 N. W. 987.

Mississippi. — Perkins *v.* Guy, 55 Miss. 153, 179, 30 Am. Rep. 510.

Nebraska. — Jahnke *v.* State, 68 Neb. 154, 94 N. W. 158, 166, 104 N. W. 154.

ecutor, and as such is made defendant in an action concerning devised estate, he cannot refuse to answer concerning knowledge derived during the relationship of attorney and client, on the ground of privileged communication.[61]

D. Attorney Devisee of Client, Immaterial. — The fact that attorney becomes devisee of the property, concerning which he acted for his client, does not render communications non-privileged.[62]

15. Waiver. — The privilege may be waived; and when waiver is made the attorney may give in evidence matters confidentially communicated by his client.[63]

A. By Whom Waived. — a. *Client.* — Privilege may be waived by client in person, or by his attorney.[64]

New York. — Yordan *v.* Hess, 13 Johns. 492.

Attorney Discharged. — Privilege continues after attorney has been discharged by client, without regard to client's conduct toward him. Hutchins *v.* Hutchins, 1 Hogan (Irish) 315.

61. Crosby *v.* Berger, 4 Edw. Ch. (N. Y.) 538.

62. Chant *v.* Brown, 7 Hare 79, 68 Eng. Reprint 32.

63. *England.* — Merle *v.* More, Ry. & M. 390, 21 L. C. L. 390; *s. c.* 2 Car. & P. 275, 12 E. C. L. 127.

United States. — Hunt *v.* Blackburn, 128 U. S. 464.

Alabama. — Rowland *v.* Plummer, 50 Ala, 182, 194.

Maryland — Chase's Case, 1 Bland. Ch. 206, 17 Am. Dec. 277.

Michigan. — Passmore *v.* Passmore, 50 Mich. 626, 16 N. W. 170, 45 Am. Rep. 62.

New Hampshire. — Sleeper *v.* Abbott, 60 N. H. 162.

New York. — Benjamin *v.* Coventry, 19 Wend. 353; Britton *v.* Lorenz, 3 Daly 23, *affirmed* 45 N. Y. 51.

Ohio. — King *v.* Barrett, 11 Ohio St. 261.

Texas. — Walker *v.* State, 19 Tex. App. 176.

Under Georgia statute which provides that "No attorney shall be competent or compellable to testify in any court in this state for or against his client, to any matter or thing, knowledge of which he may have acquired from his client by virtue of his relation as attorney" it was held that the client could not waive the privilege. O'Brien *v.* Spalding, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

Client's Loss of Interest, Immaterial. — Client may waive, although he may have parted with all interest in the matter to which the communication relates. Benjamin *v.* Coventry, 19 Wend. (N. Y.) 353.

Client Disqualified as Witness, Immaterial. — Client may waive, although himself disqualified as a witness. Benjamin *v.* Coventry, 19 Wend. (N. Y.) 353. This case was decided when law disqualified as witness any person having an interest in an action.

64. Waiver. — By Client or Attorney. — See generally cases on waiver. In Britton *v.* Lorenz, 3 Daly (N. Y.) 23, the report shows that client in open court consented to attorney's testifying.

May Require Client to Waive or Insist. — In McCooe *v.* Dighton, S. & S. St. R. Co. 173 Mass. 117, 53 N. E. 133, it is said that when a party's attorney objects to a question concerning confidential communications of his client, the court may require the party to state in person whether or not he waives the privilege. The trial court made such a requirement, to which exception was taken. The supreme court says: "We should not like to overrule this exception on the ground that it was waived by the plaintiff's waiver of his privilege. For if the court was wrong in requiring a personal expression from the plaintiff, then the waiver was made to avoid an inference which was dangerous to his case, and to

b. *Personal Representative,* or by his executor or administrator.[65]

c. *Heir,* or heir.[66]

d. *Assignee.* — *Not.* — But not by his assignee in bankruptcy.[67]

e. *Successor of Client in Representative Capacity.* — Nor by one who succeeds attorney's employer in a representative capacity.[68]

f. *Several Clients.* — When privilege belongs to two or more persons, the consent of each is essential to a waiver.[69]

which he ought not to have been exposed. But we are not prepared to say that the court was wrong or exceeded the limits of the discretion allowed to the presiding judge by the law. It is no part of the conduct of the case to object or consent to evidence which is excluded only because of a personal privilege. By accident, the privilege in this case belonged to the plaintiff, but it might as well have belonged to any one else, and clearly if it had belonged to a third person it would not have rested with the plaintiff's lawyer to waive or to assert it. Commonwealth *v.* Shaw, 4 Cush. 594. We do not see that it matters that the privilege was the plaintiff's own. Inasmuch as to assert or waive it was not primarily a weapon for the trial, but a right standing on independent grounds, the court might in its discretion feel unwilling to assume that control of that weapon was intrusted to the counsel in the case without an assurance to that effect from the party himself. The plaintiff had testified, and although this was not of itself a waiver of privilege, (*Montgomery v. Pickering,* 116 Mass. 227, 231,) it was so far a submission to be examined upon the same matter that it may have given the judge an additional reason for directing a personal inquiry."

65. Waiver by Personal Representative. — Brooks *v.* Holden, 175 Mass, 137, 55 N. E. 802; Whelpley *v.* Loder, 1 Dem. (N. Y.) 368; *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552.

66. Waiver by Heir. — Privilege may be waived by heir in proceeding to compel his ancestor's administrator to render an accounting. Fossler *v.* Schriber, 38 Ill. 172. In this case the court says: "The appellant, however, insists that the evidence of the attorney was improperly admitted, because his information was derived from a professional consultation with Mrs. Fossler, and that only one of her heirs is a party to this suit, and consenting to his giving testimony. It is sufficient to say that this rule of professional sanctity is enforced for the benefit of the client; that the only heir of the client who is before the court is the party that calls for the testimony, and even if there were other heirs, and if they had a right to interpose an objection, not being parties to the suit, yet in the absence of such objection, the court would presume their concurrence with their co-heir in removing the seal of professional secrecy, since to do so was obviously for their benefit as well as his."

67. Not by Assignee. — Bowman *v.* Norton, 5 Car. & P. 177, 24 E. C. L. 265.

68. Client's Successor in Representative Capacity. — Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922. In this case it is held that a person who succeeds another as assignee for benefit of creditors, cannot waive privilege as to matters communicated by his predecessor to his attorney.

69. Waiver.— Several Clients. Where privilege belongs to several clients, one of them, or even a majority, cannot, contrary to the expressed will of the others, waive the privilege so as to justify an attorney in giving testimony in relation to communications made to him as their common attorney. Chant *v.* Brown, 7 Hare 79, 87; 68 Eng. Reprint 32; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Michael *v.* Foil, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; Chahoon's Case, 21 Gratt. (Va.) 822, 842; Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922; *In re* Seip's Estate, 163 Pa.

B. *Express or Implied.* — Client's waiver of his privilege may be indicated by express words, or implied in his conduct.

a. *Express.* — Client makes an express waiver of his privilege when he states in person, or by attorney, that he waives it.[70]

St. 423, 30 Atl. 226, 43 Am. St. Rep. 803; Whiting *v.* Barney, 30 N. Y. 330, 86 Am. Dec. 385, *reversing* 38 Barb. 393.

Partners as Clients. — One member of firm of clients cannot waive privilege. All must waive. People *v.* Barker, 56 Ill. 299.

Accomplices. — In People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843, it is held that where accomplices in crime have employed the same attorney in civil matters, one accomplice called as a witness by the prosecution, may testify concerning his statements to the common attorney, the fact that defendant and witness had the same counsel, not preventing him from waiving his privilege.

In Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189, Chancellor Walworth says that rule making consent of all clients essential to waiver is especially applicable in a case like that decided, where the testimony related to matters communicated to an attorney professionally and equally effecting the moral character of each of his clients, by showing that they employed him to assist them in submitting to a fictitious judgment for the purpose of defrauding certain creditors. In the same case it is held that it is not material that the client whose waiver is not obtained is not a party to the action in which the attorney is called as a witness. To effect that it is immaterial whether or not the client is a party to the action in which the evidence is offered, see also Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362.

70. Britton *v.* Lorenz, 3 Daly (N. Y.) 23.

Express Waiver. — What Constitutes. — In matter of Coleman, 111 N. Y. 220, 19 N. E. 71, the court held that, by requesting his attorneys to sign his will as subscribing witnesses a testator waived his privilege as to their testimony. The controlling statute made communications to attorneys privileged unless "expressly waived." After referring to testator's statements to his attorneys as to preparation of his will, the court says: "He must have been aware that his object in making a will might prove to be ineffectual unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. The condition of the testator's mind, as evidenced by his actions, conduct and conversation at the time of making a will, is a part of the *res gestae* of the transaction, and witnesses thereto are competent to speak thereof, and give opinions in relation thereto, without any other knowledge thereof except that derived from his conduct on such occasions. (*Clapp v. Fullerton,* 34 N. Y. 190; *Holcomb v. Holcomb,* 95 *id.* 316.) The law presumes a knowledge on his part of its provisions, and that what he does deliberately is done with a full comprehension of the legal effect of his act, and the duty which it imposes upon those who comply with his request. It would be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action. It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that

b. *Implied.* — **(1.) Nature of Communication.** — Waiver of privilege may be implied from the nature of the communication.[71]

(A.) Letter To Be Communicated. — When client who writes a letter to his attorney authorizes him to communicate its contents to another, he waives privilege as to the letter.[72]

(B.) Verbal Statement To Be Communicated. — So as to verbal statement intended to be communicated.[73]

(C.) Grant of Authority. — By granting attorney authority to enter into a contract with another person, client waives privilege of objecting to attorney's testimony in regard to the nature of such authority.[74]

(2.) Circumstances of Making. — Waiver may also be inferred from the circumstance under which the client made the communication in question.

(A.) Attorney Subscribing Witness. — Thus, client by requesting attorney to attest as subscribing witness an instrument which he has caused his attorney to prepare, waives privilege as to the attorney's testimony concerning the execution of such instrument.[75]

his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not. (*McKinney v. G. St., etc. R. R. Co.*, 104 N. Y. 352.) The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove."

See note 75, under III, 15, B, (2) (A). Such waiver "express" or "implied."

71. Scott *v.* Harris, 113 Ill. 447, 455; Laflin *v.* Herrington, 1 Black (U. S.) 326; White *v.* State, 86 Ala. 69, 5 So. 674; Burnside *v.* Terry, 51 Ga. 186.

In Rosseau *v.* Bleau, 131 N. Y. 177 30 N. E. 52, 27 Am. St. Rep. 578, the question was: Can an attorney testify as to delivery of deed by his client to him to be delivered to another person. The court held he could so testify, and uses this language: "When the deceased (the client) commissioned the witness to deliver the deed to the grantee named therein, she necessarily waived all objections she might otherwise make to proof of that fact by the attorney." Rosseau *v.* Bleau reverses same case on appeal from General Term, where it was held that client did not waive privilege by requesting attorney to become subscribing witness to deed. See Rousseau *v.* Bleau, 60 Hun 259, 14 N. Y. Supp. 712.

72. Where client who writes a letter to his attorney authorizes him to communicate its contents to another lawyer, he waives his privilege as to the letter. Laflin *v.* Herrington, 1 Black (U. S.) 326.

73. White *v.* State, 86 Ala. 69, 5 So. 674; Oliver *v.* Cameron, McA. & M. (D. C.) 237. So as to matter communicated to attorney to be by him proposed to client's adversary. (Burnside *v.* Terry, 51 Ga. 186).

74. Authority. — Koeber *v.* Somers, 108 Wis. 497, 597, 84 N. W. 991, 52 L. R. A. 512.

75. Waiver Implied From Circumstances. — Attorney Subscribing Witness to Will. — When a testator requests attorney who has prepared his will to attest it as a witness,' he waives his privilege as to his attorney's testimony concerning the preparation and execution of the will. Blackburn *v.* Crawford's Lessee, 3 Wall (U. S.) 175; McMaster v. Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; Doherty *v.* O'Cal-

Extent of Such Waiver. — It has been held that client's request to attorney to become subscribing witness to an instrument does not constitute waiver as to matters communicated to the attorney in the course of preparation of such instrument, but is limited to fact of execution.[76]

(B.) Employing Common Attorney. — The rule to the effect that communications by clients to their common attorney are not privileged, has been placed upon the ground of waiver, it being held that, by employing common attorney and making statements to him in each others presence, each client waives privilege to object to attorney's testimony as to such communications, when offered in an action between such clients.[77]

(3.) Client's Conduct. — Waiver may also be inferred from client's conduct.

(A.) Client's Disclosure of Privileged Matter. — Client waives privilege by making any disclosure of matters communicated by him in confidence to his attorney.[78]

(B.) Offering Testimony In Support of Pleading. — By pleading the fact that he had made certain statements to his attorney, and

laghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. Rep. 258, 17 L. R. A. 188; Denning v. Butcher, 91 Iowa 425, 434, 59 N. W. 69; Pence *v.* Waugh, 135 Ind. 143, 152, 34 N. E. 860.

Effect of Such Waiver. — Requesting attorney to become subscribing witness to will is a complete waiver, and nullifies a request made by testator to attorney to regard as confidential communications in regard to terms of will. *In re* Lumb's Will, 18 N. Y. Supp. 173.

In McMaster *v.* Scriven, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828, the court says: "This (*i. e.* act of testatrix in requesting attorney who had prepared her will to become subscribing witness) must be held to be a waiver of objection to his competency, so as to leave the witness free to perform the duties of the position, and to testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation, including the mental condition of the testatrix at the time." Such waiver dissolves relation of attorney and client as regards execution of the will. (*In re* Gagan's Will, 20 N. Y. Supp. 426, 47 N. Y. St. Rep. 444).

Subscribing Witness to Deed. In Rousseau *v.* Bleau, 14 N. Y. Supp. 712, 38 N. Y. St. Rep. 221, it is held that client's act in requesting his attorney to become subscribing witness to deed, is not a waiver. The judgment in this was reversed, on the ground that the trial court erroneously excluded the attorney's testimony concerning delivery of the deed in question. See 131 N. Y. 177, 30 N. E. 52. In its reversing opinion the court of appeals does not discuss the question of client's waiver by causing attorney to become subscribing witness.

76. To Mortgage. — Monaghan Bay Co. *v.* Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; Moffatt *v.* Hardin, 22 S. C. 9, 26; Doe d. Salt *v.* Carr, 1 Car. & M. 123, 41 E. C. L. 73.

To Agreement. — Doe d. Jupp *v.* Andrews, 1 Cowp. (Eng.) 845; Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

77. Parish *v.* Gates, Admr., 29 Ala. 254.

78. Disclosure by Client. — See Smith *v.* Daniell, 44 L. J. Ch. 189, L. R. 18 Eq. 649, 30 L. T. 752.

By signing a will before witnesses a person waives privilege as to his attorney's testimony concerning the execution and contents of the will. Fayerweather *v.* Ritch, 90 Fed. 13.

offering testimony in support of this allegation, attorney waives privilege as to the matter pleaded.[79]

(a.) *Waiver As To Part, Not Total.* — By pleading portion of privileged document, client waives privilege as to portion set forth, but not as to the remainder.[80]

(b.) *Referring In Pleading To Documents* does not constitute a waiver of privilege as to such documents.[81]

(c.) *Partial Disclosure of Documents By Attorney* does not constitute waiver.[82]

(d.) *Solicitor's Affidavit To Documents* in his possession does not constitute waiver of privilege as to such documents.[83]

(e.) *Proceedings For Discovery.* — It has been held that by taking proceedings against an attorney to obtain discovery of his testator's estate, an executor waives privilege as to attorney's knowledge.[84]

(f.) *Producing Portions of Documents Demanded By Adversary.* — If production of a number of documents which have been prepared by attorney for client is demanded of a party by his adversary in litigation, his conduct in producing some of such documents is no waiver of privilege as to others, although client had at one time claimed all to be privileged.[85]

(C.) Failure To Object. — Client waives privilege by failure to object to question addressed to attorney, calling for disclosure of privileged communication,[86] or failure to object to question ad-

But in Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, the circuit court of appeals held that the attorney could not under New York statute, be required to testify concerning the contents of a lost will.

In *In re* Burnette (Kan.), 85 Pac. 575, 583, a client caused proceedings to be taken to procure the disbarment of his attorney, charging among other things, violation of professional confidence by disclosing confidential communications, the alleged disclosure consisting in making known an answer prepared for client. It appeared that the client had made known the contents of the answer to several persons, and had printed it in a newspaper. *Held,* that client's conduct operated as a waiver of privilege. *In re* Elliott (Kan.), 84 Pac. 750, is the same in effect.

79. Cole *v.* Andrews, 74 Minn. 93, 76 N. W. 962.

80. Belsham *v.* Harrison, 15 L. J. N. S. Ch. 438, 10 Jur. 772.

81. Roberts *v.* Oppenheim, L. R. 26 Ch. Div. 724, 53 L. J. N. S. Ch. 1148, 50 L. T. N. S. 729.

82. Procter *v.* Smiles, 55 L. J. N. S. Q. B. 527, *affirming* 55 L. J. N. S. Q. B. 467. Showing opinion to opposing solicitor is not waiver as to case submitted for opinion. Carey *v.* Cuthbert, 6 Ir. Rep. Eq. 599.

83. Turton *v.* Barber, L. R. 17 Eq. 329, 43 L. J. N. S. Ch. 468.

84. *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552.

85. Lyell *v.* Kennedy, L. R. 27 Ch. Div. 1, 53 L. J. N. S. Ch. 937, 50 L. T. N. S. 730.

86. Chase's Case, 1 Bland Ch. (Md.) 206, 17 Am. Dec. 277; Shelton *v.* Northern Texas Traction Co., 32 Tex. Civ. App. 507, 75 S. W. 338.

Attorney Justified in Assuming Waiver. — If client does not object to attorney's testimony, the latter is justified in assuming that the former waives the privilege. Sleeper v. Abbott, 60 N. H. 162. But if the attorney knows that client was ignorant that his agent had consulted the attorney, he would not be justified in

dressed to client on cross-examination calling for privileged communication,[87] or by omitting to move to strike out testimony claimed to involve privileged matter,[88] or by submitting to attorney called as a witness the question whether or not a certain communication was privileged.[89]

(D.) Turning State's Evidence. — By turning State's evidence against his accomplice in crime, a person will be held to have waived privilege as to statements made to his attorney which would convict his accomplice and himself.[90]

(E.) Client Testifying Concerning Communication. — Implied waiver arises from client's act in giving his own testimony concerning communications between himself and his attorney.[91]

so assuming. *Ib.* In this case the communication claimed to be privileged had been made to attorney by client's agent.

87. Oliver *v.* Cameron, McArthur & M. (D. C.) 237.

88. Omitting Motion to Strike Out. — Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64.

89. Submitting Question to Witness. — Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724.

90. Jones *v.* State, 65 Miss. 179, 3 So. 379. In this case the court says: "He thereby waives all privileges against criminating himself and against disclosing communications between himself and his counsel touching the offense charged. Both client and counsel, may in such case, be compelled to disclose such communications. *Alderman* v. *People*, 4 Mich., 414; *Foster* v. *People*, 18 Mich., 266; *Hamilton* v. *People*, 29 Mich., 173. The reason for maintaining such privileges ceases, when one has voluntarily exposed himself by his own testimony, to the very consequences from which it was intended by the privilege to protect him. To preserve such privilege in such case would be worse than vain, for while it could not help the witness, it might, by withholding the only means of contradicting and impeaching him, operate with the greatest injustice towards the party on trial." To same effect, see Alderman *v.* People, 4 Mich. 414, 69 Am. Dec. 321; People *v.* Gallagher, 75 Mich. 512, 42 N. W. 1063. *Contra.* — Sutton *v.* State, 16 Tex. App. 490.

91. Client as Witness. — Knight *v.* People, 192 Ill. 170, 61 N. E. 371; Brand *v.* Brand, 39 How. Pr. 193, 282; House *v.* Lockwood, 63 Hun 630, 17 N. Y. Supp. 817; People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843; Shelton v. Northern Texas Traction Co., 32 Tex. Civ. App. 507, 75 S. W. 338.

Agent of Corporation as Witness. So, if in an action to which a corporation is a party, the corporation calls its agent as a witness and asks if he did not, in regard to a matter connected with the action, consult the corporation's attorney, he may, on cross-examination, be interrogated as to all that was said by him or the attorney; and the adversary may, in rebuttal, require the attorney to state what communications passed between him and the agent. Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 349, 22 So. 163. In this case a railway company was sued for moving trees growing on plaintiff's land. Defendant introduced its foreman as a witness, and asked him if he had not consulted defendant's attorney in regard to moving the trees. On cross-examination the foreman was asked what passed between him and the attorney. Plaintiff, in rebuttal, introduced the attorney as a witness, and interrogated him as to the communications between him and the foreman. Defendant moved to exclude this evidence, and its motion was denied. In affirming this ruling the supreme court says: "The objection was not valid. The defendant waited while its witness was being examined

(F.) Client Testifying. — As to whether or not by the mere act of becoming a witness in his own behalf client waives the right to object to questions to himself or attorney concerning professional communications, the authorities are conflicting.

touching this matter, and made no objection to the examination, on account of professional confidence. It thus availed itself of all the advantages its witness gave of this interview, and when it was proposed to contradict him, and show what the facts were, to avoid the damaging effects of the evidence of the plaintiffs, this objection was sprung by defendant. If ever the defendant had the right to interpose such an objection, it waived it. It could not invite such an investigation, and reap the advantages of a partial and one sided statement from its witness of what occurred, and thereafter object to plaintiff's bringing out the whole conversation."

In Hunt *v.* Blackburn, 128 U. S. 464, client testified that a certain deed had been drawn for her by her attorney, that she did not have it, and thought she had given it to him. It was held that it was proper to permit the attorney to put in evidence his client's letter calling for the deed, and his letter inclosing it to her.

In Oliver *v.* Pate, 43 Ind. 132, the court says: "The appellant was a witness on the trial of the case, in his own behalf, and voluntarily testified to his communication to the attorney, which he claims was privileged. Did that remove the injunction of secrecy? The object of extending to him the privilege is, that his communication shall not be disclosed without his consent. It is a personal privilege, and if he makes the disclosure himself, and undertakes to tell what statement he made to his attorney, it ceases to be a secret. Having opened the door himself by testifying to what took place between himself and his counsel and to the communications between them, he has made it public and thus consented that the attorney may testify in relation to it. It is no longer a secret, any more than if the statement had been made to his attorney in the presence and hearing of others, and with the avowed purpose that it should be heard by them. In such a case it could not be said that the communication was confidential, although made with the purpose of getting legal advice and to enable the attorney to give it. He would be asking advice on a public statement of facts. In Parker *v.* Carter, 4 Munf. 286, the court said that all communications made by a client to his attorney were to be regarded as confidential, 'unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear them.' What we hold on the last question is this: If the party voluntarily testifies as a witness to confidential communications made to his attorney, he thereby destroys the privileged character of the communication and consents that the attorney may be a witness and testify in relation to the same communication, and state all that was said on that subject. We do not decide that he gives such consent by voluntarily testifying in the action generally. It is because he testifies and voluntarily discloses the confidential communication, that he waives the privilege and consents that the attorney may be a witness against him, and not because he testifies as a witness in the cause."

"The reason of the rule relating to privileged communications is not applicable with respect to a fact which the witness testifies to directly." State *v.* Tall, 43 Minn. 273, 45 N. W. 449. In this case the "witness" was a person who had made a confidential communication to his attorney. In the same case it is said that if a witness testifies to a fact, he may, on cross-examination, be asked whether he had communicated that fact to his attorney.

Client Testifying as to Conduct. Where client testifies that in a given transaction he acted under advice of his attorney, it is not error to permit the attorney to testify to the same

(a.) *Waiver Implied From Client's Testifying.* — It has been held that if client sees fit to become a witness in his own behalf, he thereby waives his privilege, and may on cross-examination be interrogated as to statements made to his attorney,[92] and that his attorney may be examined concerning such communications.[93]

(b.) *No Waiver From Testifying.* — But it has also been held that the mere act of testifying does not constitute such waiver.[94]

(c.) *No Waiver Unless Communication Referred To.* — A rule which reconciles the conflicting authorities has been announced in cases which hold that if client becomes a witness for himself, and does not, on direct examination refer to his counsel or to any conversation with or advice from him, he cannot, on cross-examination be interrogated as to his statements to or advice received from his attorney.[95]

thing. Becker *v.* Shaw, 120 Ga. 1003, 48 S. E. 408.

92. Waiver Implied From Testifying. — Inhabitants of Woburn *v.* Henshaw, 101 Mass. 193, 3 Am. Rep. 333.

93. Eldridge *v.* State, 126 Ala. 63, 28 So. 580; Becker *v.* Shaw, 120 Ga. 1003, 48 S. E. 408; Oliver *v.* Cameron, McArthur & M. (D. C.) 237.

94. Client does not, by offering himself as a witness, waive his privilege, and, although client testifies on his own behalf, he cannot, on cross-examination, be compelled to disclose matters communicated by his attorney to him, or by him to his attorney. Bigler *v.* Reyher, 43 Ind. 112; Jones *v.* State, 65 Miss. 179, 3 So. 379; State *v.* James, 34 S. C. 49, 57, 12 S. E. 657; Chahoon's Case, 21 Gratt. (Va.) 822, 842; Tate *v.* Tate's Exr., 75 Va. 522, 531; Helbig *v.* Citizen's Ins. Co., 108 Ill. App. 624.

In Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362, the court, after referring to Inhabitants of Woburn *v.* Henshaw, says: "But we apprehend that other witnesses than the party could not, on cross-examination, be compelled to disclose confidential communications made to their legal adviser, either for the purpose of impeachment or otherwise. Nor do we see the propriety of not allowing the attorney to make the disclosure, without the consent of his client, and yet compelling the client himself to make them."

In King *v.* Barrett, 11 Ohio St. 261, the court quotes a statute of Ohio providing that "if a person offers himself as a witness, that is to be deemed a consent to the examination also of an attorney . . . . on the same subject." Applying this statute, the court held that a party to an action, by offering himself generally as a witness in his own behalf, waived his privilege as to all communications made to his attorney.

In Duttenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362, it is said that in civil cases client waives his privilege by testifying, because the Code of Civil Procedure so provides; but, as the Code of Criminal Procedure contained no such provision, the rule did not apply to criminal cases. The court says: "We think no such waiver ought to be applied."

95. Tate *v.* Tate's Exr., 75 Va. 522, 531; Helbig *v.* Citizen's Ins. Co., 108 Ill. App. 624; Barker *v.* Kuhn, 38 Iowa 392; Kaufman *v.* Rosenshine, 97 App. Div. 514, 90 N. Y. Supp. 205; *s. c. affirmed* 183 N. Y. 562, 76 N. E. 1098. Erickson *v.* Milwaukee L. S. & W. R. Co., 93 Mich. 414, 53 N. W. 393.

State *v.* White, 19 Kan. 445, 27 Am. Rep. 137, and Duttenhofer *v.* State, 19 Kan. 445, 27 Am. Rep. 137, are cited by the supreme court of California as authority for holding that a man who testfies in his own behalf cannot, on cross-examination, be interrogated as to statements made by him to his wife, no reference having been made to such statements during his examination in chief. See "Husband and Wife," *supra.*

(d.) *Not Implied From Answering On Cross-Examination.* — A waiver is not implied from client's referring to interview with his attorney when interrogated concerning the same on cross-examination,[96] or stating general nature of conversation with attorney.[97]

(e.) *Testifying On Cross-Examination, Without Objection.* — But it has been said that if, on cross-examination, client, without objection, testifies concerning subject-matter of communication to counsel, privilege is waived as to counsel's testimony.[98]

(f.) *Testifying As To Advice.* — If client testifies that he took certain action upon the advice of his attorney, he cannot object to the attorney's testifying to the same effect.[99]

(G.) Charging Attorney With Wrongful Conduct. — If client, in his testimony, charge attorney with unlawful or unprofessional conduct, he waives privilege, and attorney may testify concerning transactions between them.[1]

(H.) Making Attorney Witness. — Client waives privilege by interrogating his attorney concerning the matter of confidential communications, or concerning professional conduct.[2]

(a.) *No Waiver Unless Questioned As To Communication.* — If client call his attorney as a witness, and, upon direct examination asks him no questions as to confidential communications, the attorney cannot, on cross-examination, be interrogated as to such communications. Client's conduct does not have the effect of waiver.[3]

(b.) *Introducing Letters From Attorney.* — By introducing in evidence letters received from his attorney, client waives privilege as

By stating that he employed counsel, and repeating general instructions given him, client does not waive privilege, nor authorize his attorney to disclose their conversation. State v. Barrows, 52 Conn. 323. In this case the court says that client's statement to counsel of the nature of his defense desired was preliminary to any consultation, and was nothing more than was implied in retaining him.

96. Lockwood *v.* House, 17 Jones & S. (N. Y.) 500.

97. Kaufman *v.* Rosenshine, 97 App. Div. 514, 90 N. Y. Supp. 205; *s. c. affirmed* 183 N. Y. 562, 76 N. E. 1098.

98. Oliver *v.* Cameron, McArthur & M. (D. C.) 237.

99. Becker *v.* Shaw, 120 Ga. 1003, 48 S. E. 408.

1. Olmstead *v.* Webb, 5 App. Cas. (D. C.) 38, 53.

2. Examining Attorney. — *England.* — Vaillant *v.* Dodemead, 2 Atk. 524, 26 Eng. Reprint 715.

United States. — Crittenden *v.* Strother, 2 Cranch C. C. 464.

New York. — Whelpley *v.* Loder, 1 Dem. 368; Masterton *v.* Boyce, 53 Hun 630, 6 N. Y. Supp. 65; Smith *v.* Crego, 54 Hun 22, 7 N. Y. Supp. 86; *In re* Cornell's Will, 87 App. Div. 412, 85 N. Y. Supp. 920; Stockwell *v.* Boyce, 53 Hun 630. 5 N. Y. Supp. 948.

North Carolina. — Jones *v.* Nantahala M. & T. Co., 137 N. C. 237, 49 S. E. 94 (See statement in note under III, 6, A, a, (4).

Texas. — Smith *v.* Wilson, 1 Tex. Civ. App. 115, 20 S. W. 1119.

In Brooks *v.* Holden, 175 Mass. 137, 55 N. E. 802, it is held that an administrator waives privilege by calling his intestate's attorney to testify to professional communications made by deceased.

3. Montgomery *v.* Pickering, 116 Mass. 227; McCooe *v.* Dighton, S. & S. St. R. Co., 173 Mass. 117, 53 N. E. 133; Blount *v.* Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554.

to attorney's testimony concerning the transaction to which the letters relate.[4]

Introducing Portions of Correspondence. — By introducing in evidence portions of letters from his attorney, client waives privilege as to the entire correspondence.[5]

(c.) *Subpoena Duces Tecum To Attorney.* — By serving *subpoena duces tecum* on former attorney to produce papers in court, client waives privilege as to papers so produced.[6]

Proceeding for Discovery and Production. — Client's executor waives privilege by proceeding against his testator's attorney to compel discovery of assets and production of papers belonging to intestate's estate.[7]

No Opportunity to Object. — Attorney Witness in Case to Which Client Not Party. — The fact that an attorney testified in a criminal proceeding to certain matters learned in professional confidence, does not deprive his client of the right to object to his testifying to the same matters, in a subsequent action, it not appearing that the client took any part in the criminal proceeding.[8]

(d.) *Causing Attorney To Answer Interrogatories.* — Where officers of a municipality elect to answer interrogatories, addressed to them in a suit, through their town clerk, who is also their solicitor, he cannot refuse to answer questions as to matters learned in his capacity as solicitor, on the ground of privilege.[9] But where adverse party addresses interrogatories, submitted in suit against the city to town clerk who is also solicitor, and the latter states that all his knowledge on the subject inquired about was acquired as solicitor, and not as town clerk, he cannot be compelled to answer.[10]

(I.) Client Testifying After Objection Overruled. — If attorney is permitted against client's objection to testify as to confidential com-

4. White *v.* Thacker, 78 Fed. 862, 24 C. C. A. 374.

5. Western Union Tel. Co. *v.* Baltimore & Ohio Tel. Co., 26 Fed. 55.

6. **Waiver — Subpoena for Papers.** Hoyt *v.* Jackson, 3 Dem. (N. Y.) 388, 397. In this case a party to a will contest served upon her former attorney *subpoena duces tecum* to produce in court certain papers intrusted to him by her. The attorney delivered the papers to the judge. *Held, inter alia,* that this conduct amounted to a waiver, and that the opposite party could introduce the papers in evidence.

7. *Ex parte* Gfeller, 178 Mo. 248, 77 S. W. 552.

8. Wilson *v.* Ohio Farmers' Ins. Co., 164 Ind. 462, 73 N. E. 892. In this case an attorney was questioned as to the state of accounts between his client and an agent. It appeared that in a prosecution of the agent for embezzlement the attorney had testified as to such accounts; also that the client had nothing to do with the prosecution. *Held,* that objection to attorney's testimony was properly sustained.

9. Mayor of Swansea *v.* Quirk, L. R. 5 C. P. 106, 49 L. J. N. S. Com. Law 157, 41 L. T. N. S. 758.

10. Mayor of Salford *v.* Lever, 59 L. J. Q. B. 248, 24 Q. B. Div. 695, 62 L. T. N. S. 434. The court distinguishes the case from Mayor of Swansea *v.* Quirk in next preceding note, by stating that in the Swansea case the interrogatories were addressed to the town clerk "or other proper officer," and that the city by electing to proffer as a witness an officer who was also their solicitor,

munications, and client afterwards testifies to the same matter, error in admitting attorney's testimony is rendered harmless.[11]

C. Waiver Must Appear. — Court Cannot Waive. — Waiver must appear by expression or inference; court is not authorized to supply the consent to disclosure of privileged matter of one who died without giving it.[12]

D. Must Be Unequivocal. — Evidence of waiver must be distinct and unequivocal.[13]

E. Effect of Waiver. — When client waives privilege, his attorney may be compelled to testify to professional communications.[14]

must be held to have waived privilege as to knowledge acquired by him in his capacity as solicitor; while in the Salford case the town clerk was singled out as a witness by the other side, and had no alternative, nor had the city any option or election.

11. Knight *v.* People, 192 Ill. 170, 61 N. E. 371. In this case an attorney for a person indicted for murder was, against his client's objection, permitted to show matters communicated in confidence by his client. The client afterwards testified as to the matter communicated. On appeal it was held that error in admitting the attorney's testimony was rendered harmless by client's testifying to the same matter. The court says: "Even if erroneous and harmful when given, Tanner's testimony was rendered wholly harmless by the testimony of defendant, in which he made the same admissions to the jury that he had made to Tanner. After defendant's testimony was given it was no longer a question in dispute whether he had killed Hutch Knight or not, but only under what circumstances and with what intent he killed him, and Alfred Tanner's testimony did not bear upon the latter question at all. But counsel say that by the admission of Tanner's testimony the defendant was forced to become a witness and to state the facts of the killing. We think this argument is without force, for it certainly remained optional with the defendant to testify or not. If he considered that the killing by him was not sufficiently proved by evidence other than Tanner's testimony to call for any explanation on his part, he could have remained off the witness stand, and, if convicted, assigned the admission of Tanner's testimony as error, and availed himself of any advantage which the decision of that question would have given him. But it seems too clear for argument that he could not go on the stand as a witness in his own behalf and testify to the same fact that he had communicated to Tanner, and then, after conviction, assign as error the admission of Tanner's testimony of such fact."

12. Court Cannot Supply Consent. — Hart *v.* Thompson's Exr., 15 La. 88; Morris *v.* Cain's Exrs., 39 La. Ann. 712, 726, 1 So. 797, 2 So. 418.

"As to any supposed waiver of this objection on the part of the appellant, it is neither seen that he cross-examined the witness (attorney), was present at his examination, or knew that that particular witness was to be examined; nor, if it were otherwise, would such waiver be justly inferred therefrom." Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453.

13. State *v.* James, 34 S. C. 49, 58, 12 S. E. 657; Tate *v.* Tate's Exr., 75 Va. 522, 533.

14. *In re* The Cameron's C. etc. R. Co., 25 Beav. 1, 53 Eng. Reprint 535; Gaskell *v.* Chambers, 26 Beav. (Eng.) 303, 53 Eng. Reprint 915. See cases cited under III, 15 n. 63, *ante*.

Benjamin *v.* Coventry, 19 Wend. (N. Y.) 353.

Waiver by principal of privilege as to matters communicated by his agent to principal's attorney, renders the attorney competent, in action between principal and agent, to testify against the agent concerning the matters communicated. Leyner

a. *Attorney's Testimony Competent for Any Purpose.* — After waiver by client, attorney may be compelled to testify as to statements and admissions of his client, either for the purpose of giving evidence in chief, or for purposes of impeachment.[15]

b. *Effect in Subsequent Trial of Same Action.* — Waiver upon one hearing or trial is binding upon client in subsequent trial of the same action.[16]

c. *No Presumption Against Client for Insisting Upon Privilege.* It has been said that no presumption of fact will be made against a person who insists upon his privilege of excluding his attorney's testimony as to confidential communications.[17]

Refusal to Waive, Subject of Comment. — Client's refusal to waive privilege is a proper subject of comment in argument.[18]

16. Protection of Privilege. — A. Who May Claim. — a. *Client.* As the privilege belongs to the client, it may be asserted by him.

b. *Personal Representative.* — After death of client, the privilege may be claimed by his personal representative.[19]

c. *Antagonist Cannot Claim.* — When attorney is questioned as to conversation with his client, and the latter, being a party to the action, does not object to the question, the opposite party cannot object on the ground of privileged communication;[20] nor any one except the client, or his representative.[21]

B. How Claimed. — a. *Objection.* — The client claims his priv-

v. Leyner, 123 Iowa 185, 98 N. W. 628.

15. King *v.* Barrett, 11 Ohio St. 261.

16. Green *v.* Crapo, 181 Mass. 55, 62 N. E. 956.

17. Wentworth *v.* Lloyd, 10 House L. Cas. 589; *s. c.* 10 L. T. N. S. 767, 33 L. J. Ch. 688, 10 Jur. (N. S.) 961.

18. Refusal — Comment. — McCooe *v.* Dighton, S. & S. St. R. Co., 173 Mass. 117, 53 N. E. 133. In this case the court says: "In a civil case, if one of the parties insists upon his privilege to exclude testimony that would throw light upon the merits of the case and the truth of his testimony, we are of opinion that it is a proper subject for comment. Andrews *v.* Frye, 104 Mass. 234, 236. See Com. *v.* Smith, 163 Mass. 411, 430 *et seq.* This being so, it was proper for the court to compel the plaintiff to take the full responsibility of the choice."

Where testimony of attorney and client conflicts, failure of client to waive privilege invites and justifies comment. Matter of Monroe, 2 Connolly (N. Y.) 395.

19. Personal Representative. Brown *v.* Butler, 71 Conn. 576, 42 Atl. 654; Pearsall *v.* Elmer, 5 Redf. (N. Y.) 181; Whelpley *v.* Loder, 1 Dem. (N. Y.) 368, *affirmed* in 111 N. Y. 239, 18 N. E. 874.

In Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627, it is said that one who is a joint party with person making communication may object to attorney's testifying to the matter communicated. But that question was not necessary to the decision of the case.

20. Merle *v.* More, Ry. & M. 390; *s. c.* 2 Car. & P. 275, 21 E. C. L. 469; Chant *v.* Brown, 9 Hare 790, 68 Eng. Reprint 735.

21. Marston *v.* Downes, 1 Ad. & El. 31, 28 E. C. L. 24, 6 Car. & P. 381, 3 L. J. K. B. 158; Chant *v.* Brown, 9 Hare 790, 68 Eng. Reprint 735; Dowie's Estate (Appeal of McNulty) 135 Pa. St. 210, 19 Atl. 936; *In re* Padelford's Estate, 190 Pa. St. 35, 42 Atl. 381.

ilege by objecting to question which calls for disclosure of privileged matter.[22]

Specific Objection Necessary. — Person objecting to question as calling for privileged communication, must specify that ground in his objection, and indicate the portion objected to. It is not sufficient to state that question is objected to as incompetent.[23]

b. *Motion to Strike Out.* — Client may also claim his privilege by moving to strike out testimony as to such matters.[24]

c. *Demurrer to Interrogatories.* — In courts of chancery in the United States and in England the question of privilege may be raised by demurrer to interrogatories.[25]

C. Protection by Court. — The court will stop a witness who

22. Cleave *v.* Jones, Exrx., 7 Exch. (Welsb. H & G.) 421, 21 L. J. Exch. 105.

When Made. — The objection must be made when witness proceeds to testify to privileged matters. Norris *v.* Stewart's Heirs, 105 N. C. 455, to S. E. 912, 18 Am. St. Rep. 917.

Cannot be Made Originally Upon Appeal. — An objection to testimony that it was privileged communication cannot be raised for the first time on appeal. Graves *v.* Graves, 55 Hun 612, 9 N. Y. Supp. 145.

Client's Approval Presumed. When attorney called as a witness objects to testifying on the ground of privilege, it is presumed that he does so in behalf of client who made the communication in question; and if such client or his representative, being present, does not release attorney from his obligation of silence, he will be presumed to sanction the objection and insist upon the privilege. Chew *v.* Farmers' Bank, 2 Md. Ch. 231.

23. Norris *v.* Stewart's Heirs, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 917; Brennan *v.* Hall, 131 N. Y. 160, 29 N. E. 1009. In this latter case an attorney testified to conversations which took place between his client and another in regard to a certain transaction. Defendant objected to "evidence of the conversation," and objection was overruled. *Held,* that the objection was too broad, that witness was at least competent to testify to what was said by the third party, therefore objection to the whole conversaion was not well founded. This case affirms *s. c.* on appeal to general term, where same ruling was made. See 14 N. Y. Supp. 864.

Objection on the ground that witness had been in a certain matter attorney for person communicating is insufficient. Mandeville *v.* Guernsey, 38 Barb. (N. Y.) 225.

Objection to attorney's testimony that "it is not shown that he was not acting in the capacity of client to an attorney" is not sufficient to raise the question of inadmissibility on the ground of calling for privileged matter. Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482. See Fort Dodge *v.* Minneapolis & St. L. R. Co., 87 Iowa 389, 54 N. W. 243, where it is held that "where the testimony of a witness related to actions he had taken, and statements he had made as attorney for the defendants, and the authority under which he acted, and some of it, at least, was material and competent, *held,* that an objection to the whole of such testimony, on the ground that it was a disclosure of privileged communications, was not well taken."

24. **Relation Not Shown on Direct Examination.** — When during a trial an attorney testifies to declarations of a certain person, and it appears on cross-examination that when the declarations were made witness was acting as attorney for person making them, and that they were made to him as attorney, it was held error to deny motion to strike out the attorney's testimony. Loveridge *v.* Hill, 96 N. Y. 222.

25. **Demurrer to Interrogatories.** Russell *v.* Jackson, 9 Hare 387, 68

seems desirous or disposed to reveal confidential communications,[26] or will refer depositions to a master with instructions to expunge such portions as involve the disclosure of confidential communications.[27]

a. *Withdrawal of Witness.* — It has been held that the court should instruct a party producing a witness to withdraw him, if he proposes to state confidential communications.[28]

b. *Duty of Court.* — If the client is not a party to the action in which attorney's testimony as to privileged communications is offered, it is the duty of the court to forbid the attorney to testify.[29]

c. *Client's Right to Notice.* — In an action against attorney for fraud, if in response to demand for production of certain documents, defendant claims that they are in his possession as solicitor for a certain person, a co-defendant, an order of production should not be made without client being called upon to show cause why these documents should not be produced.[30]

D. PRIVILEGE, HOW DETERMINED. — QUESTION FOR COURT. Whether or not a given communication is privileged is a question to be determined by the court.[31]

Eng. Reprint 558. See also Chew *v.* Farmers Bank, 2 Md. Ch. 231.

As to nature of such so called "demurrer" see Parkhurst *v.* Lowten, 2 Swanst. 194, 36 Eng. Reprint 589, where it is said that witness demurring to interrogatories on the ground of privilege, must show that matter called for was acquired in professional confidence.

26. Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453; Thorp *v.* Goewey, 85 Ill. 611; Austin, T. & W. Mfg. Co. *v.* Heiser, 6 S. D. 429, 437, 61 N. W. 445. See remarks of Buller, J., at p. 759 of 4 Term Rep. in case of Wilson *v.* Rastall, and statement of the Lord Chancellor in Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587. See 2 Bac. 579.

"The court will never compel, or even allow, an attorney to disclose facts thus communicated to him by his client." People *v.* Barker, 56 Ill. 300.

27. Clay *v.* Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453.

28. Henry *v.* Buddecke, 81 Mo. App. 360.

29. "And if the client be no party to the matter in controversy so as to be able to communicate an express or tacit relinquishment of his privilege, the lips of his attorney must remain forever closed; and the court cannot allow him to speak of that which the policy of the law has prohibited him from disclosing." Hodges *v.* Mullikin, 1 Bland Ch. (Md.) 503.

30. MacGregor *v.* McDonald, 11 Ont. Pr. (Can.) 386.

31. Privilege, Question for Court. *England.* — Cleave *v.* Jones, Exrx., 7 Exch. (Welsb. H. & G.) 421, 21 L. J. N. S. Exch. 105.

Indiana. — McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336.

Missouri. — Hull *v.* Lyon, 27 Mo. 570.

New Mexico. — Waldo *v.* Beckwith, 1 N. M. 182.

New York. — Coveney *v.* Tannahill, 1 Hill 33, 37 Am. Dec. 287; Mitchell's Case, 12 Abb. Pr. 249, 261; Avery *v.* Mattice, 56 Hun 639, 9 N. Y. Supp. 166; Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64.

North Carolina. — Hughes *v.* Boone, 102 N. C. 137, 160, 9 S. E. 286.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Vermont. — Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

Wisconsin. — Dudley *v.* Beck, 3 Wis. 274, 285.

In English Chancery Court it has

a. *Preliminary Inquiry, By Whom.* — Preliminary inquiry as to character of information called for by question objected to as calling for disclosure of privileged communication may be made by the court,[32] or by a referee appointed by the court.[33]

b. *Permitting Attorney to Determine Question.* — It has been held that for the trial court to permit an attorney who is offered as a witness as to matter communicated by his client to determine whether or not he will make disclosure, does not constitute error.[34]

c. *Excluded if Attorney Make Oath to Privileged Character.* It has been held that if attorney refuses to answer a certain question, basing his refusal upon his opinion, given under oath, that the transactions referred to were such as he was privileged from revealing, on the ground of professional confidence, he will not be required to testify.[35]

been held that a deposition objected to as containing privileged matter should be referred to a master to determine what portions of facts testified to were learned by witness in his professional capacity. Sandford *v.* Remington, 2 Ves. Jr. 189, 30 Eng. Reprint 587. This case is disapproved in Parkhurst *v.* Lowten, 3 Madd. 121, 56 Eng. Reprint 455.

In Mitchell's Case, 12 Abb. Pr. (N. Y.) 249, the court says: "If the production of a document was called for, and the witness declined to produce it, upon the ground that the reading of it in evidence would be prejudicial to his interests, or to the interest of the person for whom the witness acted as attorney, the witness was required to submit the document to the inspection of the court, and if the judge, after perusing it, differed from the witness, he would direct it to be read (Copeland *v.* Watts, 1 Starkie, 95; Bradshaw *v.* Bradshaw, 1 Rus. & Myl. 358; Walsh *v.* Trevanion, 15 Sim., 578) or if a witness swore that a question put to him could not be answered without the disclosure of secrets communicated to him by his client, it was for the court to determine from the nature of the inquiry whether the principle of protection extended to it or not (Morgan *v.* Shaw, 4 Madd., 57; Parkhurst *v.* Lowten, 3 Ib., 121; Beer *v.* Ward, Jac., 77; Com. *v.* Braynard, Thatcher's Cr. Cas. 146); and if the court decided that it did not, the witness, should he refuse to answer, would be deemed guilty of a contempt, nor would the court even hear counsel upon the validity of the witness's objection. (Doe *v.* The Earl of Egremont, 2 M. & Rob., 386.)" Attorney in doubt as to privilege may submit the question to court. Moore *v.* Bray, 10 Pa. St. 519.

32. Hughes *v.* Boone, 102 N. C. 137, 160, 9 S. E. 286.

33. Avery *v.* Mattice, 56 Hun 639, 9 N. Y. Supp. 166.

34. Maxham *v.* Place, 46 Vt. 434, 443.

35. Orton *v.* McCord, 33 Wis. 205.

In McClure *v.* Goodenough, 12 N. Y. Supp. 459, the court says: "The language of the Code is 'prohibitory,' although from the nature of the case the attorney must sometimes decide whether the inquiry made of him is prohibited."

On demurrer to interrogatories addressed to attorney concerning his client's affairs, his statement that he treated and considered a certain person as the medium of communication between himself and client, is sufficient. Carpmael *v.* Powis, 9 Beav. 16, 15 L. J. Ch. 275, 50 Eng. Reprint 248. Upon such demurrer attorney's sworn statement that the matter inquired about was communicated to him by his client in confidence is conclusive. Morgan *v.* Shaw, 4 Madd. 54, 56 Eng. Reprint 629. But such statement must show that the mater in question was communicated to him by his client. Morgan *v.* Shaw, 4 Madd. 54, 56 Eng. Reprint 629; Parkhurst *v.* Lowten, 2

d. *Client's Affidavit as to Documents.* — In England, if production of documents is demanded and client makes oath that the documents in question were confidentially communicated between himself and his attorney, production will not be ordered.[36]

e. *Attorney's Statement as to Document.* — It is also held in England that, if a document called for to be produced in evidence by an attorney is stated by him to be privileged, because deposited or delivered in confidence, the judge has no right to examine it to determine if it is privileged.[37]

f. *Admitted if Relation Denied by Attorney.* — It has been held that if attorney testifies that certain statements were not made to him as attorney for person making them, and he is not positively contradicted, the statements should be admitted.[38]

g. *Denied by One Claimed to be Client.* — It has also been held that if person claimed by attorney to have been his client make oath that the relation of attorney and client never existed between himself and witness, the attorney is bound to testify.[39]

h. *Court Not Bound by Attorney's Testimony.* — It has been held that even if an attorney testifies that certain knowledge was acquired by him by reason of the relationship of attorney and client existing between him and a given person, the court may find that it was not so acquired.[40]

i. *Burden of Proof.* — The burden of proof rests upon the party seeking to exclude evidence on the ground that its introduction would involve the disclosure of privileged communication; and he must show that the admission of the proposed testimony would violate the rule against such disclosure.[41]

Swanst. 194, 36 Eng. Reprint 589.

36. Underwood *v.* Secretary of State, 14 L. T. N. S. (Eng.) 385, 35 L. J. Ch. 545, 12 Jur. N. S. 321.

37. Volant *v.* Soyer, 13 Com. B. (Eng.) 231, 22 L. J. C. P. 83.

38. Admitted if Attorney Denies. — Lyon *v.* Lyon, 197 Pa. St. 212, 47 Atl. 193; Hall *v.* Rixey, 84 Va. 790, 6 S. E. 215. But attorney's disavowal is not conclusive (McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, 345).

39. Relation Denied. — *In re* Mellen, 63 Hun 632, 18 N. Y. Supp. 515.

40. Dudley *v.* Beck, 3 Wis. 274, 285.

41. *California.* — Sharon *v.* Sharon, 79 Cal. 633, 677, 22 Pac. 26, 131; Carroll *v.* Sprague, 59 Cal. 655.

Connecticut. — Appeal of Turner, 72 Conn. 305, 317, 44 Atl. 310.

Montana. — Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

New York. — Rosseau *v.* Bleu, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578; Mandeville *v.* Guernsey, 38 Barb. 225; Mowell *v.* Van Buren, 77 Hun 569, 28 N. Y. Supp. 1035.

Utah. — State *v.* Snowden, 23 Utah 318, 65 Pac. 479.

Vermont. — Earle *v.* Grout, 46 Vt. 113, 125; Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941.

Party claiming to be exempt from testifying must bring himself clearly within the privilege. Crosby *v.* Berger, 4 Edw. Ch. (N. Y.) 254.

In Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483, the court uses this language: "When the witness was placed upon the stand the presumption is that he was called upon to tell the whole truth. The burden was upon the party who sought to have a portion of his testimony suppressed because they were privileged communications, to show such incompetency. The fact that would

(1.) Facts Showing Incompetency Must be Shown. — Facts which render the proposed testimony incompetent must be proved.[42]

(A.) What Facts. – Party claiming privilege must show that the communication in question possesses all the characteristics hereinbefore stated as essential; that is, he must show that the communication was made to an attorney, as such, confidentially and secretly, during the existence of their relation as attorney and client, and for the purpose of obtaining his professional services in the matter which was the subject of the communication.[43]

(B.) Knowledge Not Obtained Otherwise. — Claimant of privilege

make his statements incompetent must be proved. The only way this could be done was by an examination of the witness himself, which was done. In order to make the witness incompetent it was necessary to show that the relation of attorney and client existed between him and W. P. Bingham, and that the communication was made by the client for the purpose of obtaining counsel, advice or direction in regard to his legal rights. The facts elicited by the examination show that the conference related to the legal rights and business of Harriet A. Bingham, rather than that of her husband."

Attorney may testify for or against his client unless it be shown that his testimony would disclose material facts communicated to him in confidence. Buckmaster Admx. *v.* Kelley, 15 Fla. 180, 193.

42. Facts Must be Shown.

England. — Gardner *v.* Irvin, 48 L. J. Exch. 223, 4 Exch. Div. 49, 40 L. T. N. S. 35; O'Shea *v.* Woods, 60 L. J. P. 83, [1891], 65 L. T. N. S. 30; Maden *v.* Veevers, 7 Beav. 489, 49 Eng. Reprint 1155; Parkhurst *v.* Lowten, 2 Swanst. 194; 36 Eng. Reprint 589; Moseley *v.* Victoria R. Co., 55 L. T. N. S. 482.

Irish. — Worthington *v.* Dublin, W. & W. R. Co., 22 L. R. Ir. 310.

Canada. — Hoffman *v.* Crerar, 17 Ont. Pr. 404.

Georgia. — Equitable Securities Co. *v.* Green, 113 Ga. 1013 39 S. E. 434.

Indiana. — Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483.

Vermont. — Earle *v.* Grout, 46 Vt. 113, 125.

Status as attorney must appear. Machette *v.* Wanless, 2 Colo. 169, 179.

Relation must appear. Montgomery *v.* Perkins, 94 Fed. 23.

It is proper to show by attorney called as a witness that at the time to which question to him was directed, the relation of attorney did not exist between him and a certain person. Rosseau *v.* Bleau, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. Rep. 578; Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941.

43. Essentials. — See III, 7, *ante.*

Answer to application for discovery of documents, which relies upon privilege, must show that the documents in question are of a confidential nature. The Mayor & Corp. of D. *v.* Holdsworth, 10 Sim. 476, 59 Eng. Reprint 701; Walsh *v.* Trevanion, 15 Sim. 577, 60 Eng. Reprint 743; Balgny *v.* Broadhurst, 1 Sim. N. S. (Eng.) 111; Smith *v.* Daniell, 44 L. J. Ch. 189, L. R. 18 Eq. 649, 30 L. T. 752; Thomas *v.* Rawlings, 27 Beav. 140, 5 Jur. (N. S.) 667, 54 Eng. Reprint 54.

"The objection that evidence is a disclosure of a privileged communication between attorney and client, is founded upon proof of the fact that the relation of attorney and client existed." Harriman *v.* Jones, 58 N. H. 328; Equitable Securities Co. *v.* Green, 113 Ga. 1013, 39 S. E. 434; Hampson *v.* Hampson, 26 L. J. N. S. Ch. 612.

It is not sufficient to show that information was acquired "whilst acting as solicitor" for a given person. It must appear that it was acquired by witness while acting professionally. Thomas *v.* Rawlings, 27 Beav. 140, 5 Jur. (N. S.) 667, 54 Eng. Reprint 54.

Where same person acts as solicitor and patent agent for a party,

must also show that the knowledge sought to be disclosed was not obtained otherwise than in the course of confidential, professional communication.[44]

(2.) How Shown. — Facts showing whether or not the communication in question was privileged may be shown by examination, on the *voir dire* of the attorney offered as a witness,[45] or by examination of the client.[46]

(3.) Affidavit of Client. — In equity case, the court will permit client to file affidavit showing that certain documents were by him communicated to his attorney in confidence.[47] So, in response to rule to produce documents, client may show by affidavit that they are privileged.[48]

(4.) Testimony of Witnesses. — Client may call witnesses to show that proposed testimony will result in disclosure of confidential communications.[49]

(5.) Presumption. — It will be presumed that all communications between attorney and client relating to the matter which necessitated the formation of their relation were confidential and privileged.[50] Also, that knowledge communicated to attorney by third

and the court holds communications to patent agent to be non-privileged, such party's affidavit in response to discovery must show what communications were made to his agent as solicitor, and what as patent agent. Moseley *v.* Victoria R. Co., 55 L. T. N. S. 482.

44. Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131; Smith *v.* Caldwell, 22 Mont. 331, 56 Pac. 590.

The ruling in Marriott *v.* Anchor R. Co. (Ltd.), 3 Giff. 304, 8 Jur. (N. S.) 51, 5 L. T. 545, 66 Eng. Reprint 425, indicates an opinion that party calling an attorney as witness must show that his knowledge was not obtained from client. To same effect, see Parkhurst *v.* Lowten, 3 Madd. 121, 56 Eng. Reprint 455; *s. c.* 2 Swanst. 194, 36 E. R. 589, 56 Eng. Reprint 455; Lewis *v.* Pennington, 29 L. J. N. S. Ch. 670, 6 Jur. (N. S.) 478.

45. Facts as to Incompetency, How Shown. — By Attorney. Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483; Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673.

If attorney testifies that none of the knowledge to which he testifies was acquired as attorney, he is a competent witness, although client is not present. Hodges *v.* Mullikin, 1 Bland Ch. (Md.) 503.

46. By Client. — Wyland *v.* Griffith, 96 Iowa 24, 64 N. W. 673.

Discovery, Allegations of Bill Taken as True. — It has been held in England that when application for discovery of documents is made, the allegations of the bill on the subject of the character of such documents must be taken as true. Gresley *v.* Mousley, 2 Kay & J. 288, 69 Eng. Reprint 789.

47. How Shown. — Penruddock *v.* Hammond, 11 Beav. 59, 50 Eng. Reprint 739.

48. Affidavit. — Forshaw *v.* Lewis, 10 Exch. (Hurlst. & G.) 712; Parsons *v.* Robertson, 2 Keen 605, 48 Eng. Reprint 761.

49. Witnesses. — Cleave *v.* Jones, Exrx., 7 Exch. (Welsb. H. & G.) 421, 21 L. J. N. S. Exch. 105.

50. Presumed Confidential. Hager *v.* Shindler, 29 Cal. 48, 64; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131; State *v.* Snowden, 23 Utah 318, 65 Pac. 479; Hutchins *v.* Hutchins, 1 Hogan (Irish) 315.

Paper. — When an attorney has in his possession a paper relating to his client's affairs, it will be presumed to have been delivered as a confidential communication. McPherson *v.* Rathbone, 7 Wend. (N. Y.) 216.

Non-Confidential Character Not Presumed. — The court will not pre-

person, and relating to testimony in pending cause of his client was communicated to him in his professional capacity.[51]

(A.) Presumption Not Conclusive. — But this presumption is not conclusive, and may be rebutted.[52]

(a.) *Rebuttal By Evidence.* — This presumption may be rebutted by evidence.[53]

(b.) *By Rules and Maxims.* — Or by the application of rules and maxims which ordinarily govern human nature.[54]

E. By What Law Determined. — Whether or not a particular communication is privileged will be determined by the law of the forum.[55]

a. *United States Courts.* — The authorities are conflicting as to the rule applicable in courts of the United States.[56]

sume from the fact that a conversation between attorney and client was held in a public place, that it was intended to be non-confidential. Parker *v.* Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

Contra. — But it has been held that when an attorney offers to disclose knowledge obtained from his client, it will be presumed that it was not acquired under the seal of professional confidence. In such cases the law will presume that had the knowledge been so acquired, the attorney would have raised the objection himself. Chillicothe F. R. & B. Co. *v.* Jameson, 48 Ill. 281.

51. *In re* Young *v.* Holloway, 56 L. J. P. 81, 12 P. D. 167, 57 L. T. N. S. 515. In this case it was held that letters written to an attorney concerning testimony in an action upon which he was engaged will be presumed to have been written to him in his professional capacity.

52. Presumption Disputable. Hager *v.* Shindler, 29 Cal. 48; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

53. Presumption Rebutted by Evidence. — Hager *v.* Shindler, 29 Cal. 48; Sharon *v.* Sharon, 79 Cal. 633, 678, 22 Pac. 26, 131.

54. Rebutted by Maxims. — Hager *v.* Shindler, 29 Cal. 48; Gower *v.* Emery, 18 Me. 79.

55. Lex Fori. — *In re* **Mellen, 63** Hun 632, 18 N. Y. Supp. 515.

56. United States Courts. — In Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, question to an attorney was objected to as calling for disclosure of privileged communication. The court said that it was uncertain whether the laws of Ohio (the state where the trial was held) made such communications privileged, and says that, even if such matters were not privileged under Ohio law, the federal courts would hold them privileged. To same effect, see Liggett *v.* Glenn, 51 Fed. 381, 2 C. C. A. 286, where the court uses this language: "Counsel in their briefs have discussed at some length the provisions of the statute of Missouri on this subject, which declares that an attorney shall not be permitted to testify 'concerning any communication made to him by his client in that relation or his advice thereon, without the consent of such client.' In view of the decision of the supreme court in Insurance Co. *v.* Schaefer, 94 U. S. 457, it would seem that the provisions of the state statute are not applicable to this question of evidence when the same arises in the courts of the United States. In that case it was urged that, under the laws of Ohio, the communication offered in evidence was not privileged; but the supreme court said that . . . 'The laws of the state are only to be regarded as rules of decisions in the courts of the United States where the constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for congress to declare the rules of evi-

b. *Commission From Foreign Tribunal.* — If tribunal of one country issues commission to take testimony in a case therein pending to commissioner in a foreign country, and witness refuses to answer questions on the ground of privilege, upon a proceeding before a court of the country where testimony is taken, to compel answers, the court will determine the question of privilege by the law of the latter country[57]

F. CONSTRUCTION OF STATUTES. — The authorities are conflicting as to the rule of construction to be applied to statutes creating privilege.

a. *Liberally Construed.* — It has been held that such statutes should be liberally construed.[58]

dence which shall prevail in the courts of the United States not affecting rights of property, and, where congress has declared the rule, the state law is silent.' . . . In the case of State *v.* Dawson, 90 Mo. 149, 1 S. W. 827, the supreme court of that state held that the section of the state statute already cited is only declaratory of the common law; that 'it is not designed to, nor does it, narrow the common-law privilege.' So far, therefore, as the particular point now under consideration is concerned, the correctness of the ruling made by the trial court is not dependent upon the question whether the state statute is applicable or not."

In Connecticut Mut. L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, it was held that if the law of the state where the trial takes place makes such communications privileged, the same matters would be held privileged in the federal courts, on the ground that the Revised Statutes of the United States did not make a different provision from that of the state. This case related to communications made to a physician.

In Butler *v.* Fayerweather, 91 Fed. 458, 33 C. C. A. 625, 63 U. S. App. 120, it is held that the question of privilege will be determined according to the law of the state in which the federal court is held.

57. *In re* Whitlock, 3 N. Y. Supp. 855, 21 N. Y. St. Rep. 719.

58. Liberally Construed. — Brazier *v.* Fortune, 10 Ala. 516; Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Kling *v.* City of Kansas, 27 Mo. App. 231, 243; Henry *v.* Buddecke, 81 Mo. App. 360; Benedict *v.* State, 44 Ohio St. 679, 688, 11 N. E. 125. See Denver Tramway Co. *v.* Owens, 20 Colo. 107, 126, 36 Pac. 848; Swift *v.* Perry, 13 Ga. 138; Hammond *v.* Myrick, 14 Ga. 77.

Statute should be "fairly" construed. Hartness *v.* Brown, 21 Wash. 655, 668, 59 Pac. 491.

In Wade *v.* Ridley, 87 Me. 368, 32 Atl. 975, the court says: "An order of men, honorable, enlightened, learned in the law and skilled in legal procedure, is essential to the beneficient administration of justice. The aid of such men is now practically indispensable to the orderly, accurate and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts, without fear that his statements may be possibly used against him. For these reasons, the rule above stated should be construed liberally in favor of those seeking legal advice. It does not apply, of course, where it is sought to find a way to violate some law."

In Benedict *v.* State, 44 Ohio St. 679, 11 N. E. 125, it was contended that the rule as to privilege did not apply to communications made to an attorney who practiced in justice's

b. *Strictly Construed.* — It has also been held that such statutes should receive a strict construction.[59]

G. Other Protection. — a. *Injunction.* — It has been held that in a proper case a court will enjoin an attorney from disclosing matters confidentially communicated to him by his client.[60]

Changing Sides, especially if the attorney has changed sides in a case, or is about to do so.[61] A court will enjoin an attorney from changing sides.[62]

b. *Striking Attorney's Name From Roll.* — It has also been held that a court may prevent disclosure of professional communication by striking from the roll the name of an attorney who voluntarily

courts, but not in superior courts. The court uses this language: "It is equally true that there is a growing tendency in the courts to extend the rule of privilege to cases which, though not within the letter, are within the manifest spirit of the rule as it is generally understood. We are not called upon to declare the comprehensive rule that all statements made to persons who practice in justices' courts, during the course of consultation upon legal controversies, are privileged. We simply declare that the peculiar facts of this case called upon the court below to reject the testimony of the witness, Petty, and in admitting it there was error, for which the judgment below is reversed."

59. *California.* — Satterlee *v.* Bliss, 36 Cal. 489.

Connecticut. — Appeal of Turner, 72 Conn. 305, 44 Atl. 310.

Georgia. — Collins *v.* Johnson, 16 Ga. 458.

Illinois. — Goltra *v.* Wolcott, 14 Ill. 88.

Maine. — Gower *v.* Emery, 18 Me. 79 (which approves and adopts Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400).

Massachusetts. — Hatton *v.* Robinson, 14 Pick. 416, 25 Am. Dec. 415; Foster *v.* Hall, 12 Pick. 89, 22 Am. Dec. 400; Barnes *v.* Harris, 7 Cush. 576, 54 Am. Dec. 734.

Pennsylvania. — Beeson *v.* Beeson, 9 Pa. St. 279.

Rule should extend no further than absolutely necessary to enable client to obtain professional advice with safety. Glyn *v.* Caulfield, 3 Macn. & G. 463, 474, 42 Eng. Reprint 339.

Property of client in the possession of his attorney cannot be shielded from his creditors by construing the rule as to privileged communications to include property intrusted to client. White *v.* Bird, 20 La. Ann. 188, 96 Am. Dec. 393.

"Courts will not extend the rule as to privileged communications. 'As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it.'" State *v.* Smith, 138 N. C. 700, 50 S. E. 859.

60. Injunction. — Davies *v.* Clough, 8 Sim. 262, 6 L. J. Ch. (N. S.) 113, 1 Jur. 5, 59 Eng. Reprint 105.

In Beer *v.* Ward, 1 Jacob (Eng.) 77, 194, Lord Eldon held that he could not allow a motion to restrain a solicitor from giving evidence of confidential matters, but would leave the propriety of his being examined to the court before which he might appear as a witness.

A clerk for a solicitor, commencing practice for himself, cannot be restrained from acting as solicitor for parties against whom his former employer was employed, upon general allegations of having, in his former service, acquired information likely to be prejudicial to his employer's clients. Bricheno *v.* Thorp, 1 Jacob (Eng.) 300. See also Johnson *v.* Marriott, 2 Cromp. & M. (Eng.) 183.

61. Changing Sides. — Davies *v.* Clough, 8 Sim. 262, 6 L. J. Ch. (N. S.) 113, 1 Jur. 5, 59 Eng. Reprint 105. See Grissel *v.* Peto, 9 Bing. 1, 23 E. C. L. 241; Cholmondeley *v.* Clinton, G. Coop. 80; *s. c.* 19 Ves. Jr. 261, 35 Eng. Reprint 484.

62. Hutchins *v.* Hutchins, 1 Hogan (Irish) 315.

offers to give in testimony facts communicated to him by his client, without his client's express consent.[63]

c. *Action for Damages.* — Action will lie against an attorney for damages caused by his violation of his duty as regards confidential communications.[64]

17. Duty of Attorney Toward Confidential Communications. — A. Duty to Keep Client's Secrets. — It is an attorney's duty to keep his client's secrets, and not reveal matters entrusted to him under the seal of professional confidence.[65]

B. Duty to Divulge Criminal Communications. — But it has been held that under certain circumstances it is an attorney's duty to divulge communications made to him by his client for the purpose of obtaining advice or assistance in the commission of a crime.[66]

C. Violation of Confidence Not Presumed. — It will be presumed that an attorney has not violated, or will not violate professional confidence;[67] consequently, knowledge acquired by an attorney while transacting business for one client will be presumed not to have been communicated to another client.[68]

63. Striking Attorney's Name. People *v.* Barker, 56 Ill. 299; Cholmondeley *v.* Clinton, 19 Ves. 261, 34 Eng. Reprint 515.

64. Damages. — Taylor *v.* Blacklow, 3 Bing. N. C. (Eng.) 235; *s. c.* 6 L. J. N. S. C. P. 14.

65. Duty to Keep Secrets. — Taylor *v.* Blacklow, 3 Bing. N. C. (Eng.) 235; *s. c.* 6 L. J. N. S. C. P. 14; Hutchins *v.* Hutchins, 1 Hogan (Irish) 315.

In Wisden *v.* Wisden, 6 Hare 549, 67 Eng. Reprint 1281, the Vice Chancellor says that it is an attorney's duty to insist upon privilege.

66. Duty as to Criminal Communications. — People *v.* Van Alstine, 57 Mich. 69, 79, 23 N. W. 594. See language of court in State *v.* Barrows, 52 Conn. 323.

67. Violation Not Presumed. — If an attorney offers to disclose knowledge intrusted to him by his client, it will be presumed that it was not acquired under the seal of professional confidence. In such case the court will presume that, had the knowledge been so acquired, the attorney would have raised the objection himself. Chillicothe, F. R. & B. Co. *v.* Jameson, 48 Ill. 281.

68. Melms *v.* Pabst Brew. Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899; Akers *v.* Rowan, 33 *s. c.* 451, 473, 12 S. E. 165, 10 L. R. A. 705. On this subject, see Templeman *v.* Hamilton, 37 La. Ann. 754.

In Trentor *v.* Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225, the question arose upon an application of the principle that an agent is presumed to communicate to his principal knowledge acquired in the course of his employment. It was held that knowledge acquired by an attorney while engaged for one client will not be presumed to have been communicated to another client. For a case similar to Trentor *v.* Pothen, although the question of privilege is not discussed, see Wittenbrock *v.* Parker, 102 Cal. 93, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197.

In Melms *v.* Pabst Brew. Co., 93 Wis. 153, 66 N. W. 518, 57 Am. St. Rep. 899, it was claimed that a purchaser had notice of facts which invalidated an executors' sale, on the ground, *inter alia*, that he had constructive notice, in that the attorney who acted for him in making his purchase, had acted for the executors in making and reporting their sale. The court held that notice and knowledge obtained by the attorney while acting for the executors would not be imputed to his subsequent client, the person who purchased from the ex-

D. Cannot Conceal Confidential Communications From Client's Representative. — An attorney cannot obtain information from a client in a professional way as to the location of certain property, and, after client's death, escape from testifying in regard thereto by becoming the attorney of a person charged with embezzling such property.[69]

E. To Charge Attorney With Violating Confidence, Libelous. — To publish concerning an attorney that he has offered himself as a witness to disclose his client's secrets is libelous.[70]

IV. COMMUNICATIONS TO CLERGYMAN.

1. Not Privileged at Common Law. — Communications between

ecutors' vendee. The court recognizes the rule that notice to an attorney is notice to his client; but states that the rule is subject to a qualification. The court says: "The rule itself is based upon the duty of the attorney or agent to disclose to his client or principal all knowledge and information he possessed at the time, in relation to the subject-matter of the employment or agency, and the presumption is, that he communicated it accordingly; but he cannot be expected to communicate what he has forgotten, or what it would be his legal duty to conceal, or information which, from his relation to the subject-matter or his previous conduct, it is certain that he would not disclose. Whatever knowledge the mutual attorney had acquired in respect to the character and validity of the executors' deed and sale five months before was acquired under circumstances which would render it a breach of professional confidence to disclose it to another, or to take advantage of such knowledge to serve or promote the interests of another client; and therefore such second client would not be affected or bound by it." The court also says: "The whole doctrine of imputed notice to the client or principal rests upon the ground that the attorney or agent has knowledge of something material to the particular transaction, which it is his duty to communicate to his principal. Wyllie *v.* Pollen, 3 De Gex, J. & S. 596, 46 Eng. Reprint 767. And notice of it will not be imputed to the client where it would be a breach of professional confidence to make the communication."

In Littauer *v.* Houck, 92 Mich. 162, 52 N. W. 464, 31 Am. St. Rep. 572, notice to attorney was imputed to client, but in that case it appeared that the imputed knowledge was not acquired as attorney, but in the course of conversation regarding a purchase proposed to be made by the attorney. See title "Notice." See Hood *v.* Fahnestock, 8 Watts (Pa.) 489, 34 Am. Dec. 489; Martin *v.* Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; McCormick *v.* Wheeler, Mellick & Co., 36 Ill. 114, 85 Am. Dec. 388; Pepper *v.* George, 51 Ala. 190; Taylor *v.* Evans (Tex. Civ. App.), 29 S. W. 172. In this last case it was held that where a person contemplating insolvency delayed execution of his assignment to enable certain creditors to obtain preference by attachment, and communicated this purpose to his attorney, and this attorney was soon thereafter retained by the creditors sought to be preferred, such new clients would be charged with notice of former client's fraudulent intent. The court said that the attorney could, without breach of professional duty, have communicated his knowledge to his new client.

69. *Ex parte* Gfeller, 178 Mo. 248, 269, 77 S. W. 552.

70. Riggs *v.* Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145.

As to questions to be considered by the jury in such cases, see Moore *v.* Terrell, 4 Barn. & Ad. 870, 24 E. C. L. 175.

clergyman and one confessing to him, or seeking spiritual advice, were not privileged at common law.[71]

2. General Rule. — The general rule deducible from statements and decisions on this subject is, that communications in the nature of confessions or applications for spiritual guidance, made to a priest or clergyman, as such, in confidence, and in the course of the discipline enjoined by the church of which the clergyman is a member, are privileged.[72]

3. Essentials. — A. Clergyman. — Communication To Fellow Church Member Not Privileged. — Communication must be made to a clergyman; consequently confession of a person, voluntarily made to members of the same church, may be given in evidence by them on his trial for the crime or misdemeanor confessed by him.[73]

B. Must be Acting in Professional Capacity. — Clergyman must have been acting in his professional capacity at time communication in question was made.[74]

Acting as Officer of Church. — When clergyman is acting, not as a spiritual guide, but as an officer of his church, communications made to him are not privileged.[75]

71. Normanshaw *v.* Normanshaw, 69 L. T. N. S. 468; Rex *v.* Gilham, 1 Moody Crown Cas. 186. See *dicta* to same effect in Wheeler v. LeMarchant, L. R. 17 Ch. Div. 675, 50 L. J. N. S. Ch. 793, 44 L. T. N. S. 632; Anderson *v.* Bank of British Columbia, L. R. 2 Ch. Div. 644, 45 L. J. N. S. Ch. 449, 35 L. T. N. S. 76; Russell *v.* Jackson, 9 Hare 387, 68 Eng. Reprint 558.

Contra. — Dictum. — In Broad *v.* Pitt, 3 Car. & P. 518, 14 E. C. L. 423, Best, C. J., said he would never compel a clergyman to disclose communications made to him by a prisoner, but would receive them in evidence, should the clergyman choose to disclose them. But the case did not involve the question of admissibility of clergyman's testimony. See also dictum of Alderson, B., in Reg. *v.* Griffen, 6 Cox, C. C. 219.

In Greenlaw *v.* King, 1 Beav. 137, 8 L. J. Ch. N. S. 92, 48 Eng. Reprint 891, Lord Langdale says: "The cases of privilege are confined to solicitors and their clients; and stewards, parents, medical attendants, clergymen and persons in the most closely confidential relation are bound to disclose communications made to them."

72. *California.* — Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83.

Indiana. — Knight *v.* Lee, 80 Ind. 201; Dehler *v.* State *ex rel.* Bierck, 22 Ind. App. 383, 53 N. E. 850; Gillooley *v.* State, 58 Ind. 182.

Iowa. — State *v.* Brown, 95 Iowa 381, 64 N. W. 277.

Massachusetts. — People *v.* Drake, 15 Mass. 161.

Missouri. — State *v.* Morgan, 196 Mo. 177, 95 S. W. 402.

Nebraska. — Hills *v.* State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155.

New York. — People *v.* Gates, 13 Wend. 311.

Wisconsin. — Colbert *v.* State, 125 Wis. 423, 104 N. W. 61.

73. Com. *v.* Drake, 15 Mass. 161.

74. Colbert *v.* State, 125 Wis. 423, 104 N. W. 61; People *v.* Gates, 13 Wend. (N. Y.) 311; State *v.* Morgan, 196 Mo. 177, 95 S. W. 402.

75. Knight *v.* Lee, 80 Ind. 201. In this case defendant was sued for slander. Plaintiff introduced a clergyman as witness to show what defendant had said concerning plaintiff's character. It appeared that defendant was not a member of this clergyman's congregation. Clergyman was engaged in investigating rumors affecting the character of plaintiff, who

Church Membership of Person Addressing Clergyman. — In some cases courts have, apparently, considered the fact that the person addressing the clergyman whose testimony is offered was not a member of the church or denomination to which witness belonged, as a circumstance showing that the communication in question was not made to witness in his professional capacity, or in confidence.[76]

Confession by Non-Member. — Voluntary confession of crime by accused, in justification of his acts, to a clergyman of a church of which person confessing was not a member, is not privileged.[77]

C. CONFESSION. — Communication must have been in the nature of a confession.[78]

was a member of the clergyman's denomination, but not of his congregation. Objection was made to clergyman's testimony, as calling for privileged communication. Objection was overruled, and judgment affirmed on appeal. The court says: "The act of March 15th, 1879, which was in force at the time of the trial, and to which reference is made in the argument, provides that clergymen shall be incompetent to testify concerning confessions made to him in course of discipline enjoined by their church. Acts 1879, p. 245.

"We are unable to give this act so broad a construction as is contended for by counsel, and do not think it supports the objection urged to the testimony of Bryant, set forth as above. In the first place, the testimony did not show that Bryant was acting in the capacity of a clergyman when he had the conversation with the defendant, concerning which he was permitted to testify. In the next place, the information imparted by the defendant to Bryant on that occasion cannot be held to have been, in any sense, a confession within the meaning of the act above referred to.

"The confessions, concerning which clergymen are incompetent to testify, are, evidently, such as are penitential in their character, or as are made to clergymen in obedience to some supposed religious duty or obligation, and do not embrace communications to clergymen, however confidential, when not made in connection with or in discharge of some such supposed religious duty or obligation; or when made to them while in the discharge of duties other than those which pertain to the office of a clergyman. We are, therefore, of the opinion that the court did not err in permitting Bryant to testify, as he did, over the objection of the defendant."

76. State *v.* Brown, 95 Iowa 381, 64 N. W. 277; State *v.* Morgan, 196 Mo. 177, 95 S. W. 402; Knight *v.* Lee, 80 Ind. 201.

77. State *v.* Brown, 95 Iowa 381, 64 N. W. 277; State *v.* Morgan, 196 Mo. 177, 95 S. W. 402.

78. Colbert *v.* State, 125 Wis. 423, 104 N. W. 61; Estates of Toomes, 54 Cal. 509, 35 Am. Rep. 83. In this latter case it is held that a priest must testify concerning knowledge acquired at preliminary examination conducted to ascertain whether or not his parishioner is prepared to receive the sacrament. Priest's testimony was offered to show parishioner's mental condition, and objected to as disclosing privileged communication. The priest testified that on every occasion of the administration of the rites of the church to invalids or dying persons, the administering priest is required to make an examination of the mental condition of recipient, to ascertain if his mind be in proper state to reason, or act of its own volition; and that the sacrament could only be administered after such an examination. He also testified that on the occasion in question he made such examination. It did not appear that his parishioner made any confession. *Held,* that the priest could testify as to parishioner's mental condition.

"The confessions, concerning which clergymen are incompetent to testify, are, evidently, such as are

Purpose. — Communication must have been for the purpose of enabling the clergyman to perform his functions.[79]

D. In Course of Discipline. — It is essential that the confession in question be made in course of discipline enjoined by the church; consequently, priest may testify as to any communication to himself not in conformity with such discipline.[80]

E. Confidential. — Communication must have been confidential.[81]

Injunction of Confidence Unnecessary. — But it is not essential that it be made under any express injunction of secrecy.[82]

F. Certain Essentials Lacking. — When it appears from clergyman's testimony that he did not consider a certain communication to have been made to him in his professional capacity, and it does not appear to have been a statement required by discipline, clergyman may be required to give such statement in evidence.[83]

penitential in their character, or as are made to clergymen in obedience to some supposed religious duty or obligation." Knight *v.* Lee, 80 Ind. 201.

79. State *v.* Brown, 95 Iowa 381, 64 N. W. 277. In this case it was held that a voluntary statement made by an accused person to a clergyman, for the purpose of justifying his conduct, and not to obtain the clergyman's advice or assistance, was not privileged.

80. Gillooley *v.* State, 58 Ind. 182. In this case the court says: "The next reason urged for a new trial was the permitting of Francis Lordeman, a Catholic priest, to testify in the cause. We have a statute that 'clergyman, concerning any confession made to them in course of discipline enjoined by the church, shall not in any case be competent witnesses, unless with the consent of party making such confidential communication.' 2 R. S. 1876, p. 134. In this case, the testimony of Father Lordeman was not concerning any confessions made to him in course of discipline enjoined by the church."

81. Hills *v.* State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155. In this case a person imprisoned on a charge of bigamy sent for a clergyman and urged him to intercede with prisoner's first wife to settle the criminal prosecution. He also requested the clergyman to deliver a letter of similar purport to the prosecuting attorney. Prisoner prepared a paper giving substance of what he wished the clergyman to state to his first wife. To the introduction in evidence of this paper it was objected that it disclosed a privileged communication made to a clergyman. *Held,* that as the matter communicated to the clergyman was intended to be disclosed to another person it was not privileged.

82. Communication need not be accompanied by an express charge or injunction of secrecy; but it must appear that it was made in confidence, with an understanding, express or implied, that it was not to be revealed to any one. Hills *v.* State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155.

83. People *v.* Gates, 13 Wend. (N. Y.) 311, 322. In this case statute provided that a clergyman shall not "be allowed to disclose any confession made to him in his professional character, or in the course of discipline enjoined by the rules or practice of such denomination." Person charged with a crime had made certain statements to a clergyman. When it was sought to prove such statements by the clergyman, his testimony was objected to on ground of privilege. He stated that he did not consider that defendant's statements were made to him in his professional character, or as a clergyman. It did not appear that

4. Clergyman's Statements Privileged. — Statements made by clergyman to person who addresses him confidentially in his professional capacity are privileged,[84] although the clergyman is defendant in the action in which he is called as a witness.[85]

V. AFFAIRS OF GOVERNMENT.

1. President. — No case involving the privilege of the President of the United States in regard to public matters has been decided by the federal courts.[86]

2. Governor of State. — The governor of a state cannot be compelled to testify as to knowledge acquired by him in the discharge of his official duties.[87]

A. NOT COMPELLABLE TO PRODUCE PAPERS. — Nor can he be compelled to produce in evidence the records of his office.[88]

the statements in question were made in the course of the discipline of the church. *Held,* that the clergyman's testimony was admissible.

84. Gill *v.* Bouchard, 5 Quebec Q. B. 138 "Rapports Judiciaires Officiels, Quebec, Banc De La Reine." Vol. V, p. 138.

85. Gill *v.* Bouchard, 5 Quebec Q. B. 138. "Rapports Judiciaires Officiels, Quebec, Banc De La Reine, Vol. V, p. 138.

86. In Aaron Burr's trial Chief Justice Marshall issued a subpoena to President Jefferson requiring the production of certain documents; but the question of privilege as relating to the privileged character of the evidence demanded was not raised. See Aaron Burr's Trial, Robertson's Rep. Vol. I, pp. 121, 127, 136, 181, 255. See reference to Burr's trial, in Worthington *v.* Scribner, 109 Mass. 487, 12 Am. Rep. 736.

87. Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667.

88. In Thompson *v.* German Val. R. Co., 22 N. J. 111, the governor of the state of New Jersey was subpoenaed as a witness to produce certain documents in his custody. The court, after stating that the dignity of the office of governor is not a sufficient excuse for declining to appear, says: "Whether the highest officer in the government or state will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such cases is. that he will be allowed to withhold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so. These were the rules adopted by Chief Justice Marshall in the trial of Aaron Burr. He allowed a *subpoena duces tecum* to President Jefferson and held that he was bound to appear, but that he should be allowed to keep back any document, or part of a document, which he thought ought not to be produced. 1 Burr's Trial 182; 2 Ibid. 535-6."

In Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23, the supreme court of Pennsylvania held that the governor of that state could not be compelled to produce a certain deposition which had been sent to him to be used in substantiating charges against a certain public official. The court uses this language: "Public policy would seem to be in the way of admitting parol evidence, as well as of producing the original writing; for that would come to the same thing as to the policy. It would be a check on representations to the *competent authority.* It would restrain the free communications that might be necessary for the public good in case of a candidate for office, or of one who was alleged unworthy to retain an office, to lay it down, that a governor, or the competent authority for appointing and removing, should be compellable

B. Reasons, or state his reasons for taking or not taking certain action.[89]

C. Action. — Nor can he be compelled to testify concerning his action regarding a bill.[90]

D. Time of Signing Bill. — But governor of state may be examined as to the time of signing a certain bill.[91]

E. Governor's Subordinates Entitled to Privilege. — The privilege of the governor extends to his subordinates.[92]

3. Governor of Colony. — The governor of a colony cannot be compelled to produce in evidence correspondence between himself and the secretary of state of the home government relating to public affairs.[93]

4. Lord Lieutenant. — Report made to Lord Lieutenant of Ireland by an inspector general of prisons is privileged.[94]

5. Departments of Government. — A. State Department.— Secretary of state cannot be compelled to produce in evidence documents under his custody relating to public business.[95]

B. War Department. — a. *Secretary of War.* — In an action between private individuals secretary of war cannot be compelled to produce in evidence documents in his custody relating to the business of his department.[96]

b. *Commander-in-Chief.* — Reports made to commander-in-chief

to produce papers for the purpose of supporting an action in a court of law."

89. Thompson *v.* German Val. R. Co., 22 N. J. Eq. 111. In this case it was held that the governor could not be compelled to state his reasons for not signing a certain bill.

90. Thompson *v.* German Val. R. Co., 22 N. J. Eq. 111.

91. Thompson *v.* German Val. R. Co., 22 N. J. Eq. 111. In this case the court gives as a reason for its ruling " . . . that is a bare fact; that includes no action on his part."

92. Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667, where it is held that, the governor not being compellable to testify concerning official knowledge, the privilege extended to his secretary of state, adjutant-general, and two officers of the state militia.

93. Hennessy *v.* Wright, L. R. 21 Q. B. Div. 509, 57 L. J. Q. B. 530, 59 L. T. N. S. 323.

94. M'Elveney *v.* Connellan, 17 Ir. Com. Law 55.

95. Gugy *v.* Maguire, 13 Low. C. 33, 49.

As to correspondence between secretary of state and colonial governor see Hennessy *v.* Wright, L. R. 21 Q. B. Div. 509, 57 L. J. N. S. Q. B. 530, 59 L. T. N. S. 323.

96. Beatson *v.* Skene, 5 Hurlst. & N. (Eng.) 838, 29 L. J. N. S. C. L. 230, 2 L. T. N. S. 378. This is the leading English case on the subject of privilege as relating to government matters. It is cited in all succeeding cases on the subject. The action was for slander, the language complained of having been used by a commissioner attending an army corps to an army officer who, under orders from a superior, was investigating the condition of plaintiff's command. Plaintiff claimed that certain documents in the office of the secretary of war, containing minutes of the proceedings of a court of inquiry were relevant to his case, and demanded their production by the secretary. The court refused to make an order against the secretary.

of army by a commission of officers appointed by him to inquire into the conduct of an officer are privileged.[97]

c. *Plan of Fortress.* — A government official cannot be compelled to state whether or not a certain plan of a fortress of his government is correct.[98]

C. *Admiralty.* — Reports made by naval officers to admiralty department are privileged.[99]

D. Treasury. — Communications with officers of treasury department relating to matters under its administration are privileged.[1]

a. *National Bank Examiner.* — Letter from stockholder in national bank to national bank examiner is not privileged so far as relates to an admission therein contained to the effect that the writer was aware of the condition of the bank in which he was stockholder.[2]

b. *Appraiser of Imported Goods,* appointed to determine value for purposes of revenue cannot testify to impeach the appraisement.[3]

E. Postal Matters. — Letter Carrier. — Knowledge of a letter carrier concerning letters delivered by him is not privileged.[4]

97. Home *v.* Bentinck, 2 Brod. & B. 130, 6 E. C. L. 46; Dawkins *v.* Rokeby, L. R. 8. Q. B. 255, 45 L. J. Q. B. 8, 33 L. T. N. S. 196.

98. Rex *v* Watson, 2 Stark. 116, 3 E. C. L. 273.

99. H. M. S. Bellerophon, 44 L. J. N. S. Adm. 5, 31 L. T. N. S. 756.

1. Worthington *v.* Scribner, 109 Mass. 487, 12 Am. Rep. 736. In this case plaintiff filed interrogatories to be answered by defendants requiring them to state what communications had passed between defendants and officials of the treasury department of the United States concerning certain alleged acts of plaintiff in regard to importation of goods; also directing defendants to file copies of all written communications on this subject. Upon defendants' refusal to answer plaintiff moved that they be ordered to do so. Plaintiff's motion was denied. The court says: "The question now before us is not one of the law of slander or libel, but of the law of evidence; not whether the communications of the defendants to the officers of the treasury are so privileged from being considered as slanderous, as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. The reasons and authorities already stated conclusively show that the communications in questions are privileged in the latter sense, and cannot be disclosed without the permission of the secretary of the treasury. And it is quite clear that the discovery of documents which are protected from disclosures upon grounds of public policy cannot be compelled, either by bill in equity or by interrogatories at law."

2. Cox *v.* Montague, 78 Fed. 845, 24 C. C. A. 364.

3. Oelberman *v.* Merritt, 19 Fed. 408.

4. Smith *v.* Smith, 2 Pen. (Del.) 365, 45 Atl. 848. In this case it was held that a state court can compel a letter carrier to state whether or not he had to deliver, and delivered, letters addressed to a certain person, that when he called to deliver such letters he had to wait for the door of the house of delivery to be opened, and whether or not person to whom letters were addressed instructed him not to leave letters at

F. Interior Department. — a. *Collector of Internal Revenue.* Collector of internal revenue cannot be compelled to produce the records of his office in a case pending in a state court, or give evidence concerning their contents.[5]

b. *Other Revenue Officers.* — Correspondence between collector of port and commissioners of customs relating to revenue business is privileged.[6]

c. *Patent Office.* — Communications between patent office and applicant for letters-patent are not privileged.[7]

G. Officers of Government and Agencies of Government. Communications between government officers and agency of government relating to the government of a portion of the territory under jurisdiction of such agency are privileged.[8]

H. Legal Department. — a. *Prosecuting Officers. — United States Attorney-General.* — Correspondence between attorney-gen-

her residence, but to take them to another person, also as to whether or not he had kept letters for such person in his possession several days, and whether or not such person did not meet him at a place different from her residence and there receive letters from him.

5. *In re* Lamberton, 124 Fed. 446; *In re* Weeks, 82 Fed. 729.

In *In re* Comingore, 96 Fed. 552, a collector of United States internal revenue was asked to produce in evidence in an action pending in a state court certain reports made to him as such collector showing the quantity of a certain commodity produced by a manufacturer, the making of such reports being required by law. Upon witness' refusal to file copies of these reports, he was committed to jail for contempt. Upon petition for *habeas corpus*, a district court of the United States ordered his discharge from custody. On appeal to the supreme court of the United States the judgment of the district court was affirmed. Boske *v.* Comingore, 177 U. S. 459. The supreme court held that the reports in question were records and papers appertaining to the business of the treasury department and belonging to the United States. That the secretary of the interior was authorized to make regulations not inconsistent with law for the custody, use and preservation of records of his department. That the collector had refused to produce the reports in question in pursuance of a regulation made by the secretary forbidding his subordinates giving out any information contained in their records, and that his refusal was proper. To the same effect is *In re* Huttman, 70 Fed. 699.

Contra. — In *In re* Hirsch, 74 Fed. 928, the question arose in the same manner as in *In re* Comingore, that, is, upon application to federal court, by petition for writ of *habeas corpus*, to obtain discharge of collector of internal revenue imprisoned for refusal to produce records of his office in evidence in an action pending in a state court. The writ was discharged, the circuit court for the first circuit holding that petitioner was not justified by the regulations of the department in refusing to produce his records in evidence. The law on the subject is now settled by Boske *v.* Comingore, 177 U. S. 459.

6. Black *v.* Holmes, 2 Fox & S. (Irish K. B.) 28.

As to other correspondence of commissioners of customs, see Earl *v.* Vass, 1 Sh. App. (Eng.) 229.

7. Edison Elec. L. Co. *v.* United States Elec. L. Co., 44 Fed. 294.

8. In Smith *v.* East India Co., 1 Phil. 50, 41 Eng. Reprint 550, it was held that correspondence between the directors of the East India Company and the Commissioners for the affairs of India was privileged, the company being charged with the government of India. To same effect is Wadeer *v.* East India Co.,

eral and district attorney concerning prosecution of a case pending in federal court is confidential.[9]

b. *Prosecuting Attorney.* — It has been held that communications between public prosecutor and a witness for the prosecution in regard to contemplated or pending criminal proceeding are privileged.[10]

(1.) Contra. — But the contrary has been held.[11]

(2.) Prosecuting Attorney as to Grand Jury Proceedings. — It has been held that prosecuting attorney can be compelled to state what passes in grand jury room.[12]

Contra. — But the contrary has been held.[13]

(3.) Statement of Witness. — Also that he may be compelled to testify concerning statements made by a witness in course of testimony before grand jury.[14]

c. *Arresting Officer* is not bound to disclose the name of person from whom he received confidential information which led to the detection and arrest of a person.[15]

8 De G. M. & G. 182, 44 Eng. Reprint 360, 25 L. J. N. S. Eq. 345 (also cited as the "Rajah of Goorg *v.* East India Co."). So as to documents in custody of agent-general for a colony. Wright & Co. *v.* Mills, 62 L. T. N. S. 558.

9. United States *v.* Six Lots of Ground, 1 Wood C. C. (U. S.) 234.

10. Vogel *v.* Gruaz, 110 U. S. 311; State *v.* Houseworth, 91 Iowa 740, 60 N. W. 221; Gabriel *v.* McMullin, 127 Iowa 426, 103 N. W. 355; State *v.* Phelps, Kirby (Conn.) 282.

So as to statements to attorney general as prosecuting attorney in course of consultation with witness concerning preparation for prosecution. State *v.* Brown, 2 Marv. (Del.) 380, 397, 36 Atl. 458.

In Oliver *v.* Pate, 43 Ind. 132, 141, the court says: "The State furnishes an attorney to prosecute all persons charged with crime. It is essential that he should be furnished with facts to enable him to successfully prosecute. Every good citizen, it is presumed, will aid in the conviction of offenders and communicate to the prosecuting attorney all the facts within his knowledge, tending to establish the guilt of such offender; and all such communications and statements made to him must be considered and held to be privileged, and must not be divulged without the consent of the party making them. The fact that the State furnishes the attorney can make no difference. The statement is made to one, who for the time being and for that purpose occupies the position of legal adviser. And that must determine the question, and not who selects or employs him. The prosecutor acts as attorney and receives the communication in that capacity. Public policy requires that a person in making communications to a prosecuting attorney, relative to criminals or persons suspected of being guilty of crime, should be at liberty to make a full statement to him without fear of disclosure."

11. Granger *v.* Warrington, 8 Ill. 299; Cole *v.* Andrews, 74 Minn. 93, 76 N. W. 962; Meysenberg *v.* Engelke, 18 Mo. App. 346.

12. Clark *v.* Field, 12 Vt. 485. In note at foot of this case, Redfield, J., says: "But in all these cases the object of withholding the testimony is secrecy, and when the matter is once made public that object becomes impossible. So that in the present case, when the testimony had been taken down, it might well be used. I apprehend that the true doctrine, in regard to requiring a witness to disclose state secrets, is, that the court will exercise its discretion in each particular case."

13. McLellan *v.* Richardson, 13 Me. 82.

14. State *v.* Van Buskirk, 59 Ind. 384.

15. United States *v.* Moses, 4 Wash. C. C. (U. S.) 726.

d. *Information Concerning Informer.* — Witness for prosecution in criminal case cannot be compelled to state the names of persons from whom he received information which led to defendant's arrest;[16] nor to whom he gave such information.[17] Nor can he be asked if he was the person who gave information to prosecuting officer.[18] Nor can public prosecutor be compelled to disclose names of informants whose statements caused prosecution to be instituted.[19]

e. *Complaining Witness In Prosecution* cannot be asked as to his reasons for making complaint against defendant.[20]

Extent of Privilege of Witness for Prosecution. — It has been held that defendant in criminal case is entitled, on cross-examination, to ask government witness what agreement witness had made with government agents or detectives exempting him from prosecution in consideration of his appearing as a witness, the court holding that the rule that communications between government and its agents are privileged cannot be invoked to deprive defendant of such right.[21]

I. Other Public Matters.— a. *Bankruptcy Commissioner and Insolvent.* — Communications between an insolvent and the commissioner in bankruptcy are not privileged.[22]

b. *Board of Trade.* — When board of trade is a department of government, depositions taken by its officers for statistical purposes are privileged.[23]

c. *Ship's Papers.* — In an action by underwriters against re-insurer, ship's papers are not privileged.[24]

16. Attorney-General *v.* Briant, 15 Mees. & Wels. (Eng.) 169.

In State *v.* Soper, 16 Me. 293, 33 Am. Dec. 665, which was a prosecution for larceny, a witness for the state was asked if he had received certain information, and from whom. Witness declined to answer, stating that the persons who had informed him feared mob violence would result from disclosure of their names. The trial court refused to compel witness to answer. In overruling exception to this action, the supreme judicial court cites United States *v.* Moses, 4 Wash. C. C. (U. S.) 726, and says: "It was remarked by the court, that such a disclosure can be of no importance to the defense, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes, which they know to have been committed. And we think the situation of the witness, in the employment of the owners of the logs, alleged to have been stolen, would well warrant the court from holding him to disclose the names of those from whom he received the information, as much as in the case of the officer before spoken of."

17. Rex. v. Watson, 2 Stark. 116, 3 E. C. L. 273.

18. Attorney-General *v.* Briant, 15 Mees. & Wels. (Eng.) 169.

19. Marks *v.* Beyfus, L. R. 25 Q. B. Div. 494, 63 L. T. N. S. 733.

20. State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650.

21. King *v.* United States, 112 Fed. 988, 50 C. C. A. 647.

22. Flight *v.* Robinson, 8 Beav. 22, 40, 13 L. J. Ch. 425, 50 Eng. Reprint 9.

23. The Palermo, 49 L. T. N. S. 551.

24. China Traders' Ins. Co. *v.* Royal E. Assur. Co., 67 L. J. N. S. Q. B. 736; Boutton *v.* Houlder, 73

d. *Herald's Office.* — Communications between an officer of the Heralds' College and persons who confer with him in regard to matters of pedigree are not privileged.[25]

e. *Records of Foreign Consulate.* — The records of a consulate maintained in the United States by a foreign government are privileged.[26]

Privilege of Government Maintaining. — In such case the privilege is the privilege of the government maintaining the consulate,[27] and may be claimed by the consul.[28] If, under apprehension of commitment for contempt in case of refusal to answer in regard to such records, witness discloses the contents of such records, his answers may, on motion, be stricken out.[29]

f. *Municipal Corporation.* — Minutes of committee of municipal corporation made with reference to past, present or contemplated litigation are privileged.[30]

g. *Town Clerk, as to Inventories of Taxable Property.* — Where statute provides that inventories to taxable property, sworn to by tax-payers, shall be held by town clerk, and not disclosed to any person, except in prosecution for breach of the revenue law, a town clerk having custody of such records cannot be compelled to produce them in evidence in a civil action against person returning such inventory.[31]

6. Character of Communication. — How Shown. — Where an officer of government is sought to be examined as to matters pertaining to his department, or production of public documents or records is demanded, and testimony or production refused on the ground of privilege, the court is entitled to have the head officer of the department in question appear to give the reason for such refusal, stating that he is head of the department, and objects to certain documents being produced, on the ground of public policy.[32]

By Whom Determined. — The question whether or not information in possession of an officer of government should be disclosed, or documents produced will be determined by the officer at the head of the department from which testimony oral or written is attempted to be obtained.[33]

L. J. N. S. K. B. 493; Harding *v.* Russell, 74 L. J. N. S. K. B. 500.

25. Slade *v.* Tucker, L. R. 14 Eq. 23, 49 L. J. Ch. 644, 14 Ch. D. 824, 43 L. T. N. S. 49.

26. Kessler *v.* Best, 121 Fed. 439.

27. Kessler *v.* Best, 121 Fed. 439.

28. Kessler *v.* Best, 121 Fed. 439.

29. Kessler *v.* Best, 121 Fed. 439.

30. Mayor of Bristol *v.* Cox, L. R. 26 Ch. Div. 678, 50 L. T. N. S. 719.

31. Witters *v.* Sowles, 32 Fed. 130.

32. Kain *v.* Farrer, 37 L. T. N. S. 469. In this case the court cites Beatson *v.* Skene, 5 Hurlst. & N. 838, 853, 29 L. J. N. S. C. L. 230, 2 L. T. N. S. 378, as authority for its holding. The court states that it is not sufficient for an official to state in a mere formal affidavit that discovery is objected to on grounds of public policy. It should appear that the mind of a responsible person has been brought to bear on the question of the expediency to the public interest of giving or refusing the information asked for.

33. Kain *v.* Farrer, 37 L. T. N. S. 469; Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667; Gray *v.* Pent-

VI. JUDICIAL MATTERS.

1. Judge. — A. Matters Taking Place at Trial. — A judge cannot be compelled to testify as to what occurred at a trial over which he presided.[34] But he may so testify if he desires.[35]

B. Case and Opinion for Judge. — When rule of court requires that leave to sue as a pauper shall not be granted until a case laid before counsel and his opinion thereon be exhibited to the judge of the court in which leave to sue is sought, such case and opinion are for the information of the judge alone, and defendant in an action instituted under leave of court is not entitled to see them.[36]

land, 2 Serg. & R. (Pa.) 23; Thompson *v.* German Val. R. Co., 22 N. J. Eq. 111.

In Beatson *v.* Skene, 5 Hurlst. & N. 838, 853, 29 L. J. N. S. C. L. 230, 2 L. T. N. S. 378, Pollock, C. B., says: "We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined? It is manifest it must be determined either by the presiding judge or by the responsible servant of the Crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question whether the production of the document would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think that it is (with respect to the production or nonproduction of a State paper in a court of justice) subordinate to the general welfare of the community." The court further says: "If the head of the department does not attend personally to say that the production of the document will be injurious, but sends the document to be produced or not as the judge may think proper, or, as was the case in Dickson *v.* The Earl of Wilton, before Lord Campbell, and reported in Foster and Finlason's Nisi Prius Reports, p. 425, when a subordinate was sent with the document with instructions to object, but nothing more, then indeed the case may be different—the judge may compel the production of it." Beatson *v.* Skene is cited as authority in Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667.

34. Welcome *v.* Batchelder, 23 Me. 85.

Alderman sitting as justice of the peace may testify concerning terms of settlement, made in his presence, of prosecution pending before him. Schubkagel *v.* Dierstein, 131 Pa. St. 46, 18 Atl. 1059, 6 L. R. A. 481.

35. Welcome *v.* Batchelder, 23 Me. 85, where the court says: "As to Judge Redington, it is true, that he might have been excused from testifying if he had insisted upon it. Public policy would have authorized it. But it is no ground of exception that he did not insist upon his right to be excused."

In Supples *v.* Cannon, 44 Conn. 424, a judge testified that he received certain evidence and made a certain finding of fact; also that he made a certain conclusion of law and rendered judgment. Question was not raised, whether or not he could be compelled to testify. See Reg. *v.* Harvey, 8 Cox, C. C. (Eng.) 99.

36. Sloane *v.* British S. Co. Ltd.,

C. Before Grand Jury as to Statements of Witness at Trial. A judge of court cannot be compelled to testify before a grand jury as to statements made by a witness who testified upon a trial at which such judge presided.[37]

D. Papers Upon Which Warrant Issued. — A judge may testify upon what papers he issued a warrant for the arrest of a certain person.[38]

E. Grounds of Decision. — It has been held that a justice of the peace may testify as to the grounds upon which he rendered a certain decision.[39]

Contra. — Also that he may not.[40]

F. Records of Court. — The records of a court having charge of an insane person and his estate are privileged, to the extent that no one can examine them except persons claiming property affected by such records.[41]

1 Q. B. 185, 66 L. J. N. S. Q. B. 72, 75 L. T. 542.

37. Reg. *v.* Gazard, 8 Car. & P. 595, 34 E. C. L. 542.

38. Matter of Heyward, 1 Sandf. (N. Y.) 701. This case was a petition for writ of *habeas corpus* by person arrested as fugitive from justice. *Held,* that the magistrate issuing the writ could testify as to the papers upon which it was issued.

39. Taylor *v.* Larkin, 12 Mo. 103, 49 Am. Dec. 119.

40. Agan *v.* Hey, 30 Hun (N. Y.) 591.

41. *In re* Strachan, L. R. Ch. Div. 1895, Vol. 1, p. 439. In this case the court says: "It is not the practice in Lunacy to produce documents in the office to any one who wants to see them. No one is allowed to see them without an order of one of the Masters or of a Judge in Lunacy: see *Re Silcock's Lunacy* and *In re Wood,* 4 D. J. & S. 134. A person who has no interest except curiosity to see such documents is not allowed to see them. On the other hand, any one who can satisfy the Master or Judge that he desires to see such documents for any reasonable and proper purpose, is allowed to see them, provided always, if the lunatic is living, that he is not prejudiced thereby. If the lunatic is dead, the cases of *In re Wood,* 4 D. J. & S. 134, *In re* Ferrior Law Rep. 3 Ch. 175, 182, *In re* Smyth 15 Ch. Div. 286, 16 Ch. Div. 673, show that, if the applicant wants to see documents in the custody of the court, in order to make good a claim to the lunatic's property, such a purpose is *prima facie* sufficient to induce the court to allow inspection, even although the request is opposed by a rival litigant. Nor have I found any case in which an application by such a person, for such a purpose, has been made and refused. But it is obvious that there are some exceptions to this general rule. The court would not, under any circumstances, make an order for the inspection of the reports which are confidentially made to the court by its own medical advisers. But, with this exception, and possibly some others, which do not occur to me at the moment, the general rule is to allow inspection by any person claiming an interest in the property of a deceased lunatic, or alleged lunatic, who can satisfy the court that he wants inspection for some reasonable and proper purpose." As to the nature of this privilege the court says: "The fact that the documents are of such a kind that a litigant who had them could not be compelled to produce them does not, as a matter of law, disentitle his opponents from seeing them. As a matter of law, as distinguished from a matter which the court ought to consider in the exercise of its discretion, privilege is no bar to inspection in such a case as I am now considering. . . . When documents are not in the possession

2. Arbitrator. — An arbitrator may testify concerning facts coming under his notice in the course of a hearing which takes place before him.[42]

Course of Proceedings. — An arbitrator is competent to show the course of proceedings before him, up to the making of the award.[43]

A. What May Show. — a. *Course of Proceedings.* — An arbitrator may testify as to what matters were submitted to and discussed by himself and associates,[44] and what was openly decided in presence of parties to submission.[45]

Also that the award contained matters which were not contained in the submission,[46] also that the arbitrators exceeded their authority.[47]

b. *Mistake in Award.* — It has been held that an arbitrator's testimony may be admitted to show mistake in an award;[48] also that it may not.[49]

or power of a litigant, no question of discovery by him before trial, or of privilege from such discovery, can arise. Documents in the custody of the Masters in Lunacy are not in the possession or power of a litigant (Vivian *v.* Little (1); he has not to produce them or to make any affidavit about them; and if a Judge in Lunacy is applied to for inspection, privilege from discovery is an irrelevant topic for discussion except so far as it may bear upon the exercise by the court of the discretion which it has in the matter. The duty of the court is to act with perfect impartiality between the parties before it; not assisting either against the other, or more than the other, where neither can establish any right to such assistance against the other."

42. Graham *v.* Graham, 9 Pa. St. 254, 49 Am. Dec. 557.

43. Duke of Buccleuch *v.* Metropolitan Board of Works, 27 L. T. N. S. 1; Cole *v.* Blunt, 2 Bosw. (N. Y.) 116.

He may be examined to prove that no evidence was given on a particular subject, or that certain matters were, or were not, examined or acted upon; also he may show the time when and the circumstances under which the award was made; and any facts which transpired at the hearing. Spurck *v.* Crook, 19 Ill. 415, 425.

44. Zeigler *v.* Zeigler, 2 Serg. & R. (Pa.) 286; Roop *v.* Brubacker, 1 Rawle (Pa.) 304; Spurck *v.* Crook, 19 Ill. 415, 425.

In *In re* Dare Val. R. Co., L. R. 6 Eq. Cas. 429, the court says: "I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him. If there is mistake in point of subject-matter — that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded — these are subjects on which he ought to be examined, and also grounds for setting aside his award." Arbitrators in this case were appointed under special statute, the provisions of which are not shown by the report. See also *In re* Christie & Toronto Junction, 22 Ont. App. (Can.) 21, 33.

45. Boughton *v.* Seamans, 9 Hun. (N. Y.) 392.

46. Briggs *v.* Smith, 20 Barb. (N. Y.) 409, 418.

47. Matter of Williams, 4 Denio (N. Y.) 194.

48. Spurck *v.* Crook, 19 Ill. 415, 425. See also *In re* Rhys, etc., R. Co., 37 L. J. N. S. Eq. 719.

49. Newland *v.* Douglass, 2 Johns. (N. Y.) 62.

c. *Competent to Sustain Award.* — An arbitrator may be called as a witness to sustain award.[50]

d. *But Not to Impeach it.* — But he may not give testimony tending to impeach such award.[51]

(1.) May Impeach in Case of Fraud. — But arbitrator may give testimony tending to impeach the award when it is claimed to have been made by fraud.[52]

(2.) Arbitrator Not Joining in Award. — An arbitrator who did not join in an award, was not present when it was made, and dissents from it, and whose power was terminated by the appointment of an umpire, who made the award, may testify that on the hearing a certain matter was not taken into consideration,[53] and may also testify to acts of partiality and misconduct on the part of the other arbitrators.[54]

(3.) Cannot Show Dissent in Opinion. — An arbitrator cannot show that he differed in opinion from his associates, when the evidence shows that he was present when opinion was given, and did not dissent.[55]

(4.) Misconduct of Self. — An arbitrator cannot show his own misconduct.[56]

(5.) Misconduct of Associates. But if he dissents from the award he may show misconduct of associates.[57]

B. To Whom Privilege Belongs. — From language used in several cases, it seems that the privilege of refusing to testify belongs to the arbitrator, and if, when questioned concerning matters learned by him in the discharge of his duty, he does not object to testifying, no one else can object.[58]

50. Stone *v.* Atwood, 28 Ill. 30, 43; Ellison *v.* Weathers, 78 Mo. 115, 125.

51. *England.* — *In re* Rhys etc. R. Co., 37 L. J. N. S. Eq. 719.

Illinois. — Stone *v.* Atwood, 28 Ill. 30, 43; Pulliam *v.* Pensoneau, 33 Ill. 375; Tucker *v.* Page, 69 Ill. 179; Denman *v.* Bayless, 22 Ill. 300 (where an arbitrator was not permitted to testify that he never delivered, or intended to deliver the award).

Massachusetts. — Withington *v.* Warren, 10 Metc. 431; Bigelow *v.* Maynard, 4 Cush. 317.

Missouri. — Ellison *v.* Weathers, 78 Mo. 115, 125; Taylor *v.* Scott, 26 Mo. App. 249.

New York. — Doke *v.* James, 4 N. Y. 568, 575; French *v.* New, 20 Barb. 481; Mayor & Co. of New York *v.* Butler, 1 Barb. 325, 335; Campbell *v.* Western, 3 Paige 124.

Ohio. — Corrigan *v.* Rockefeller, 67 Ohio St. 354, 66 N. E. 95.

52. Pulliam *v.* Pensoneau, 33 Ill. 375, *citing* Spurck *v.* Crook, 19 Ill. 415.

In *In re* Rhys etc. R. Co., 37 L. J. N. S. Eq. 719, it is held that an arbitrator may give testimony to impeach his award, on a motion to set it aside on the ground of fraud or mistake, either as to the subject-matter of the reference, or as to some legal principle which goes directly to the basis on which the award is founded.

53. Mayor, etc. of New York *v.* Butler, 1 Barb. (N. Y.) 325, 335.

54. Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

55. Jackson *v.* Gager, 5 Cow. (N. Y.) 388.

56. Claycomb *v.* Butler, 36 Ill. 100.

57. Levine *v.* Lancashire Ins. Co., 66 Minn. 136, 68 N. W. 855.

58. Graham *v.* Graham, 9 Pa. St.

VII. COMMUNICATION IN VIEW OF LITIGATION.

Ordinary business communications, though confidential in fact, are not privileged in law. But it is held that certain communications made in view of litigation are privileged, although not passing from or to a legal adviser.

1. Between Partners. — Communications between partners in regard to litigation, which at time of communication they expect to begin, and do presently begin, are privileged.[59]

2. Between Principal and Agent. — It is held in England that communications had between principal and agent for the purpose of preparing for litigation to be conducted on behalf of the former are privileged.[60] Thus it has been held that reports of surveys

254, 49 Am. Dec. 557. See remarks of Lord Hardwick in anonymous case in 3 Atk. 644, 26 Eng. Reprint 1170; also note in American reprint of English Common Law Reports, 19 E. C. L. 406. But see Corrigan *v.* Rockefeller, 67 Ohio St. 354, 66 N. E. 95, where the court says: "An arbitrator has no privileged standing to exempt him from being called, and it is settled that for some purposes he is a competent witness."

In Ponsford *v.* Swaine, 1 Johns. & H. 433, 4 L. T. N. S. 15, 70 Eng. Reprint 816, it was held that arbitrators could not be compelled to produce in evidence the papers, plans and calculations which they had caused to be prepared to enable them to make their award; nor to answer questions concerning the nature of the accounts and proceedings before them.

59. *In re* Krueger, 2 Lowell 182, 14 Fed. Cas. No. 7,942.

60. Chartered Bank *v.* Rich, 4 Best & S. 73, 32 L. J. N. S. Q. B. 300, 116 E. C. L. 73; Ross *v.* Gibbs, L. R. 8 Eq. 522; Skinner *v.* Great Northern R. Co., L. R. 9 Exch. 298, 43 L. J. Exch. 150, 32 L. T. M. S. 233; Lafone *v.* Falkland Island's Co., 4 Kay & J. 34, 27 L. J. N. S. Ch. 25, 70 Eng. Reprint 14; Cossey *v.* London, B. & S. C. R. Co., L. R. 5 C. P. 146; The London T. & S. R. Co. *v.* Kirk, 51 L. T. N. S. 599.

In Woolley *v.* North L. R. Co., L. R. 4 C. P. Cas. 602, 610, 20 L. T. N. S. 813, 38 L. J. C. P. 317, the court says: "The question before us is, what is the general rule which is to regulate our discretion as to granting inspection of a certain class of documents, viz. reports and communications made by agents or servants, in the ordinary course of their duty, to their principals. It seems to me that the rule may be thus stated: — Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defense in an existing litigation, is privileged, and will not be ordered to be produced; but, if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation. The documents numbered 1, 2 and 3 in this case are reports made by officers or servants of the company to the manager in the ordinary course of their duty; therefore, whether litigation had begun or was contemplated or not, they must be produced. But, as to those numbered 5 and 7, assuming that they were reports of facts and opinions, but were made only because the company contemplated litigation, and for the purpose of enabling them to resist it, they ought not to be produced."

made by railway company for the purpose of procuring information to be used as evidence in litigation,[61] reports of mining engineer to mine owner,[62] report of physician of railway company who examined a person injured by the company's train, report to be used in damage suit brought by such person,[63] reports of scientific men to be used in preparing evidence for trial, are privileged.[64] It must appear that the documents were prepared, or letters written, in view of litigation.[65]

A. Limited to Pending Litigation. — It is held that, to be privileged, such communications must relate to litigation which has actually commenced.[66]

B. Threat Not Sufficient. — Threat of litigation is not sufficient.[67]

3. Party to Action and Party to Transaction. — It has been held that correspondence between a party to an action and a party to the transaction therein involved, had after threat of litigation, and by advice of counsel, for the purpose of obtaining evidence, is privileged.[68]

4. Writing Signed by Opponent. — If in course of preparing evidence for his principal, an agent obtains writing signed by principal's opponent, such writing is not privileged.[69]

5. Minutes of Corporation. — It has been held that minutes of

In Fenner *v.* London & S. E. R. Co., L. R. 7 Q. B. 767, 41 L. J. Q. B. 313, 26 L. T. 971, production was ordered because the reports there in question were not sufficiently shown to have been made for use in litigation. See also Boughton *v.* The Citizen's Ins. Co., 11 Ont. Pr. (Can.) 110. *Compare* Martin *v.* Butchard, 36 L. T. N. S. 732. So held in America, Davenport Co. *v.* Pennsylvania R., 166 Pa. St. 480, 31 Atl. 245. Apparently *contra,* Kerr & Gillespie, 7 Beav. 572, 49 Eng. Reprint 1188.

61. Canadian Pac. R. Co. *v.* Conmee, 11 Ont. (Can.) 297.

62. Bargaddie Coal Co. *v.* Wark, 3 McQueen, H. L. (Eng.) 467, 488, 495.

63. Friend *v.* London C. & D. R. Co., 46 L. J. N. S. Ex. 696, 2 Ex. Div. 437, 36 L. T. N. S. 729; Cossey *v.* London B. & S. C. R. Co., L. R. 5 C. P. 146. *Compare* Baker *v.* London & S. W. R., 37 L. J. N. S. Q. B. 53, 8 B. & S. 645, L. R. 3 Q. B. 91. See explanation of this case in Cossey *v.* London B. & C. R. Co., *supra.*

64. Pacey *v.* Metropolitan Tramways Co., 46 L. J. N. S. C. 698; Woolley *v.* North London R. Co., L. R. 4 C. P. 602, 610, 38 L. J. C. P. 317, 20 L. T. 813.

65. Kerry County Council *v.* Liverpool S. Assn., Irish Rep. 1905, Vol. 2, p. 38; Fenner *v.* London & S. E. R., L. R. 7 Q. B. 767, 41 L. J. Q. B. 313, 26 L. T. 971; Westinghouse *v.* Midland R. Co., 48 L. T. N. S. 462.

66. Malden *v.* Great Northern R. Co., L. R. 9 Exch. 300; Toronto G. R. Co. *v.* Taylor, 6 Ont. Pr. (Can.) 227.

67. Anderson *v.* Bank of British Columbia, L. R. 2 Ch. Div. 644, 45 L. J. N. S. Ch. 449, 35 L. T. N. S. 76, followed in Van Volkenburg *v.* The Bank of British N. A., 5 Columbia 4.

68. Donahue *v.* Johnston, 14 Ont. Pr. (Can.) 476.

69. Tobakin *v.* Dublin S. D. T. Co., Irish Rep. 1905, Vol. 2, p. 58. In this case plaintiff sued for damages caused by defendant's alleged negligence. An agent of defendant called on plaintiff and obtained from him a signed statement showing how the accident occurred. *Held,* that

a railway corporation made with reference to litigation are privileged.[70]

6. Admissibility in Court's Discretion. — It has been held to rest in the court's discretion to admit letters between principal and agent in regard to evidence, although taking place after litigation has begun.[71]

7. Regular Reports In Course of Employment. — Reports which agent makes to his principal in the ordinary course of his duty and not in view of litigation, are not privileged.[72]

VIII. COMMUNICATIONS IN REGARD TO COMPROMISE.

1. Proposed. — Communications between attorneys for opposing parties had for the purpose of effecting a compromise of matters in controversy between their clients are privileged.[73]

2. Accomplished. — But if a compromise has been in fact accomplished, a letter from one party to the other proposing the compromise may be admitted.[74]

IX. EXPERT IN PATENT CASE.

The rules of privilege applicable to communications between attorney and client, or counsel and associate govern communications of a party to patent litigation, or his counsel, with an expert in the art in question, employed by the party to manage the litigation in his behalf, or with such an expert employed as assistant to counsel.[75]

plaintiff was entitled to production of this writing.

70. Worthington *v.* Dublin W. & W. R. Co., 22 L. R. Ir. 310.

Municipal Corporation. — See Mayor of Bristol *v.* Cox, L. R. 26 Ch. Div. 678, 50 L. T. N. S. 719.

71. Fenner *v.* London & S. E. R., L. R. 7 Q. B. 767, 41 L. J. Q. B. 313, 26 L. T. 971.

72. Skinner *v.* Great Northern R. Co., L. R. 9 Exch. 298, 43 L. J. Ex. 150, L. R. 9 Ex. 298, 32 L. T. 233; Woolley *v.* North L. R. Co., L. R. 4 C. P. 602, 38 L. J. C. P. 317, 20 L. T. 813; Parr *v.* London, C. & D. R., 24 L. T. N. S. 558. Report by train-conductor to railway company, showing injury to a certain person and circumstances under which it was received, and made in compliance with a rule of the company, is not privileged. Carlton *v.* Western & A. R. Co., 81 Georgia, 531, 7 S E. 623.

73. Jardine *v.* Sheridan, 2 Car. & K. 24, 61 E. C. L. 24.

74. Collier *v.* Nokes, 2 Car. & K. 1012, 61 E. C. L. 1011.

75. Lalance & Grosjean Mfg. Co. *v.* Haberman Mfg. Co., 87 Fed. 563. In this case the court says: "While I do not find any express authority dealing with the question to what extent, if at all, communications passing between counsel and client on the one side and the so-called 'expert' on the other are privileged, the conditions of patent litigation are such that a similar public policy would seem to require an extension of the doctrine of privilege. It is quite conceivable that a patent may be owned by a corporation which would be the actual party litigant, but the entire management of its affairs touching the use of such patent, and the taking of whatever steps may be necessary to sustain it and prevent infringement, be confided to

Privilege Lost, if Expert Acts as Witness. — The privilege is lost, if the expert ceases to act as an assistant, and becomes a witness.[76]

X. CERTAIN COMMUNICATIONS NON-PRIVILEGED.

It has been held that the following communications, or knowledge, are non-privileged:

1. Ordinary Business Communications, although confidential in point of fact.[77]

2. Telegraphic Dispatch is not privileged.[78]

some general manager or superintendent skilled in the art upon whose judgment solely the officers of the corporation might be accustomed to rely in deciding whether they should prosecute an action, or refrain from doing so, and be the sole one finally to determine upon what lines and to what extent the litigation should be conducted. In such a case the expert would be in reality, so far as litigation upon the particular patent was concerned, the *alter ego* of the complainant; and the privilege which public policy secures to the individual litigant could not be secured to the corporation litigant unless it was so extended as to include him. So, too, questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor. In such a case it would seem fair to apply the same rule to the expert as to the counsel. It would seem, however, that in such a case the privilege should be lost when the expert ceases to act as counsel, and allows himself to be made a witness; at least, to the extent to which he testifies."

76. Lalance & Grosjean Mfg. Co. *v.* Haberman Mfg. Co., 87 Fed. 563.

77. Principal and Agent. — *England.* — Mahony *v.* National W. L. A. F., L. R. 6 C. P. 252, 40 L. J. N. S. C. P. 203, 24 L. T. N. S. 548 (Life insurance company and medical examiner); M'Corquodale *v.* Bell, 1 C. P. 471, 45 L. J. N. S. C. P. 329, 35 L. T. N. S. 261 (recognizes rule); Fenner *v.* London & S. E. R. Co., L. R. 7 Q. B. 767, 41 L. J. N. S. Q. B. 313, 26 L. T. N. S. 971 (local agents and general officers of railway company); Cossey *v.* London, B. & S. C. R. Co., L. R. 5 C. P. 146; Hopkinson *v.* Lord Burghley, L. R. 2 Ch. 447, 36, L. J. N. S. Ch. 504 (letters relating to affairs of a club); Telford *v.* Ruskin, 29 L. J. N. S. Ch. 867 (names and private dealings of customers of merchant).

United States. — Holmes *v.* Comegys, 1 Dall. 439 (confidential agent and principal); Corps *v.* Robinson, 2 Wash. C. C. 388.

Georgia. — Carlton *v.* Western & A. R. Co., 81 Ga. 531, 7 S. E. 623 (report made by conductor of railway train to company operating the train, showing nature of injury to employe and the circumstances under which it occurred).

New York. — Sondheim *v.* Schmidt, 32 Misc. 737, 66 N. Y. Supp. 1034 (conversation between employer and clerk. Knowledge acquired by clerk in conduct of employer's business).

78. State *v.* Litchfield, 58 Me. 267; *Ex parte* Brown, 72 Mo. 83, 37 Am. Rep. 426; National Bank *v.* National Bank, 7 W. Va. 544. In this latter case the court says: "We are not prepared to approve the doctrine that has been advanced that telegraphic communications are privileged from disclosure, when a court shall have decided that they are proper testimony to promote the ends of justice. They are not necessarily confidential in their character, and if they were, they would not merely, for that reason be protected. Letters passing through the mails are protected by act of Congress from being seized and opened for the purpose of furnishing testimony. They

A. Action Between Receiver and Sender. — In action between receiver and sender of telegraphic message, officers of the transmitting company may be compelled to produce the message in evidence,[79] although a statute makes it a misdemeanor for a person engaged in transmitting such dispatches to make known the contents of a message to any person except the addressee.[80]

B. In Criminal Prosecution. — Such dispatch is non-privileged in criminal prosecution against receiver or sender.[81]

3. Banking Matters. — A banker's knowledge of his customer's account is non-privileged.[82] So as to the books and records of a bank, although containing records of transactions relating to national debt.[83] So as to correspondence between a bank and its agents.[84]

4. Medical Adviser to Life Insurance Company. — Report of physician acting as medical examiner for life insurance company, to his principal as to health of applicant for insurance is not privileged.[85]

5. Newspaper Reporter. — Nor is a communication to a newspaper reporter.[86]

6. Mason. — Nor are statements made by a mason in confidence to a fellow member of that order, although the obligation of a mason prevents his disclosing matters told him in confidence by a brother member.[87]

7. Attorney and Clerk. — In an action against an attorney his clerk cannot refuse to testify concerning defendant's admissions, on the ground that witness had taken an oath to keep his employer's secrets, it not appearing that the testimony called for in-

are protected for reasons of high public policy. But no such legislative enactment, state or national, shields the communications by the telegraph; the adoption of the principle would limit the field of inquiry after truth, in the investigation of human affairs, and would be introducing a new class of privileged communications unknown to the common law. When the legislative power can be so easily invoked, if reasons of sufficient moment can be made to appear for the purpose, it may be wiser and better for the courts to refrain from such a line of decision."

See also Re Dwight & Macklam, 15 Ont. 148; Tomline *v.* Tyler, 44 L. T. N. S. 187; United States *v.* Hunter, 15 Fed. 712.

79. Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484, 39 Am. Rep. 170; Ince's Case, 20 L. T. N. S. 421.

80. Woods *v.* Miller, 55 Iowa, 168, 7 N. W. 484, 39 Am. Rep. 170.

81. *In re* Storror, 63 Fed. 564.

82. *In re* Davies, 68 Kan. 791, 75 Pac. 1048; Lloyd *v.* Freshfield, 2 Car. & P. 325, 12 E. C. L. 149; Hannum *v.* McRae, 18 Ont. Pr. (Can.) 185; *s. c.* 17 Ont. Pr. 567; Greenl. (15th ed.) § 248.

83. Heslop *v.* Bank of England, 6 Sim. 192, 58 Eng. Reprint 566.

84. Anderson *v.* Bank of British Columbia, 2 L. R. Ch. Div. 644, 45 L. J. N. S. Ch. 449, 35 L. T. N. S. 76.

85. Lee *v.* Hammerton, 10 L. T. N. S. 730; Mahony *v.* National W. L. A. Co., L. R. 6 C. P. 252, 40 L. J. N. S. C. P. 203, 24 L. T. N. S. 548.

86. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; *Ex parte* Lawrence, 116 Cal. 298, 48 Pac. 124.

87. Owens *v.* Frank, 7 Wyo. 457, 53 Pac. 282, 75 Am. St. Rep. 932.

volved a disclosure of any matter affecting the affairs of his employer's clients.[88]

8. Commercial Agency. — Confidential communication made to a commercial agency is not privileged.[89]

9. Ordinary Communication, Under Oath of Secrecy. — Voluntary statement between persons not occupying any of the confidential relations hereinbefore treated must be given in evidence by the person to whom it was made, although he may have taken an oath not to disclose it.[90]

10. Letter as to Character of Servant. — A letter in which the writer makes statements concerning the character of a servant whom the receiver contemplates employing is not privileged, and may be introduced in evidence in an action against the writer.[91]

88. Webb *v.* Smith, 1 Car. & P. 337, 11 E. C. L. 410.

89. Shauer *v.* Alterton, 151 U. S. 607, where it was held that statement made by a person to Bradstreet's commercial agency was not privileged.

90. Rex *v.* Shaw, 6 Car. & P. 372, 25 E. C. L. 443; Rex *v.* Thomas, 7 Car. & P. 346; Mills *v.* Griswold, 1 Root (Com.) 383.

91. Webb *v.* East, L. R. 5 Exch. Div. 108, 49 L. J. Exch. 250, 41 L. T. N. S. 715.

PRIVILEGE OF WITNESSES.—See Witnesses.

PRIZE.—See Admiralty.

PROBABLE CAUSE.—See False Imprisonment; Libel and Slander; Malicious Prosecution.

PROCESS.—See Service.

PROMISE OF MARRIAGE.—See Breach of Promise.

PROSTITUTION.—See Adultery; Disorderly House; Fornication.

PROTEST.—See Certificates.

PROXIMATE CAUSE.—See Cause; Injuries to Person; Master and Servant; Negligence.

PUBLIC ADMINISTRATORS.—See Executors and Administrators.

PUBLIC ASSEMBLAGE.—See Disturbance of Public Assemblages.

PUBLICATION.—See Service.

PUBLIC DOCUMENTS.—See Documentary Evidence; Records.

PUBLIC DOMAIN.—See Public Lands.

PUBLIC EASEMENTS.—See Dedication.

PUBLIC INTEREST.—See Libel and Slander.

PUBLIC LANDS.

By E. S. Page.

I. MODE OF PROVING TITLE.

1. Judicial Notice. — Rules and regulations adopted by the federal land department,[1] acts of Congress or legislatures,[2] the governmental system of surveys,[3] matters of public history,[4] or geographical facts,[5] relating to or affecting the title to public lands, will be judicially noticed. Courts will also take notice of the fact that title to public lands was originally in the United States,[6] but not that such was the fact at any particular date.[7]

2. General Presumption of Regularity of Official Acts. — It is generally presumed that officers of the federal and state land departments have performed their official duties as required by law,[8]

1. Caha *v.* United States, 152 U. S. 211; United States *v.* Williams, 6 Mont. 379, 12 Pac. 851; Larson *v.* First Nat. Bank, 66 Neb. 595, 92 N. W. 729; United States *v.* Gumm, 9 N. M. 611, 58 Pac. 398; Whitney *v.* Spratt, 25 Wash. 62, 64 Pac. 919, 87 Am. St. Rep. 738.

In Hensley *v.* Tarpey, 7 Cal. 288, it was held that the courts of California were not bound to take official notice of the rules and regulations of the various departments of the federal government. But see Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680, holding the contrary.

Judicial notice will be taken of an executive order creating an Indian reservation. Apis *v.* United States, 88 Fed. 931.

2. Acts of Congress. — Gooding *v.* Morgan, 70 Ill. 275; Hamilton *v.* Shoaff, 99 Ind. 63; Wood *v.* Nortman, 85 Mo. 298; Papin *v.* Ryan, 32 Mo. 21.

The courts of California will take judicial notice, that under the Act of Congress of March 3, 1851, a person claiming lands by virtue of a Mexican grant should petition for a confirmation thereof. Semple *v.* Hagar, 27 Cal. 163.

Acts of Legislature. — In McCarver *v.* Herzberg, 120 Ala. 523, 25 So. 3, the court took notice of a legislative grant. See also People *v.* Oakland Water Front Co., 118 Cal. 234, 50 Pac. 305. But see Holmes *v.* Anderson, 59 Tex. 481, holding that judicial notice would not be taken of a special act of the legislature directing the issuance of a certificate to a particular person.

3. See article on "Judicial Notice," Vol. VII, p. 1031.

4. See article on "Judicial Notice," Vol. VII, p. 916.

5. See article on "Judicial Notice," Vol. VII, p. 910.

6. In Smith *v.* Stevens, 82 Ill. 554, the court took judicial notice of the fact that title to a certain section of land was at one time vested in the United States, and that it had been granted to Illinois. See also Bonner *v.* Phillips, 77 Ala. 427.

In Belcher Con. G. M. Co. *v.* Deferrari, 62 Cal. 160, the court took judicial notice of the fact that certain mining claims were originally owned by the United States.

7. Schwerdtle *v.* Placer County 108 Cal. 589, 41 Pac. 448.

8. In holding that proper notice of the forfeiture of an entry on school lands, by reason of default in payment of interest, would be presumed, the court said: "In other words, the law will presume official acts of public officers to have been rightly done, unless the circumstances of the case overturn this presumption." State *v.* Graham, 21 Neb. 329, 32 N. W. 142.

In Coombs *v.* Lane, 4 Ohio St. 112, this general presumption was applied to the act of an officer in designating and selecting school lands. See also P. & T. R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448, 458; Sprayberry *v.* State, 62 Ala. 459; Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680; Weaver *v.* Fairchild, 50 Cal. 360; Fulton *v.* McAfee, 5 How. (Miss.) 751; Green *v.* Barker, 47 Neb. 934, 66 N. W. 1032.

and especially after the lapse of a long period of time.[9] But this presumption may be overcome.[10]

3. Documentary Evidence. — A. PATENTS. — a. *Issuance.* — The issuance of a patent can be proved by a certified copy or exemplification of the record as well as by producing the patent.[11] An entry in the books of the land office that the purchase money for land had been paid is evidence that the patent issued to the one who paid the money, even though the patent itself is not produced.[12] The date on the patent is evidence of the time of issuance.[13]

b. *Acceptance.* — Acceptance of a patent will generally be presumed in the absence of express dissent.[14] Evidence that the pat-

In Woods *v.* Sawtelle, 46 Cal. 389, it was held that the fact that an application to purchase state lands had been approved by the surveyor-general, raised no presumption that it conformed to the statute.

Authority Not Presumed. — In State *v.* Stanley, 14 Ind. 409, it is intimated that authority of the official to act would not be presumed. But see People *v.* Livingston, 8 Barb. (N. Y.) 253, where it was held that authority of a governor to make a grant would be presumed after a great number of years. See also Parkinson *v.* Bracken, 1 Pin. (Wis.) 174, 39 Am. Dec. 296.

9. McPheeters *v.* Wright, 110 Ind. 519, 10 N. E. 634.

10. In Gough *v.* Dorsey, 27 Wis. 119, the presumption was overcome by evidence that the necessary papers were not on file, and in rendering judgment the court said: "In the absence of all proof to the contrary, the correctness of the action of the commissioners in canceling the entry of the defendant and allowing that of the plaintiff may well be presumed. On the other hand, if previous application had been duly made by the plaintiff, accompanied by the requisite payment of purchase money, the presumption is equally strong that it would have been shown by proper entries in the books; and so, too, is the presumption that the application itself would have been found in the proper place, subject of course to the accident of being occasionally lost or mislaid. The presumption, therefore, affords no aid to the plaintiff; and, besides, it is to be resorted to only where the proofs are doubtful, or in the absence of proof." See also State *v.* Graham, 21 Neb. 329, 32 N. W. 142.

11. Vance *v.* Kohlberg, 50 Cal. 346; Ney *v.* Mumme, 66 Tex. 268, 17 S. W. 407; Stevens *v.* Geiser, 71 Tex. 140, 8 S. W. 610.

12. Willis *v.* Bucher, 3 Wash. (U. S.) 369.

13. McGowan *v.* Crooks, 5 Dana (Ky.) 65.

14. United States *v.* Schurz, 102 U. S. 378; LeRoy *v.* Clayton, 2 Sawy. (U. S.) 493, 15 Fed. Cas. No. 8,268; Le Roy *v.* Jamison, 3 Sawy. 369, 15 Fed. Cas. No. 8,271; Chipley *v.* Farris, 45 Cal. 527.

In Alvarado *v.* Nordhold, 95 Cal. 116, 30 Pac. 211, it is said that "when it is signed, sealed, and recorded in the records of the land-office, then, so far as the government is concerned, the title to the land therein described has been transferred to the grantee, and 'its acceptance by the grantee will then be conclusively presumed, unless, immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land-office.'"

Reasons. — "No one can be compelled by the government, any more than by an individual, to become a purchaser, or even to take a gift. No one can have property, with its burdens or advantages, thrust upon him without his assent. In order, therefore, that the patent of the government, like the deed of a private person, may take effect as a conveyance, so as to bind the party to whom it is executed, and transfer the title to him, it is essential that it should be accepted. As the possession of property is universally, or

entee treated the land as his,[15] or of a previous application for the patent,[16] is persuasive evidence of its actual acceptance.

c. *As Evidence.* — **(1.) In General.** — A patent is evidence of the fact that all the requisites to a legal sale of public lands have been complied with,[17] and when in proper form is admissible without preliminary proof of title in the government,[18] execution,[19] or deliv-

nearly so, considered a benefit, the acceptance by the grantee of the conveyance transferring the title, where no personal obligation is imposed, whether the conveyance be a patent of the government or the deed of an individual, will always be presumed in the absence of express dissent, whenever the conveyance is placed in a condition for acceptance." LeRoy *v.* Jamison, 3 Sawy. 369, 15 Fed. Cas. No. 8,271.

15. Thus, evidence that the grantees made a division of the land is sufficient (Woods *v.* Banks, 14 N. H. 101). Evidence that he assumed to dispose of the land by will is sufficient to show acceptance (Mackinnon *v.* Barnes, 66 Barb. (N. Y.) 91).

16. United States *v.* Schurz, 102 U. S. 378; LeRoy *v.* Jamison, 3 Sawy. 369, 15 Fed. Cas. No. 8,271. In the latter case such evidence is said to be strong when the patent conforms to the application, but not conclusive when it is issued without a final survey. "He asked what the law authorized him to have, and so far as the law is disregarded in the survey he stands free as to his acceptance of the result."

17. In Goodlet *v.* Smithson, 5 Port. (Ala.) 245, 30 Am. Dec. 561, the court said: "In the ordinary case of contracts between individuals, relating to the sale of lands, the title of the seller does not pass to the purchaser, except a conveyance in the form prescribed by law be actually executed, previous to which, the interest of the purchaser is a mere equity; but this is because the title to land can pass alone by reason of some one of the common assurances, or conveyances which are known to the law. In case of sales made by the United States, the law gives the right, and the patent may be considered, not as the title itself, but as the evidence by which it is shown, that the prerequisites to a legal sale have been complied with." See also Adams *v.* Burke, 3 Sawy. (U. S.) 415, 1 Fed. Cas. No. 49; Wythe *v.* Haskell, 3 Sawy. (U. S.) 574, 30 Fed. Cas. No. 18,118; Roeder *v.* Fouts, 5 Wash. (U. S.) 135, 31 Pac. 432.

18. Knabe *v.* Burden, 88 Ala. 436, 7 So. 92; Long *v.* McDow, 87 Mo. 197; Clark *v.* Holdridge, 12 App. Div. 613, 43 N. Y. Supp. 115; Reynolds *v.* Weiss, 27 Wis. 450.

In Grant *v.* Smith, 26 Mich. 201, it was held that a swamp land patent from the state was admissible without proof of ownership in the state.

In Keeran *v.* Griffith, 31 Cal. 464, the court in holding that a patent from the state was not presumptive evidence that the land was not swamp and overflowed lands said: "This case was formerly before the court, and is reported in 27 Cal. 87. On that appeal it was held that the court erred in instructing the jury that the character of the lands, as to their being dry lands, or swamp and overflowed lands, was conclusively established by the survey made under the authority of the general government. The complaint now comes from the other party, the defendant, who contends that the court erred in admitting the patent from the state as 'presumptive evidence that the land was swamp and overflowed land,' and in instructing the jury that the patent was *prima facie* evidence that the land was of that character. The learned judge erred, we think, in assigning to the patent any value as evidence of that fact as against the defendant, who claimed under the United States by virtue of the Homestead Act of 1862." See also Keeran *v.* Allen, 33 Cal. 542.

19. Robinson *v.* Cahalan, 91 Ala. 479, 8 So. 415; Yount *v.* Howell, 14 Cal. 465; Gallup *v.* Armstrong, 22 Cal. 481; Steeple *v.* Downing, 60 Ind. 478.

ery.[20] Recordation is not necessary to render a patent admissible.[21]

(2.) Weight in Evidence. — A patent is higher evidence of title than a receiver's certificate of prior purchase;[22] but in equity, the latter, if shown to be prior, will prevail.[23] It is also higher evidence than a title by confirmation.[24] It is sometimes said to be the highest evidence of title.[25]

d. *Presumption of Validity.* — It is presumed that a patent issued by the United States or a state is valid[26] and that all incipient

As applied to colonial grants, see People *v.* Livingston, 8 Barb. (N. Y.) 253; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

Reasons. — "The seal of the general land office is a public seal, and stands on the footing of the seal of a court of record. In this character it implies verity, and is of itself sufficient proof of the due execution of any instrument to which the law requires its annexation." Bowser *v.* Warren, 4 Blackf. (Ind.) 522.

20. *United States.* — United States *v.* Schurz, 102 U. S. 378; LeRoy *v.* Clayton, 2 Sawy. 493, 15 Fed. Cas. No. 8,268.

California. — Houghton *v.* Hardenberg, 53 Cal. 181; Cruz *v.* Martinez, 53 Cal. 239; Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647; Chipley *v.* Farris, 45 Cal. 527.

Louisiana. — Kittridge *v.* Breaud, 2 Rob. 40.

Washington. — Sayward *v.* Thompson, 11 Wash. 706, 40 Pac. 379.

21. A statute of the United States requires the recordation of all patents before they are issued, but when issued they must be received as evidence of title without proof of such recordation. Callaway *v.* Fash, 50 Mo. 420.

22. Wilcox *v.* Jackson, 13 Pet. (U. S.) 498; Isaacs *v.* Steel, 4 Ill. 97; Wiggins *v.* Lusk, 12 Ill. 132; Dickenson *v.* Brown, 9 Smed. & M. (Miss.) 130.

In Mississippi, it is provided by statute that "A certificate of entry shall be taken and received as vesting a full, complete and legal title, so far as to enable the holder to maintain any action thereon, and the same shall be received in evidence as such, in any court in this state." Construing this, the Supreme court of this state has said: "It makes the certificate but a substitute for a better title. It does not profess to place it on an equal footing with a patent. The public lands belong to the United State, and Congress has declared what shall be the complete legal title. When that legal title passes, it must be intrinsically superior to a mere entry." Hester *v.* Kembrough, 12 Smed. & M. (Miss.) 659.

23. Wilcox *v.* Jackson, 13 Pet. (U. S.) 498; Isaacs *v.* Steel, 4 Ill. 97; Wiggins *v.* Lusk, 12 Ill. 132.

24. Papin *v.* Ryan, 36 Mo. 406.

25. Knabe *v.* Burden, 88 Ala. 436, 7 So. 92; Bell *v.* Hearne, 10 La. Ann. 515.

26. *United States.* — Minter *v.* Crommelin, 18 How. 87; Smelting Co. *v.* Kemp, 104 U. S. 636; Jenkins *v.* Trager, 40 Fed. 726; Harkrader *v.* Carroll, 76 Fed. 474; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29.

California. — Leviston *v.* Ryan, 75 Cal. 293, 17 Pac. 239; Collins *v.* Bartlett, 44 Cal. 371; Hooper *v.* Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56.

Kansas. — Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600.

Nebraska. — Green *v.* Barker, 47 Neb. 934, 66 N. W. 1032.

Wisconsin. — Reynolds *v.* Weiss, 27 Wis. 450; Schnee *v.* Schnee, 23 Wis. 377, 99 Am. Dec. 183; Knight *v.* Leary, 54 Wis. 459.

A survey will be presumed to have been made if necessary to support a grant. People *v.* Livingston, 8 Barb. (N. Y.) 253.

Colonial Grants or Patents. — This general presumption applies to colonial patents, but a grant by the provincial governor of New Hampshire will not be presumed valid in what

steps had been regularly taken before the title was perfected by the patent.[27] It follows that a patent is admissible in evidence without any evidence of the performance of the preliminary steps.[28]

e. *Conclusiveness of Presumption as to Validity.* — **(1.) In Collateral Proceeding at Law.** — This presumption is generally conclusive as against collateral attack in an action at law,[29] and evidence

is now Vermont without any evidence upon the subject. Woods *v.* Banks, 14 N. H. 101.

27. *United States.* — Brush *v.* Ware, 15 Pet. 93; Smelting Co. *v.* Kemp, 104 U. S. 636; Colorado Coal & Iron Co. *v.* United States, 123 U. S. 307; United States *v.* Maxwell Land Grant Co., 121 U. S. 325, *s. c.*, 122 U. S. 365; Bouldin *v.* Massie, 7 Wheat. 122; Bagnell *v.* Broderick, 13 Pet. 436; Southern Pac. R. Co. *v.* Stanley, 49 Fed. 263; Harkrader *v.* Carroll, 76 Fed. 474.

Arkansas. — State *v.* Morgan, 52 Ark. 150, 12 S. W. 243.

California. — Merriam *v.* Bachioni, 112 Cal. 191, 44 Pac. 481; Burrell *v.* Haw, 40 Cal. 373; Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Yount *v.* Howell, 14 Cal. 465; Hooper *v.* Young, 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56.

Colorado. — Smith *v.* Pipe, 3 Colo. 187; Poire *v.* Wells, 6 Colo. 406.

Illinois. — Trustees of Schools *v.* Allen, 21 Ill. 120.

Kansas. — Richards *v.* Griffith, 57 Kan. 234, 45 Pac. 600.

Michigan. — Weber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469.

Minnesota. — Sharon *v.* Wooldrick, 18 Minn. 325.

Mississippi. — Fulton *v.* McAlfee, 5 How. 751; Surget *v.* Little, 2 Cushm. 118; Sweatt *v.* Corcoran, 37 Miss. 513; Carter *v.* Spencer, 4 How. 42, 34 Am. Dec. 106.

Missouri. — Hill *v.* Miller, 36 Mo. 182; Barry *v.* Gamble, 8 Mo. 88; Allison *v.* Hunter, 9 Mo. 749; Gibson *v.* Chouteau, 39 Mo. 536.

Nebraska. — Green *v.* Barker, 47 Neb. 934, 66 N. W. 1032.

Ohio. — Strong *v.* Lehmer, 10 Ohio St. 93.

Wisconsin. — Reynolds *v.* Weiss, 27 Wis. 450; Schnee *v.* Schnee, 23 Wis. 377, 99 Am. Dec. 183.

Wyoming. — Demars *v.* Hickey, 13 Wyo. 371, 80 Pac. 521, rehearing denied, 81 Pac. 705.

Thus, where one of the necessary steps is an order from the secretary to the register to offer the land for sale, because of prior abandonment, it will be presumed that the order was given. Minter *v.* Crommelin, 18 How. (U. S.) 87. It raises the presumption that the land was regularly surveyed and offered for sale, and regularly entered by the patentee. Surget *v.* Little, 2 Cushm. (Miss.) 118.

Reasons. — The reasons are stated by Marshall, C. J., in an early case: "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all the proceedings are completed by a patent issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself." Polk *v.* Wendal, 9 Cranch (U. S.) 87. See also Strong *v.* Lehmer, 10 Ohio St. 93.

28. Southern Pac. R. Co. *v.* Purcell, 77 Cal. 69, 18 Pac. 886; Sweatt *v.* Corcoran, 37 Miss. 513.

29. *United States.* — Smelting Co. *v.* Kemp, 104 U. S. 636; Chapman *v.* School Dist., 5 Fed. Cas. No. 2,607; DeGuyer *v.* Banning, 167 U. S. 723, *affirming* 27 Pac. 761; Johnson *v.* Drew, 171 U. S. 93; Burfenning *v.* Chicago St. P. M. & O. R. Co., 163 U. S. 321; New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29; Boynton *v.* Haggart, 120 Fed. 819, 57 C. C. A. 301; Co-

as to possession or adverse rights of others,[30] settlement and improvement,[31] the character of the land,[32] or fraud,[33] will be excluded. Additional instances of the application of this rule will be found in the note.[34] But evidence is admissible in an action at

well *v.* Lammers, 21 Fed. 200; Cahn *v.* Barnes, 5 Fed. 326; Sharp *v.* Stephens, 21 Fed. Cas. No. 12,710.

Alabama. — Stringfellow *v.* Tennessee Coal, I. & R. Co., 117 Ala. 250, 22 So. 997.

Arizona. — Kansas City M. & M. Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9.

Arkansas. — State *v.* Morgan, 52 Ark. 150, 12 S. W. 243.

California. — Turner *v.* Donnelly, 70 Cal. 597, 12 Pac. 469; Irvine *v.* Tarbat, 105 Cal. 237, 38 Pac. 896; Yount *v.* Howell 14 Cal. 465; Doll *v.* Meador, 16 Cal. 295; Ely *v.* Frisbie, 17 Cal. 250; Miller *v.* Dale, 44 Cal. 562; Thompson *v.* Doaksum, 68 Cal. 593, 10 Pac. 199.

Colorado. — Poire *v.* Wells, 6 Colo. 406.

Iowa. — Harmon *v.* Steinman, 9 Iowa 112.

Louisiana. — Jones *v.* Wheelis, 4 La. Ann. 541; Ford's Heirs *v.* Morancy, 14 La. Ann. 77; Lott *v.* Prudhomme, 3 Rob. 293; Carter *v.* Monetti, 6 Rob. 82; McGill *v.* McGill, 4 La. Ann. 262.

Michigan. — Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469.

Mississippi. — Sweatt *v.* Corcoran, 37 Miss. 513; Carter *v.* Spencer, 4 How. 42, 34 Am. Dec. 106; Dixon *v.* Porter, 1 Cushm. 84.

Missouri. — Allison *v.* Hunter, 9 Mo. 749.

Montana. — Silver Bow M. & M. Co. *v.* Clark, 5 Mont. 378, 5 Pac. 570; Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58.

Nebraska. — Green *v.* Barker, 47 Neb. 934, 66 N. W. 1032.

New Mexico. — Chavez *v.* Chavez de Sanchez, 7 N. M. 58, 32 Pac. 137.

North Carolina. — Dosh *v.* Cape Fear Lumb. Co., 128 N. C. 84, 38 S. E. 284 (state grant).

Oregon. — Sanford *v.* Sanford, 19 Or. 1, 13 Pac. 602.

Utah. — Kahn *v.* Old Tele. Min. Co., 2 Utah 174; Ferry *v.* Street, 4 Utah 521, 7 Pac. 712.

Wisconsin. — Parkison *v.* Bracken, 1 Pin. 174, 39 Am. Dec. 296.

30. Evidence that one was in possession of land and had adverse rights to those of the patentee at the time the patent issued is not admissible in an attack on the patent in an action at law. See New Dunderberg M. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; Johnson *v.* Drew, 171 U. S. 93; De Guyer *v.* Banning, 167 U. S. 723.

31. Thus, a patent is conclusive evidence of settlement and performance of subsequent conditions as to improvements. Chapman *v.* School Dist., 5 Fed. Cas. No. 2,607; Jenkins *v.* Gibson, 3 La. Ann. 203.

32. When a patent is issued upon a preemption or homestead claim, it is conclusive evidence that the land in question was open to preemption and homestead. Irvine *v.* Tarbat, 105 Cal. 237, 38 Pac. 896. See also Cowell *v.* Lammers, 21 Fed. 200; Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279; Klauber *v.* Higgins, 117 Cal. 451, 49 Pac. 466; Standard Quick-Silver Co. *v.* Habishaw, 132 Cal. 115; Trapahagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58.

Contra. — In Kansas City M. & M. Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9, it was held that a preemption patent might be impeached in an action at law by showing that at the date of the final proofs there were known to exist mineral deposits which exempted it from such entry.

33. Evidence of fraud in procuring a patent is not admissible at law. Field *v.* Seabury, 60 U. S. 323; State *v.* Morgan, 52 Ark. 150, 12 S. W. 243; Miller *v.* Dale, 44 Cal. 562; Turner *v.* Donnelly, 70 Cal. 597, 12 Pac. 469; Kein's Heirs *v.* Argenbright, 26 Iowa 493; Bruckner's Lessee *v.* Lawrence, 1 Doug. (Mich.) 19.

Fraud apparent on the face of a patent may be taken advantage of in an action at law. Arnold *v.* Grimes, 2 G. Gr. (Iowa) 77.

34. Under the Donation Act which provides that a married set-

law to show that a patent is absolutely void for want of power to make the grant,[35] or that the land was reserved from sale,[36] or that

tler's interest in case of his death shall be granted to his widow and children or heirs as the direct donees of the United States, a patent issued to the heirs of the settler is conclusive in an action at law that there were no children. Cutting *v.* Cutting, 6 Fed. 259.

Evidence of the proceedings on which the patent was based is not admissible to overcome the effect of the patent in an action at law. Miller *v.* Grunsky (Cal.), 66 Pac. 858.

35. *United States.* — Polk's Lessee *v.* Yendal, 9 Cranch 87; Patterson *v.* Winn, 11 Wheat. 380; Wright *v.* Roseberry, 121 U. S. 488; Stoddard *v.* Chambers, 2 How. 284; King *v.* McAndrews, 111 Fed. 860, 50 C. C. A. 29.

California. — Edwards *v.* Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234.

Florida. — Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Iowa. — Arnold *v.* Grimes, 2 G. Gr. 77.

Mississippi. — Hit-tuk-ho-mi *v.* Watts, 7 Smed. & M. 363, 45 Am. Dec. 308; Dixon *v.* Porter, 1 Cushm. 84.

Missouri. — Morgan *v.* Stoddard, 187 Mo. 323, 86 S. W. 133.

Nevada. — Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

Any extrinsic evidence showing want of authority to issue a patent is admissible. Lakin *v.* Dolly, 53 Fed. 333.

Extrinsic evidence is admissible to show that the land was a portion of a Mexican grant and had been previously conveyed (Doolan *v.* Carr, 125 U. S. 618); and to show that the land was mineral, and therefore not subject to patent. Kansas City M. & M. Co. *v.* Clay, 3 Ariz. 326, 29 Pac. 9; Chicago Quartz Min. Co. *v.* Oliver, 75 Cal. 194, 16 Pac. 780, 7 Am. St. Rep. 143; McLaughlin *v.* Powell, 50 Cal. 64. See also Carr *v.* Quigley, 57 Cal. 394.

A patent issued under an erroneous construction of the law is not conclusive. Southern Pac. R. Co. *v.* Wiggs, 43 Fed. 333.

Evidence is admissible to show that the interior department had no jurisdiction to issue a patent. Crapo *v.* Troy Tp., 98 Mich. 635, 57 N. W. 806.

In Smelting Co. *v.* Kemp, 104 U. S. 636, Justice Field said: "If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide."

36. *United States.* — Stoddard *v.* Chambers, 2 How. 284; Morton *v.* Nebraska, 21 Wall. 660; Riley *v.* Welles, 154 U. S. 578; Garrard *v.* Silver Peak Mines, 82 Fed. 578.

Florida. — Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450.

Mississippi. — Hit-tuk-ho-mi *v.* Watts, 7 Smed. & M. 363, 45 Am. Dec. 308.

Missouri. — Wright *v.* Rutgers, 14 Mo. 585; Perry *v.* O'Hanlon, 11 Mo. 585, 49 Am. Dec. 100.

But evidence of withdrawal after a patent has been issued is incompetent. Knudsen *v.* Omanson, 10 Utah, 124, 37 Pac. 250.

In Burfenning *v.* Chicago, St. P., M. & O. R. Co., 163 U. S. 321, the court said: "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. . . . And it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of

there was no title in the government to grant.[37] Of course a patent absolutely void on its face may be impeached in any proceeding.[38]

fraud, etc. . . . But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the land department in defiances of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law."

37. Evidence of Prior Title From Same Source. — Evidence of prior title from the same source, either by legislative grant, patent, treaty or otherwise, is admissible.

United States. — Willot *v.* Sanford, 19 How. 79; Patton *v.* Carothers, 18 Fed. Cas. No. 10,833; Nelson *v.* Moon, 3 McLean, 319, 17 Fed. Cas. No. 10, 111; Francoeur *v.* Newhouse, 40 Fed. 618; McCreery *v.* Haskell, 119 U. S. 327.

Alabama. — Knabe *v.* Burden, 88 Ala. 436, 7 So. 92; Goolsbee *v.* Fordham, 49 Ala. 202.

Arizona. — Tombstone Townsite Cases, 2 Ariz. 272, 15 Pac. 26; Blackmore *v.* Reilly, 2 Ariz. 442, 17 Pac. 72.

California. — Megerle *v.* Ashe, 27 Cal. 322, 87 Am. Dec. 76.

Illinois. — Gallipot *v.* Manlove, 2 Ill. 156; Garner *v.* Willett, 18 Ill. 455.

Indiana. — Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900.

Iowa. — Rankin *v.* Miller, 43 Iowa 11.

Louisiana. — Dufresne *v.* Haydel, 7 La. Ann. 660; Wiggins *v.* Guier, 13 La. Ann. 356.

Wisconsin. — Parkinson *v.* Bracken, 1 Pin. 174, 39 Am. Dec. 296.

In a contest between a state patent and a federal patent, evidence is admissible to show that the federal government had no title to pass. The state claiming under a legislative grant, its patentee was really claiming through a prior federal grant, and the rule stated in the text applies. Megerle *v.* Ashe, 27 Cal. 322, 87 Am. Dec. 76.

A subsequent patent cannot be read in evidence. Patton *v.* Carothers, 18 Fed. Cas. No. 10,833.

Generally, the first patent vests the legal title. See cases cited above.

But in equity the court may look behind the patents and grant relief to the party who has the first equity.

California. — Smith *v.* Athern, 34 Cal. 506.

Illinois. — Isaacs *v.* Steel, 4 Ill. 97.

Louisiana. — Climer *v.* Selby, 10 La. Ann. 182.

Mississippi. — McAfee's Heirs *v.* Keirn, 17 Smed. & M. 780, 45 Am. Dec. 331.

Missouri. — Morton *v.* Blankenship, 5 Mo. 346; Wright *v.* Rutgers, 14 Mo. 585; Magwire *v.* Tyler, 40 Mo. 406.

Ohio. — Parker *v.* Wallace, 3 Ohio 490.

The older patent is the highest evidence of title, and so long as it remains in force is conclusive against a junior title. Gallipot *v.* Manlove, 2 Ill. 156.

In Contest Between State and Federal Patent. — In a contest between a state and federal patent evidence that the state had no title when it made its grant is competent. Sherman *v.* Buick, 93 U. S. 209. See also Ludeling *v.* Vester, 20 La. Ann. 433.

In a contest between a federal patent and a prior French or Spanish grant, it may be shown that the federal government had no title to convey. It is a principle applicable to every grant that it cannot affect preexisting titles. City of New Orleans *v.* De Armas, 9 Pet. (U. S.) 224. See also Northern Pac. R. Co. *v.* McCormick, 72 Fed. 736, 19 C. C. A. 165, 44 U. S. App. 396; Gregg *v.* Tesson, 1 Black (U. S.) 150.

38. Sherman *v.* Buick, 93 U. S. 209; Poire *v.* Wells, 6 Colo. 406; Schwenke *v.* Union Depot & R. Co. 7 Colo. 512, 4 Pac. 905; Arnold *v.* Grimes, 2 G. Gr. (Iowa) 77.

The rule is stated and illustrated in State *v.* Morgan, 52 Ark. 150, 12 S. W. 243, as follows: "If the patent were absolutely void on its face, that is, if it appeared on its face to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, that the land is re-

(2.) In Direct Proceeding by Government To Cancel Patent.— While evidence that a patent is voidable is not admissible in an action at law, it will be received in a direct proceeding by the government to cancel the patent.[39] Thus evidence of fraud or mistake is admissible.[40]

(3.) In Equitable Action by Individual.— In an equitable action to enforce a trust as against the patentee, evidence of fraud[41] on the part of the patentee or of the proceedings in the land department is admissible.[42] In such a proceeding the person seeking to have the patentee declared his trustee, must, in the absence of a contract with such patentee, connect himself with the paramount source of title and also show that he has prosecuted his claim with diligence.[43]

f. *Burden of Showing Invalidity.* — Where the validity of a patent may be impeached in an action at law, the burden of proving the invalidity is on the one alleging such fact.[44] In an action to cancel or set aside a patent for fraud or mistake the government must prove the facts, by clear, unequivocal and convincing evidence.[45] A claimant seeking to hold the patentee as trustee has the

served by the statutes from sale, or otherwise appropriated, or that it was executed by officers not intrusted by law with the power to issue grants of portions of the public domain, it would be subject to assault in any controversy."

39. Patterson *v.* Winn, 11 Wheat. (U. S.) 380; United States *v.* Pratt Coal & Coke Co., 18 Fed. 708; Johnson *v.* Towsley, 13 Wall. (U. S.) 72; Carter *v.* Thompson, 65 Fed. 329; State *v.* Morgan, 52 Ark. 150, 12 S. W. 243; Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

40. Field *v.* Seabury, 60 U. S. 323; United States *v.* Hughes, 52 U. S. 552; United States *v.* Throckmorton, 98 U. S. 61; United States *v.* Minor, 114 U. S. 233; Colorado Coal Co. *v.* United States, 123 U. S. 307.

41. Hedrick *v.* Atchison, T. & S. F. R. Co., 120 Mo. 516, 25 S. W. 759; Strong *v.* Lehmer, 10 Ohio St. 93.

42. Carr *v.* Fife, 156 U. S. 494. The case of Smelting Co. *v.* Kemp, 104 U. S. 636, was distinguished. "In that case the offer was to show, in an action at law, a record of the proceedings in the land office in order to impeach the patent, and the ruling was that, as against a patent regular upon its face, and in an action at law, such an offer was inadmissible."

43. Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279.

A third party, having no prior equitable interest, has no standing in court. Houck *v.* Kelsey, 17 Kan. 333; Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12; Lamprey *v.* Mead, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328; Sarpy *v.* Papin, 7 Mo. 503.

44. Leviston *v.* Ryan, 75 Cal. 293, 17 Pac. 239; Collins *v.* Bartlett, 44 Cal. 371.

The evidence must be clear and satisfactory. Martin *v.* Boon, 2 Ohio 237.

45. Colorado C. & I. Co. *v.* United States, 123 U. S. 307; Maxwell Land Grant Case, 121 U. S. 325, *affirmed* on rehearing, 122 U. S. 365; United States *v.* Hancock, 133 U. S. 193; United States *v.* Budd, 144 U. S. 154, *affirming* 43 Fed. 630; United States *v.* Edwards, 33 Fed. 104; United States *v.* Wenz, 34 Fed. 154; United States *v.* Meeker, 50 Fed. 146; United States *v.* Clark, 138 Fed. 294, *affirming* 125 Fed. 774; Moffat *v.* United States, 112 U. S. 24; People *v.* Swift, 96 Cal. 165, 31 Pac. 16.

In Maxwell Land-Grant Case, 121 U. S. 325, 381, the court said: "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud

burden of showing that, if the law had been properly administered, the title would have been awarded to him. A mere showing of error in the land department is not sufficient in such case.[46]

g. *Effect of Recitals.* — Recitals of fact in a patent are conclusive evidence of such facts as against any one claiming under it;[47]

or mistake in the execution of the instrument itself, the testimony on which it is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the president of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

46. American Mtg. Co. *v.* Hopper, 64 Fed. 553, 12 C. C. A. 293, 29 U. S. App. 12; Puget Mill Co. *v.* Brown, 59 Fed. 35, 7 C. C. A. 643; Bohall *v.* Dilla, 114 U. S. 47; Small *v.* Rakestraw, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691.

In Lee *v.* Johnson, 116 U. S. 48, the court said: "It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that but for the error or fraud or imposition of which he complains, he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee."

47. *Arkansas.* — Hendry *v.* Willis, 33 Ark. 833; Chrisman *v.* Jones, 31 Ark. 609.

California. — Jatunn *v.* Smith, 95 Cal. 154, 30 Pac. 200; Chant *v.* Reynolds, 49 Cal. 213; McGarrahan *v.* New Idria Min. Co., 49 Cal. 331; Stark *v.* Barrett, 15 Cal. 361.

Kentucky. — Weaver *v.* Froman, 6 J. J. Marsh. 213; Cain *v.* Flynn, 4 Dana 499.

Louisiana. — Boatner *v.* Ventress, 8 Mart. (N. S.) 645, 657.

Pennsylvania. — Downing *v.* Gallagher, 2 Serg. & R. 455; Backop *v.* Critchlow, 142 Pa. St. 518, 21 Atl. 984.

Texas. — Malone *v.* Dick, 94 Tex. 419, 61 S. W. 112.

Wisconsin. — Knight *v.* Leary, 54 Wis. 459, 11 N. W. 600; Eaton *v.* North, 20 Wis. 449.

Recitals in a patent are evidence of when the lands were earned. Johnson *v.* Ballou, 28 Mich. 379.

A recital that the title was taken in trust is evidence of the trust. Dean *v.* Long, 122 Ill. 447, 14 N. E. 34.

A recital is evidence of the consideration and of the authority upon which the patent issued. Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579.

A recital in a patent that the patentee is the heir of the original claimant, and has performed the necessary conditions, is sufficient evidence of those facts in an action of ejectment

and they are binding as well upon the government except in a direct proceeding to cancel or set aside the patent.[48] But they are not conclusive against a prior claimant.[49]

h. *Land Presumed Severed From Public Domain at Date of Patent.* — It will be presumed in the absence of evidence to the contrary that land was severed from the public domain at the date of the patent.[50]

B. CERTIFICATES. — a. *In General.* — Certificates of entry or location are admissible for the purpose of showing right of possession,[51] or location of land.[52] Final certificates of purchase or final receipts are admissible as evidence that the holder owns the lands described[53] or is entitled to patent and has an equitable interest

by the patentee. Chant *v.* Reynolds, 49 Cal. 213.

But recitals are not enough to show that title is of an earlier date than the patent itself. Marsh *v.* Brooks, 8 How. (U. S.) 223.

48. Boggs *v.* Merced Min. Co., 14 Cal. 279.

Reasons. — "The patent is not only the deed of the United States—it is evidence of the proceedings recited in it, and is a solemn record of the government, of its action and judgment, with respect to the title of the claimant. As such, it imports absolute verity." McGarrahan *v.* New Idria M. Co., 49 Cal. 331. The court said further: "While the recitals of fact are binding on all concerned, an opinion of the executive officers in respect to matters of law, as indicated either by the ultimate act of issuing the patent or by recitals inserted in that instrument, is not—and from the nature of the powers and duties of such officers—cannot be conclusive."

49. Boatner *v.* Ventress, 8 Mart. N. S. (La.) 645, 657; Penrose *v.* Griffith, 4 Bin. (Pa.) 231; Green *v.* Brennesholtz, 73 Pa. St. 423.

50. Laidlow *v.* Landry, 12 La. Ann. 151; Eaton *v.* North, 20 Wis. 449. In the latter case it was recited that, from the report of the commissioners, made pursuant to an act of Congress, it appears that the land had been assigned to Fowler. But the date of the report and the time of its transmission were not given. Under the circumstances the presumption controlled.

51. In Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374, it was held that a certificate of entry was admissible to show right of possession in defendant, in an action of trespass.

52. Hardin *v.* Ho-yo-po-nubby, 5 Cushm. (Miss.) 567.

In Butterfield *v.* Central Pac. R. Co., 31 Cal. 264, the court held a certificate of location signed by the register of the land office *prima facie* evidence that the land belonged to the locator.

53. **Certificates of Purchase.** Toland *v.* Mandell, 38 Cal. 30; Laugenour *v.* Hennagin, 59 Cal. 625; Haven *v.* Haws, 63 Cal. 452; McConnell *v.* Wilcox, 2 Ill. 344; Wilcox *v.* Kinzie, 4 Ill. 218.

In Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677, the court said: "It is clear that the mere certificates of purchase, such as are exhibited in this case, are not final evidence of title out of the government, although this court has generally considered them sufficient evidence of a sale from the government, as to be the basis of a petitory action."

Certificates in Form of Final Receipts.

California. — Graves *v.* Hebbron, 125 Cal. 400, 58 Pac. 12.

Colorado. — Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832.

Georgia. — Harris *v.* Dyer, 27 Ga. 211.

Illinois. — Roper *v.* Clabaugh, 4 Ill. 166.

Kansas. — Weeks *v.* White, 41 Kan. 569, 21 Pac. 600.

Louisiana. — Herriot *v.* Broussard, 4 Mart. N. S. 260; Lott *v.* Prudhomme, 3 Rob. 293; Beaumont *v.* Covington, 6 Rob. 189.

therein.[54] A certificate confirming a Spanish title has been held admissible on a question as to the title of the lands embraced therein.[55] A certificate is admissible although slightly defaced.[56] In order to identify a certificate resort may be had to the records of the land office.[57] There are statutory provisions in many of the states relative to the admissibility of certificates.[58]

Missouri. — Wickersham *v.* Woodbeck, 57 Mo. 59.

Nebraska. — Kinney *v.* Degman, 12 Neb. 237, 11 N. W. 318.

Such a receipt is sufficient to show title out of the government. Newport *v.* Cooper, 10 La. 155.

Thus, in Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302, the following was admitted: "Received from Albert Scherfen, of Modoc County, California, the sum of two hundred dollars and ——— cents, being in full for [describing the land]. Andrew Miller, Receiver."

In McDonald *v.* Edmonds, 44 Cal. 328, the defendant, in support of his preemption claim, offered a certificate by the receiver of the proper land district of the United States, to the effect that the defendant had made full payment for the land in controversy, under a preemption entry. It was objected that this was not evidence of title because not final. But it was held to be "evidence that the defendant has taken the necessary steps toward preempting the land, and has proceeded so far in that direction that he has paid to the proper officer the full purchase price thereof. Whatever may be the legal effect of the certificate, as between the defendant and the government, it is clear that it establishes in the defendant a right to the possession as against one who shows no title." See also Bracken *v.* Preston, 1 Pin. (Wis.) 584, 44 Am. Dec. 412; Wilcox *v.* Jackson, 13 Pet. (U. S.) 498; Ledbetter *v.* Borland, 128 Ala. 418, 29 So. 579; Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

Under the timber culture laws, evidence of an application to enter, and of actual occupancy, and the production of a receipt of the receiver of the United States land office, makes a *prima facie* case of ownership and right of possession, as against a third party. Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077.

Receipt for Fees. — Such a receipt was required to be issued upon payment of the fee, and it was directed that thereupon the proper entry be made. Whittaker *v.* Pendola, 78 Cal. 206, 20 Pac. 680.

"The paper was not received in evidence to show title, but the filing of the statement and the payment of the fees being contemporaneous with her settlement and possession, it was received to show her good faith, and the nature and character of her possession." Barnhart *v.* Ford, 41 Kan. 341, 21 Pac. 239.

54. As Evidence of an Equitable Right. — See Guaranty Sav. Bank *v.* Bladow, 176 U. S. 448; United States *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552, 4 U. S. App. 332; American Mtg. Co. *v.* Hopper, 56 Fed. 67, 64 Fed. 553, 12 C. C. A. 293, 29 U. S. App. 12; United States *v.* Detroit Timber & Lumb. Co., 131 Fed. 668, 67 C. C. A. 1; California Redwood Co. *v.* Little, 79 Fed. 854.

55. Olcott *v.* Ferris (Tex.), 24 S. W. 848.

56. In Pope *v.* Anthony (Tex.), 68 S. W. 521, a headright certificate was held admissible although some of the words, or parts of words, were slightly obliterated, when examined in connection with testimony of witnesses who had examined the certificate before it was defaced.

57. Cox *v.* Cock, 59 Tex. 521.

58. Statutory Provision. — § 1925 of the Code of Civil Procedure of California provides as follows: "A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a preemption claim on which the certificate

b. *Certificates Under New Madrid Act.* — There is a conflict of authority as to the admissibility of patent certificates issued under the New Madrid Act.[59]

c. *Admissibility To Show Possession.* — A certificate issued by the proper office under the Oregon Donation Act is admissible to show possession in the party to whom it is issued,[60] but a certificate

may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes." Iowa Rev. Stat. § 4055; Nebraska Code C. P., § 411, Comp. Stat. 583; Wisconsin R. S., ch. 137, §§ 103, 104. See also Alabama Code, § 2292.

In Kansas the usual duplicate receipt of the receiver of the land office is declared to be equivalent to a patent against all but the holder of an actual patent. Code, § 383. See Weeks *v.* White, 41 Kan. 569, 21 Pac. 600.

In Minnesota, the certificate is *prima facie* evidence. Winona & St. P. R. Co. *v.* Randall, 29 Minn. 283. 13 N. W. 127.

As to the Wisconsin statute, see Culbertson *v.* Coleman, 47 Wis. 193, 2 N. W. 124.

The Illinois statute is interpreted in Bruner *v.* Manlove, 2 Ill. 156. "The register's certificate is raised to as high a character in point of evidence, in the present form of action, as a patent possibly could be. Its effect is to be the same and the rights derived from it for the purpose of recovering or maintaining possession of lands described in it are co-extensive with the most formal, regularly issued patent." See also McConnell *v.* Wilcox, 2 Ill. 344. But the certificate must show an entry and purchase of land. Aldes *v.* Abbot, 23 Ill. 61. See also Chicago P. & St. L. R. Co. *v.* Woolridge, 174 Ill. 330, 51 N. E. 701.

Such certificates are sometimes said to be evidence of an equitable title (Brill *v.* Stiles, 35 Ill. 305, 85 Am. Dec. 364); but not of a legal title (Mosier *v.* Smith, 3 Blackf. [Ind.] 132.)

Sometimes, however, a final certificate is made evidence of the legal title. Stauffer *v.* Stephenson, 9 Ind. 144.

59. This act was passed for the benefit of certain earthquake sufferers, and provided for an exchange of lands injured by the earthquake. A locator was required first to obtain a certificate of the facts from the recorder. Thereupon he must have a survey made by the proper officer, and a plat recorded. It was then the duty of the recorder to issue a certificate of the facts, which must be recorded within a year, and thereafter, upon application, a patent would issue. In Missouri, it was held that this last certificate was presumptive evidence of the fulfillment of all prerequisites. "To suppose that this record was made by the recorder, without the proper information which the law requires to be in his possession before making it, would require the assumption that he had violated his official duty, and committed a fraud." Gray *v.* Givens, 26 Mo. 291.

In Arkansas, however, it was held that a patent certificate was not admissible when it did not appear that the prerequisites had been fulfilled. "It not appearing at what time the supposed survey was received or recorded, the presumption is against the party for whose benefit it was offered, as the law presumes that if the fact actually existed he would have made it appear at a date sufficiently early to preclude all adverse claims." Ashley *v.* Rector, 20 Ark. 359. It was held that a survey not shown to have been recorded was not admissible to show compliance with the requirement for a survey; nor was a letter from the surveyor, referring to a survey on record, competent for that purpose.

60. The reason for the distinction noted in the text lies in the text of the certificates and the statutes under which they are granted. Under the Oregon Donation Act, evidence of occupation was essential, and the certificate of the register and receiver certified to it. Hence such a certificate tends to prove actual possession

of preemption is not admissible for purpose of proving possession.[61]

d. *Requisites of Certificates.* — Only such certificates are admissible in evidence as the law authorizes or directs the officer to make.[62] But if others are admitted without objection they will be considered.[63] A certificate which shows on its face that the law has not been complied with,[64] or which has been suspended[65] is not admissible. In some jurisdictions a certificate is admissible without authentication,[66] while in others it must be authenticated by proof of signature.[67]

e. *Conclusiveness.* — **(1.) Generally.** — A certificate of payment of the purchase price or of performance of any other act is not generally conclusive; it may be shown to be erroneous.[68] A certificate, if admitted, is generally said to constitute *prima facie* evidence.[69]

and is admissible for that purpose. Keith *v.* Cheeny, 1 Or. 285.

61. A certificate of preemption does not tend to show actual possession, and is not admissible for that purpose. Pickard *v.* Kelley, 52 Cal. 89.

62. Thus, a certificate by the surveyor-general certifying that a lot was within certain limits, that it was not owned or claimed by any one in 1812, and that it was not a part of the St. Louis common, was held inadmissible in Evans *v.* Labaddie, 10 Mo. 425. The court said: "Of these several matters thus certified to, the surveyor-general is not the judge, and his certificate alone has not been made even *prima facie* evidence of title, as the certificate of the recorder was, under the same act, in relation to another class of lots."

Recitals in a sheriff's certificate were held not to be evidence of the fulfillment of requirements in the sale of school lands in McDonald *v.* Mangold, 61 Mo. App. 291. See also Roper *v.* Clabaugh, 4 Ill. 166; Hastings *v.* Devlin, 40 Cal. 358; Murphy *v.* Sumner, 74 Cal. 316, 16 Pac. 3; Garwood *v.* Dennis, 4 Bin. (Pa.) 314; Smithwick *v.* Andrews, 24 Tex. 488; Gaither *v.* Hanrick, 69 Tex. 92, 6 S. W. 619.

63. In Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189, the court said: "While the recital, if objected to, would doubtless have been excluded, because it was not a matter required to be placed in the order of reference, and of which the certified statement of the register of the United States land-office would have been the best evidence, still it comes within the rule that inadmissible evidence, if admitted without objection, is sufficient proof of the fact to which it relates. . . . It is at most but slight evidence."

64. McDonald *v.* Mangold, 61 Mo. App. 291. In this case, the sheriff's certificate showed a sale in bulk, while the law required a sale in forty-acre lots. It failed to recite that the plaintiff had either paid anything for the land, or that he had secured the payment of the purchase-money, which recitals, by the terms of the law must be contained in the sheriff's certificate.

65. Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

66. Floyd *v.* Ricks, 14 Ark. 286, 58 Am. Dec. 374.

"The seal of the general land office and the signature of the commissioner, to copies of originals required by law to be deposited in that office, *prima facie* prove themselves." Harris *v.* Barnett, 4 Blackf. (Ind.) 369.

67. Jackson *v.* McMurray, 4 Colo. 76; Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568.

68. Thus, it may be shown that the certificate was issued to the wrong party. Grand Gulf R. & Bkg. Co. *v.* Bryan, 8 Smed. & M. (Miss.) 234. See also Allison *v.* Hunter, 9 Mo. 749.

69. Toland *v.* Mandell, 38 Cal. 30; Whittaker *v.* Pendola, 78 Cal. 296, 20 Pac. 680; Stanway *v.* Velasquez, 51 Cal. 41; Figg *v.* Handley, 52 Cal. 244; Pierson *v.* Reed, 36 Iowa 257;

(2.) **By Statute.** — Under a statute making the certificate of the governor conclusive evidence of the building of a road, evidence that it was in fact not built is incompetent;[70] and evidence of fraud in others than the road company in obtaining the certificate is likewise irrelevant.[71]

C. Proceedings In Land Department. — a. *In General.* — Evidence of the proceedings before the land department is generally admissible,[72] but decisions of officers in contested cases are not admissible as against persons not parties nor privies to the proceedings.[73]

Newport *v.* Cooper, 10 La. 155; Surgett *v.* Little, 2 Cushm. (Miss.) 118.

The certificate is *prima facie* evidence that the state has selected the land, and sold it to a purchaser, and that he has made a payment thereon —that, as against the state, he has acquired an inchoate title, one which the state is bound to protect under her laws. Toland *v.* Mandell, 38 Cal. 30.

A certificate of location of a United States military land warrant is *prima facie* evidence that the land was the property of the locator. Butterfield *v.* Central Pac. R. Co., 31 Cal. 264.

A certificate based upon an application to purchase, and the payment of the first instalment of the purchase money, although made *prima facie* evidence by the statute, does not conclude the state, nor any one authorized by statute to contest it. McFaul *v.* Pfankuch, 98 Cal. 400, 33 Pac. 397.

In California, a certificate of purchase of school lands is not conclusive. Gilson *v.* Robinson, 68 Cal. 539, 10 Pac. 193; Jacobs *v.* Walker, 76 Cal. 175, 18 Pac. 129.

A certificate of location is *prima facie* evidence that location was made after determining necessary facts. Bradley *v.* Dells Lumb Co., 105 Wis. 245, 81 N. W. 394.

70. It has been so held under a statute providing "That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form." United States *v.* Dalles Military Road Co., 51 Fed. 629, 2 C. C. A. 419, 7 U. S. App. 297.

To the effect that such certificate is conclusive in the absence of fraud, see United States *v.* Dalles Military Road Co., 41 Fed. 493.

Evidence that the inspectors who inspected the road were paid by the company is not sufficient to show fraud in obtaining the certificate. United States *v.* Willamette Val. & C. M. Wagon Road Co., 55 Fed. 711.

71. United States *v.* Dalles Military Road Co., 51 Fed. 629, 2 C. C. A. 419, 7 U. S. App. 297.

72. Baldwin *v.* Stark, 107 U. S. 463.

A decision of the land department is admissible in an action to quiet title, although rendered after the commencement of the action. Potter *v.* Randolph, 126 Cal. 458, 58 Pac. 905. See also cases cited in following notes.

A decision by the land department in favor of an *amicus curiae* is not admissible in his favor in an action at law. Beals *v.* Cone, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92.

Record of Proceedings in Contest Case. — The record of the proceedings in a contest case before the land department is admissible in an action to set aside the findings for fraud or misconduct. Carr *v.* Fife, 156 U. S. 494, *affirming* 44 Fed. 713.

73. Megerle *v.* Ashe, 33 Cal. 74. In this case the court said: "Terry was not a contesting pre-emption claimant, but claimed under the eighth section of the Act of Congress of September 4th, 1841, granting to each state five hundred thousand acres of land for purposes of internal improvements, and under the laws of this state providing for the selection of such lands; and no authority is given to the secretary of the interior, or any of the officers of the land department of the general government, to determine the regularity or

b. *How Decision May Be Proved.* — The decision of the officers of the land department may be shown by their indorsement upon the application.[74]

sufficiency of locations made under those acts, in selecting the land granted to the states—the act of Congress providing that the selections in all the said states shall be made within their limits, respectively, 'in such manner as the legislature thereof shall direct.' Admitting that such decisions are binding upon contesting claimants of the right of preemption, they are without force as against third persons." See also Barnhart *v.* Ford, 41 Kan. 341, 21 Pac. 239.

The facts upon which a claim rests cannot be shown as against a person claiming title through another and a different course of procedure, by the recitals in official documents to which he bears no relation. Megerle *v.* Ashe, 33 Cal. 74.

In Finlay *v.* Woodruff, 8 Ark. 328, the court said: "The instructions of the commissioner to the register and receiver, Vol. 2, 414, required that the decision in each application should be endorsed under their signatures. In the cases now before us, the land officers have endorsed one, 'confirmed 11th April, 1829,' and the other 'examined and confirmed the 2d of February, 1832,' and signed them officially. These endorsements were made under the direction of the commissioner of the general land office, . . . and are satisfactory evidence that the decisions were in favor of the right of claimants to the donation granted by the act of Congress to the persons coming within the provision of the act."

74. *United States.*— Bear *v.* Luse, 6 Sawy. 148, 2 Fed. Cas. No. 1,179; Aiken *v.* Ferry, 6 Sawy. 79, 1 Fed Cas. No. 112; Shepley *v.* Cowan, 91 U. S. 330; Moore *v.* Robbins, 96 U. S. 530; Marquez *v.* Frisbie, 101 U. S. 473; Warren *v.* VanBrunt, 19 Wall. 646; Vance *v.* Burbank, 101 U. S. 514; Baldwin *v.* Stark, 107 U. S. 463, Hardin *v.* Jordan, 140 U. S. 371; Carr *v.* Fife, 156 U. S. 494, *affirming* 44 Fed. 713; Stewart *v.* McHarry, 159 U. S. 643, *affirming* 35 Pac. 141; Aurora Hill Consol. Min. Co. *v.* Eighty-five Min. Co., 12 Sawy. 355, 34 Fed. 515; Scott *v.* Lockey Inv. Co., 60 Fed. 34; Steel *v.* St. Louis Smelt. & Ref. Co., 106 U. S. 447; New Dunderberg Min. Co. *v.* Old, 79 Fed. 598, 25 C. C. A. 116; United States *v.* Mackintosh, 85 Fed. 333, 29 C. C. A. 176; Calhoun *v.* Violet, 173 U. S. 60; Northern Pac. R. Co. *v.* McCormick, 89 Fed. 659; United States *v.* Northern Pac. R. Co., 95 Fed. 864; Linkswiler *v.* Schneider, 95 Fed. 203; Gardner *v.* Bonestell, 180 U. S. 362; James *v.* Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Manley *v.* Tow, 110 Fed. 241; Brett *v.* Meisterling, 117 Fed. 768; De Cambra *v.* Rogers, 189 U. S. 119; Potter *v.* Hall, 189 U. S. 292; Edwards *v.* Begole, 121 Fed. 1, 57 C. C. A. 245; Peyton *v.* Desmond, 129 Fed. 1, 63 C. C. A. 651; Johnson *v.* Drew, 171 U. S. 93; Burfenning *v.* Chicago St. P. M. & O. R. Co. 163 U. S. 321.

Arizona. — Jeffords *v.* Hine, 11 Pac. 351.

Arkansas. — Finley *v.* Woodruff, 8 Ark. 328.

California. — Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596; Burrell *v.* Haw. 40 Cal. 373; Hosmer *v.* Wallace, 47 Cal. 461; Wilkinson *v.* Merrill, 52 Cal. 424; Dilla *v.* Bohall, 53 Cal. 709; Powers *v.* Leith, 53 Cal. 711; Mace *v.* Merrill, 56 Cal. 554; Plummer *v.* Brown, 70 Cal. 544, 12 Pac. 464; Stewart *v.* Sutherland, 93 Cal. 270, 28 Pac. 947; Los Angeles F. & M. Co. *v.* Thompson, 117 Cal. 594, 49 Pac. 714; Saunders *v.* La Purisima Gold Min. Co., 125 Cal. 159, 57 Pac. 656; Wormouth *v.* Gardner, 125 Cal. 316, 58 Pac. 20; Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710; Harvey *v.* Barker, 126 Cal. 262, 58 Pac. 692.

Colorado. — Howell *v.* Killie, 17 Colo. 88, 28 Pac. 464.

Idaho. — Le Fevre *v.* Amonson, 81 Pac. 71.

Illinois. — Bennett *v.* Farrar, 7 Ill. 598; Gray *v.* McCance, 14 Ill. 343; McGhee *v.* Wright, 16 Ill. 555; Danforth *v.* Morrical, 84 Ill. 456.

Kansas. — Tatro *v.* French, 33 Kan. 49, 5 Pac. 426; Ard *v.* Pratt, 43

c. *Conclusiveness.* — **(1.) In General.** — The decisions of officers of the federal land department are conclusive as to the facts decided, on matters within their jurisdiction. It follows that, in general, evidence showing the facts to be different from those found by the land department is irrelevant.[75]

Kan. 419, 23 Pac. 646; Freese *v.* Rusk, 54 Kan. 274, 38 Pac. 255; Cooke *v.* Blakely, 6 Kan. App. 707, 50 Pac. 981; Missouri, K. & T. R. Co. *v.* Pratt, 64 Kan. 118, 67 Pac. 464.

Louisiana. — Sandoz *v.* Ozenne, 13 La. Ann. 616.

Minnesota. — Leech *v.* Rauch, 3 Minn. 448; Monette *v.* Cratt, 7 Minn. 234; Village of Mankato *v.* Meagher, 17 Minn. 265; Sage *v.* Maxwell, 91 Minn. 527, 99 N. W. 42.

Missouri. — Garton *v.* Cannada, 39 Mo. 357.

Montana. — Graham *v.* Great Falls W. P. & T. S. Co., 30 Mont. 393, 76 Pac. 808.

Nebraska. — Kinney *v.* Dedman, 12 Neb, 237, 11 N. W. 318.

North Dakota. — Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

Oklahoma. — Twine *v.* Carey, 2 Okl. 249, 37 Pac. 1096; King *v.* Thompson, 3 Okl. 644, 39 Pac. 466; Wilbourne *v.* Baldwin, 5 Okl. 265, 47 Pac. 1045; Thornton *v.* Peery, 7 Okl. 441, 54 Pac. 649; Brown *v.* Donnelly, 9 Okl. 32, 59 Pac. 975; Cook *v.* McCord, 9 Okl. 200, 60 Pac. 497; Hartwell *v.* Havighorst, 66 Pac. 337; *affirmed* 196 U. S. 635; Jordan *v.* Smith, 12 Okla. 703, 73 Pac. 308.

Oregon. — Johnson *v.* Bridal Veil Lumbering Co. 24 Or. 182, 33 Pac. 528.

South Dakota. — Harrington *v.* Wilson 10 S. D. 606, 74 N. W. 1055.

Utah. — Ferry *v.* Street, 4 Utah, 521, 11 Pac. 571.

Washington. — Wiseman *v.* Eastman, 21 Washington 163, 57 Pac. 398; Grays Harbor Co. *v.* Drumm, 23 Wash. 706, 63 Pac. 530.

Wisconsin. — Bradley *v.* Dells Lumber Co., 105 Wis. 245, 81 N. W. 394.

In Steel *v.* St. Louis S. & R. Co., 106 U. S. 447, it was held that "the land department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

In Heath *v.* Wallace, 138 U. S. 573, it was held that "the question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands,' is a question of fact, properly determinable by the land department." The question of whether the absence of the locator from the claim was justifiable is one of fact, upon which the decision of the land office is conclusive. Dilla *v.* Bohall, 53 Cal. 709.

The decision of the officers of the land department as to the sufficiency of the proof presented is final. Danforth *v.* Morrical, 84 Ill. 456.

A finding as to residence is conclusive. Calhoun *v.* Violet, 173 U. S. 60.

Where a proceeding is brought to declare the holder of the legal title a trustee, the facts as found by the land department will be accepted as conclusive by the court. Calhoun *v.* Violet, 4 Okl. 321, 47 Pac. 479.

Matters of Law. — Decisions on matters of law are, of course, not binding. Thus, a decision that lands are subject to the operation of a grant for public improvements is not conclusive. United States *v.* Coos Bay Wagon-Road Co., 89 Fed. 151. See also Sousa *v.* Pereira, 132 Cal. 77, 64 Pac. 90; Buffalo Land & Ex. Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575.

75. Thus, under the Town-site

(2.) Matters Beyond Jurisdiction of Land Department.— Of course, decisions of the land department on matters beyond its jurisdiction are not conclusive.[76]

(3.) Fraud or Mistake. — (A.) In General.— Such findings may be reviewed by the courts for fraud or mistake,[77] other than an error of judgment in estimating the value or effect of evidence.[78] But the evidence of fraud must be clear and conclusive;[79] and it must be shown that the fraud affected the result.[80]

(B.) In an Action Between Two Claimants.— In an action between rival claimants, evidence that fraud has been practiced on the unsuccessful party and that he was thereby prevented from exhibiting his case fully to the department, is admissible.[81] Evidence that

Act, any evidence having for its object to prove that the settlement and occupation under which the entry was made was insufficient for such purpose is irrelevant and improper, save as proving who the occupants were, in behalf of whom the application was made. Leech *v.* Rauch, 3 Minn. 448.

After the land department has made its decision, evidence that a plat and notice were not posted on the claim as required by law is inadmissible. Aurora Hill Con. Min. Co. *v.* Eighty-five Min. Co., 12 Sawy. 355, 34 Fed. 515.

76. Hardin *v.* Jordan, 140 U. S. 371; Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450; See also Davis *v.* Weibbold, 139 U. S. 507.

Thus, after a patent has issued, the land department has no jurisdiction over the land; and its decision is not *res judicata*. In Moore *v.* Robbins, 96 U. S. 530, Mr. Justice Miller, speaking for the court, said: "With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another, can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancelation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

77. Johnson *v.* Towsley, 13 Wall. (U. S.) 72, 83; Bear *v.* Luse, 6 Sawy. (U. S.) 148, 2 Fed. Cas. No. 1,179; Aiken *v.* Ferry, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; Moore *v.* Robbins, 96 U. S. 530; Marquez *v.* Frisbie, 101 U. S. 473; Baldwin *v.* Stark, 107 U. S. 463; Stimson Land Co. *v.* Hollister, 75 Fed. 941.

78. Bear *v.* Luse, 6 Sawy. (U. S.) 148, 2 Fed. Cas. No. 1,179; Aiken *v.* Ferry, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112; Ard *v.* Pratt, 43 Kan. 419, 23 Pac. 646.

79. Stewart *v.* McHarry, 159 U. S. 643, *affirming* 35 Pac. 141.

80. "A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff." Lee *v.* Johnson, 116 U. S. 48.

81. Vance *v.* Burbank, 101 U. S. 514.

Illustrations. — "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him

false testimony or forged documents were presented is irrelevant.[82]

(C.) In Action by Government. — The rule stated in the last paragraph has no application in a proceeding by the government to set aside a patent for fraud.[83] In such a case the government is not in the same position as a private grantor seeking relief.

(4.) To Decisions of What Officers Rules Apply. — (A.) Secretary of Interior. — Of course the decisions of the secretary of the interior, as head of the land department, are governed by these rules.[84]

away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." United States *v.* Throckmorton, 98 U. S. 61.

82. United States *v.* Throckmorton, 98 U. S. 61; Vance *v.* Burbank, 101 U. S. 514; State *v.* Bachelder, 5 Minn. 223, 80 Am. Dec. 410.

This rule applies generally to judgments. In some jurisdictions, however, a different rule applies. See article "Judgments."

83. In United States *v.* Minor, 114 U. S. 233, the question is expressly decided, and the cases cited in support of the last paragraph are distinguished. It is clear that the rules applicable to judgments cannot control in such a case. The court said: "In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte*. . . . It is not possible for the officers of the government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of the claim, and makes no issue on the statement of the claimant. When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced." See also United States *v.* Rose, 24 Fed. 196.

84. *United States.* — Lee *v.* Johnson, 116 U. S. 48; Knight *v.* United States Land Assn., 142 U. S. 161; Pengra *v.* Munz, 29 Fed. 830; Pugsley *v.* Brown, 35 Fed. 688; Carr *v.* Fife, 44 Fed. 713; Puget Mill Co. *v.* Brown, 54 Fed. 987; Diller *v.* Hawley, 81 Fed. 651, 26 C. C. A. 514.

California. — Rutledge *v.* Murphy, 51 Cal. 388; McHarry *v.* Stewart, 35 Pac. 141; Rogers *v.* De Cambra (Cal.), 60 Pac. 863.

District Columbia. — Warner Val. Stock Co. *v.* Smith, 9 App. D. C. 187.

Florida. — Porter *v.* Bishop, 25 Fla. 749, 6 So. 863.

Illinois. — Robbins *v.* Bunn, 54 Ill. 48, 5 Am. Rep. 75.

Iowa. — Iowa R. Land Co. *v.* Antoine, 52 Iowa 429, 3 N. W. 468.

Minnesota. — Castner *v.* Gunther, 6 Minn. 119; Castner *v.* Echard, 6 Minn. 149.

Montana. — Colburn *v.* Northern Pac. R. Co., 13 Mont. 476, 34 Pac. 1017. Moore *v.* Northern Pac. R. Co., 18 Mont. 290, 45 Pac. 215.

Oklahoma. — Acers *v.* Snyder, 8 Okla. 659, 58 Pac. 780; Bertwell *v.* Haines, 10 Okla. 469, 63 Pac. 702; Forney *v.* Dow, 13 Okla. 258, 73 Pac. 1101.

Oregon. — Small *v.* Lutz, 41 Or. 570, 69 Pac. 825.

Washington. — Keane *v.* Brygger, 3 Wash. 338, 28 Pac. 653.

It will be presumed that the steps

(B.) Commissioner of Land Office. — Although the decisions of the commissioner of the general land office are generally not final, they are admissible in evidence; and ordinarily evidence cannot be introduced to revise them on matters of fact.[85]

(C.) Registers and Receivers. — Rulings of a register or receiver of a land office are generally conclusive, but may be directly attacked for fraud or mistake.[86]

D. Records of Land Office. — a. *Admissibility in General.*

preliminary to a decision by the secretary of the interior have been fulfilled. Rierson *v.* St. Louis & S. F. R. Co., 59 Kan. 32, 51 Pac. 901.

Upon Questions of Law. — The decisions of the secretary of the interior upon questions of law are not binding upon the courts. St. Paul, M. & M. R. Co. *v.* Phelps, 137 U. S. 528; United States v. Murphy, 32 Fed. 376; Emslie *v.* Young, 24 Kan. 732.

85. Haydel *v.* Nixon, 5 La. Ann. 558; Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

Effect of Appeal. — "It is true that the decision of the Commissioner of the general land office is subject to appeal, and is not therefore, technically, *res judicata;* yet, as there is no limit within which the appeal is to be taken, except perhaps the delivery of the patent; and as the defendant, who is the party to take the appeal, may never apply for such appeal, we think that the exception does not go to the dismissal of the action, and at most the defendant could only claim a continuance of the cause (after having himself taken such appeal) until the same should be decided." Butler *v.* Watts, 13 La. Ann. 390.

Decisions on Questions of Law. — Of course, decisions on questions of law are not admissible. Glidden *v.* Union Pac. R. Co., 30 Fed. 660; Stimson *v.* Clarke, 45 Fed. 760; Shelton *v.* Keirn, 45 Miss. 106; Hartman *v.* Smith, 7 Mont. 19, 14 Pac. 648.

86. *Arkansas.* — Nicks' Heirs *v.* Rector, 4 Ark. 251.

Indiana. — Stewart *v.* Haynes, 6 Blackf. 354.

Louisiana. — Henry *v.* Welsh, 4 La. 547, 23 Am. Dec. 490.

Michigan. — Boyce *v.* Danz, 29 Mich. 146.

Nebraska. — Smiley *v.* Sampson, 1 Neb. 56; Rush *v.* Valentine, 12 Neb. 513, 11 N. W. 746; Van Sant *v.* Butler, 19 Neb. 351, 27 N. W. 299.

Wisconsin. — Bracken *v.* Parkinson, 1 Pin. 685.

Thus, their decision as to the right of preemption of lands within their jurisdiction is conclusive. Jackson *v.* Wilcox, 2 Ill. 344; Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540.

Townsite Trustees. — Townsite trustees, appointed under Act of May 14, 1890, bear the same relation to the disposition of town lots that registers and receivers do to the disposal of public lands, and their decisions on questions of fact are conclusive. Twine *v.* Carey, 2 Okla. 249, 37 Pac. 1096; King *v.* Thompson, 3 Okla. 644, 39 Pac. 466. *Compare* Minnesota *v.* Bachelder, 1 Wall. (U. S.) 109; Barbarie *v.* Eslava, 9 How. (U. S.) 421; Barnard *v.* Ashley, 18 How. (U. S.) 43.

The decision is not conclusive between individuals as it respects their rights. Bird *v.* Ward, 1 Mo. 398, 13 Am. Dec. 506.

"A court of equity will look into the proceedings before the register and receiver, and even into those of the land office or other offices, where the right of property of the party is involved, and correct errors of law or fact to his prejudice. The proceedings are *ex parte* and summary before these officers, and no notice is contemplated or provided for by the preemption laws as to parties holding adverse interests, nor do they contemplate a litigation of the right between the applicant for a preemption claim with a third party. The question as contemplated is between the settler and the government, and if a compliance with the conditions is shown to the satisfaction of the officers, the patent certificate is granted." Minnesota *v.* Bachelder, 1 Wall. (U. S.) 109.

Records of the land offices are admissible as evidence of the facts therein stated.[87]

b. *Conclusiveness.* — Such records when consisting of instruments not required to be recorded are *prima facie* evidence of the facts stated,[88] but they are conclusive in regard to such things as the law requires to be recorded.[89]

E. Certified Copies and Transcripts of Records. — a. *Admissibility.* — **(1.) In General.** — In general, a duly certified copy of a record in a land office is admissible equally with the original, without proof of loss of the original.[90]

87. Galt *v.* Galloway, 4 Pet. (U. S.) 332; McGarrahan *v.* New Idria Min. Co. 96 U. S. 316; Delauney *v.* Burnett, 9 Ill. 454; Welborn *v.* Spears, 32 Miss. 138; Norris *v.* Hamilton, 7 Watts (Pa.) 91.

The record of sales of school lands by a school commissioner is admissible. Frazier *v.* Laughlin, 6 Ill. 347.

A pencil memorandum in the records may be admitted. Franklin *v.* Tiernan, 62 Tex. 92.

See further cases cited, *post,* notes 90 to 95.

88. **Reasons.** — "As the records of this office (the land office) are of great importance to the country, and are kept under the official sanctions of the government, their contents must always be considered, and they are always received in courts of justice as evidence of the facts stated. If a different rule were now to be established, and every act of the locator, in making an entry or withdrawing it, must be shown to have been done under a formal letter of attorney, it would destroy, in all probability, a majority of the titles not carried into grant. . . . An entry, or the withdrawal of an entry, is in fact made by the principal surveyor at the instance of the person who controls the warrant. It is not to be presumed that this officer would place upon his records any statement which affected the rights of others at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by these records, must be received as *prima facie* evidence of the right of the person at whose instance they were recorded, and as conclusive in regard to such things as the law requires to be recorded." Galt *v.* Galloway, 4 Pet. (U. S.) 332.

89. Galt *v.* Galloway, 4 Pet. (U. S.) 332.

Where a county record of a patent is made *prima facie* evidence, and it shows a seal, it is not overcome by a certified copy from the land office not showing a seal. Campbell *v.* Laclede Gaslight Co., 119 U. S. 445.

90. *United States.* — Patterson *v.* Winn, 5 Pet. 233; United States *v.* Percheman, 7 Pet. 51; Best *v.* Polk, 18 Wall. 112; Airhart *v.* Massieu, 98 U. S. 491; Culver *v.* Uthe, 133 U. S. 655; United States *v.* Watkins, 97 U. S. 219.

Alabama. — Sprayberry *v.* State, 62 Ala. 459.

Arkansas. — Finlay *v.* Woodruff, 8 Ark. 328; Johnson *v.* Mays, 8 Ark. 386.

California. — Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

Illinois. — Lee *v.* Getty, 26 Ill. 77.

Indiana. — Bonewits *v.* Wygant, 75 Ind. 41.

Kansas. — Stinson *v.* Geer, 42 Kan. 520, 22 Pac. 586.

Kentucky. — Kentucky Seminary *v.* Payne, 3 T. B. Mon. 161.

Louisiana. — Seymour *v.* Cooley, 3 Mart. (N. S.) 396; Franklin *v.* Woodland, 14 La. Ann, 188.

Maryland. — Casey *v.* Inloes, 1 Gill 430, 39 Am. Dec. 658.

Mississippi. — Fore *v.* Williams, 35 Miss. 533; Boddie *v.* Pardee, 74 Miss. 13, 20 So. 1.

Nevada. — Peers *v.* Deluchi, 21 Nev. 164, 26 Pac. 228; Brown *v.* Warren, 16 Nev. 228.

North Carolina. — Clarke *v.* Diggs, 28 N. C. (6 Ired. L.) 159, 44 Am. Dec. 73.

Pennsylvania. — Oliphant *v.* Ferren, 1 Watts 57; Anderson *v.* Keim, 10 Watts 251.

Texas. — Houston *v.* Perry, 3 Tex.

(2.) Patents and Grants. — Certified copies of patents and grants are generally admissible as primary evidence.[91] Where the recording of a patent in the office of a county recorder is authorized, such

390; Wheeler *v.* Moody, 9 Tex. 372; Texas M. R. Co. *v.* Jarvis, 69 Tex. 527, 7 S. W. 210; Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532; Rogers *v.* Mexia (Tex. Civ. App.), 36 S. W. 825; Allen *v.* Hoxey, 37 Tex. 320; Trevey *v.* Lowrie (Tex. Civ. App.), 78 S. W. 18; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; Dupree *v.* Frank (Tex. Civ. App.), 39 S. W. 988; Hooks *v.* Colley, 22 Tex. Civ. App. 1, 53 S. W. 56.

Wisconsin. — McLane *v.* Bovee, 35 Wis. 27.

Tennessee. — State *v.* Cooper, 53 S. W. 391.

Washington. — Ward *v.* Moorey, 1 Wash. Ter. 104.

In Arkansas, "copies of entries made in the books of any land office of the state, or papers filed therein, certified by the register and receiver," are evidence to the same extent as the original books or papers would be, if produced. Finley *v.* Woodruff, 8 Ark. 328.

A certified copy of a certificate of confirmation is admissible. Sessions *v.* Reynolds, 7 Smed. & M. (Miss.) 130.

In Pennsylvania, a certified copy of a warrant is admissible. Motz *v.* Bolard, 6 Serg. & R. (Pa.) 210.

As to the admissibility of copies after loss of the originals, see Roberts *v.* Unger, 30 Cal. 676; Smith *v.* Mosier, 5 Blackf. (Ind.) 51; State *v.* Cooper (Tenn. Ch. App.), 53 S. W. 391.

Copy of a Copy. — A certified copy of a copy is not generally admissible. Lawrence *v.* Grout, 12 La. Ann. 835; State *v.* Cardinas, 47 Tex. 250.

History. — "There was in former times a technical distinction existing on this subject which deserves notice. As *evidence,* such exemplifications of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of the letters patent, there, upon the principles of pleading, the original under the great seal was required to be produced; for a profert could not be of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI. ch. 4, and 13 Elizab. ch. 6, were passed, by which patentees, and all claiming under them were enabled to make title in pleading by showing forth an exemplification of the letters patent, as if the original were pleaded and set forth." Patterson *v.* Winn, 5 Pet. (U. S.) 233.

Statutory Provision. — "Copies of any records, books, or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record." U. S. Rev. Stat. § 891.

91. *United States.* — Patterson *v.* Winn, 5 Pet. 233; Hanrick *v.* Barton, 16 Wall. 166.

Alabama. — Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349, *overruling* Jones *v.* Walker, 47 Ala. 175; Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744.

California. — Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647; Natoma, Water & M. Co. *v.* Clarkin, 14 Cal. 544.

Florida. — Liddon *v.* Hodnett, 22 Fla. 442; Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992.

Georgia. — Reppard *v.* Warren, 103 Ga. 198, 29 S. E. 817.

Illinois. — Lane *v.* Bommelman, 17 Ill. 95.

Indiana. — Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

Kentucky. — Sneed *v.* Ward, 5 Dana 187.

Louisiana. — LeBleu *v* North American Land & Timber Co., 46 La. Ann. 1465, 16 So. 501.

Missouri. — Barton *v.* Murrain, 27 Mo. 235, 72 Am. Dec. 259; Avery *v.* Adams, 69 Mo. 603.

record, or a certified copy thereof, is admissible as primary evidence.[92]

(3.) Transfers. — A certified copy of an assignment of a right to a patent is sometimes admissible.[93]

(4.) Certificates of Purchase. — Certified copies of certificates of purchase are admissible equally with the originals.[94]

New York. — McKineron *v.* Bliss, 31 Barb. 180.

North Carolina. — Candler *v.* Lunsford, 20 N. C. 18; Archibald *v.* Davis, 49 N. C. 133; Strickland *v.* Draughan, 88 N. C. 315.

South Carolina. — M'Creight *v.* Gossitt, 1 Brev. 515; Maxwell *v.* Carlile, 1 McCord, 534.

Texas. — Jones *v.* Philips, 59 Tex. 609; Ney *v.* Mumme, 66 Tex. 268, 17 S. W. 407; Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31.

Virginia. — Pollard *v.* Lively, 4 Grat. 73.

Thus, a certified copy of a record of a patent in a state land office is admissible. LeBleu *v.* North American L. & T. Co., 46 La. Ann. 1465, 16 So. 501; Candler *v.* Lunsford, 20 N. C. 18.

A certified copy of a state grant not signed by the governor cannot be received as the copy of a grant, but it may, as a circumstance to show that there was once a grant in existence. Blount *v.* Benbury, 3 N. C. 542.

Certified copies of the surveyor-general's grants are inadmissible unless a sufficient basis be laid for their introduction. Hensley *v.* Tarpey, 7 Cal. 288.

It is not necessary to affix a facsimile copy of the seal to the certified copy. Sneed *v.* Ward, 5 Dana (Ky.) 187.

Where a patent is lost, there can be no question as to the admissibility of a certified copy of its record in the land office. Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524; New York Cent. & H. R. R. Co. *v.* Brockway Brick Co., 41 N. Y. Supp. 762, 10 App. Div. 387; Howard *v.* McKenzie, 54 Tex. 171.

And where both the patent and the record have been destroyed and the legislature has made an abstract thereof a record, such abstract is admissible. Butler *v.* Grand Rapids & I. R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84.

The original patent is not rendered inadmissible because copies are admissible. Bullion, B. & C. Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 151, 13 Pac. 174, 11 Pac. 515. (The syllabus statement to the contrary in 11 Pac. 515 does not correctly state the holding of the case.)

Limitation. — In North Carolina, a copy from the office of the secretary of state is admissible, except in favor of the patentee or those claiming under him, who would be entitled to possession of the original. Candler *v.* Lunsford, 20 N. C. 18.

92. Campbell *v.* Laclede Gas Co. 119 U. S. 445; Vance *v.* Kohlberg, 50 Cal. 346; Bernstein *v.* Smith, 10 Kan. 60; Beauvais *v.* Wall, 14 La. Ann. 199; Chandler *v.* Wilson, 77 Me. 76.

Of course the record of a patent in the office of a county recorder is not admissible when the record is unauthorized. Curtis *v.* Hunting, 6 Iowa 536.

93. Clark *v.* Hall, 19 Mich. 356; Mason *v.* McLaughlin, 16 Tex. 24; Burkett *v.* Scarborough, 59 Tex. 495; Parker *v.* Spencer, 61 Tex. 155; Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389.

It is admissible when the party makes affidavit that he cannot procure the original. Graham *v.* Henry, 17 Tex. 164. See also Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

A deed from the grantee does not become part of the records, and a certified copy from the land office is not admissible. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

In Texas a copy of an assignment certified before the issuance of a patent is not admissible. Short *v.* Wade, 25 Tex. 510.

A certified copy of an old assignment may be admitted as a copy of an ancient instrument. Huff *v.* Crawford (Tex. Civ. App.), 32 S. W. 592.

94. Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48; Robinson *v.* Par-

(5.) Official Letters. — Duly authenticated copies of letters to or from land officers are admissible when the originals would be.[95]

(6.) Duplicates. — Second Originals. — A duplicate issued to a purchaser,[96] or a second original,[97] is admissible without proof of loss of the original.

(7.) Private Papers. — Certified copies of private papers in the land office, not properly records of the office, are not admissible.[98]

b. *Form of Copy.* — **(1.) In General.** — The copy should be in the same general form as the original; but a facsimile is not necessary.[99]

ker, 3 Smed. & M. (Miss.) 114, 41 Am. Dec. 614; Holmes *v.* Anderson, 59 Tex. 481; Halbert *v.* Carroll (Tex. Civ. App.), 25 S. W. 1102. See also Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

But see Freeland *v.* McCaleb, 2 How. (Miss.) 756, where a copy of a certificate of purchase of state lands was held inadmissible until loss of the original should be proved.

Certificates of Entry. — A duly certified copy of a certificate of entry is admissible. Boddie *v.* Pardee, 74 Miss. 13, 20 So. 1.

Headright Certificates. — A certified copy of a headright certificate is admissible when the original can not be produced. Ansaldua *v.* Schwing, 81 Tex. 198, 16 S. W. 989.

Other Evidence. — Evidence is not admissible to show that such a certificate once existed, until it is shown that the original is lost and a certified copy cannot be obtained. Giddings *v.* Odom Luckett L. & L. S. Co. (Tex. Civ. App.), 33 S. W. 879.

95. People *v.* Hagar, 52 Cal. 171; Bellows *v.* Todd, 34 Iowa 18; Davis *v.* Freeland, 32 Miss. 645.

In Alabama, by statute a certified copy of a letter of cancelation of a homestead entry is admissible. Holmes *v.* State, 108 Ala. 24, 18 So. 529.

Where the official character of the letter is clearly disclosed upon its face, it is not necessary that the certificate show that it is an official letter. Darcy *v.* McCarthy, 35 Kan. 722, 12 Pac. 104.

96. Thus, in Illinois, a duplicate of a patent, issued on proof of loss of the original, is admissible. Reich *v.* Berdel, 120 Ill. 499, 11 N. E. 912.

In Iowa a duplicate receipt or certificate from the receiver or register of a land office is admissible. Burlerson *v.* Temple, 2 G. Gr. (Iowa) 542; Stone *v.* McMahan, 4 G. Gr. (Iowa) 72.

97. Thus, under the former system in Texas, a testimonio was a second original of the protocol, and both were admissible equally. Titus v. Kimbro, 8 Tex. 210; Blythe *v.* Houston, 46 Tex. 65; Herndon *v.* Casiano, 7 Tex. 322.

But a certified copy of a testimonio was not admissible, because it did not belong in the official custody of the commissioner. Paschal *v.* Perez, 7 Tex. 348. A copy of a testimonio recorded in the office of a county recorder may be admitted. Herndon *v.* Casiano, 7 Tex. 322.

98. Stephenson *v.* Reeves, 92 Ala. 582, 8 So. 695; Herndon *v.* Casiano, 7 Tex. 322; Paschal *v.* Perez, 7 Tex. 348; Hatchett *v.* Conner, 30 Tex. 104; Rogers *v.* Pettus, 80 Tex. 425, 15 S. W. 1093. *Compare* Lanning *v.* Dolph, 4 Wash. C. C. 624, 14 Fed. Cas. No. 8,073.

Thus, an *hipotica especial* does not pertain to the records of the Texas land office, and hence a certified copy is not admissible. Mapes *v.* Leal's Heirs, 27 Tex. 345.

99. An exemplification of a patent showing the signatures only by initials is not admissible. Briggs *v.* Holmstrong, 72 Mo. 337.

It is not necessary to copy a plat referred to. Rosamond *v.* M'Ilwain, 2 Brev. (S. C.) 132.

The fact that a certified copy of a certificate varies from the dates in field notes is not an objection to its admissibility. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

Seal. — It is not necessary to copy

(2.) Extracts From Records. — An extract from the records in the land office is admissible, if it appears on its face to contain all that relates to the subject in controversy.[1]

c. *Authentication.* — A copy is not admissible unless duly certified by the officer having charge of the original,[2] or otherwise proved by testimony in court.[3] The certificate should show that

the seal. Hedden *v.* Overton, 4 Bibb (Ky.) 406. The copy need not show the seal. Bell *v.* Fry, 5 Dana (Ky.) 341.

Facsimiles. — While facsimilies are not necessary, it is no objection to a copy that it attempts to be such. Thus, where it is doubtful whether a letter should be *T* or *F*, it is proper to make the signature as near like the original as possible, leaving it for the jury to decide which is the proper one. McCamant *v.* Roberts, Tex. Civ. App., 25 S. W. 731.

Defective Records. — The record stands in the same position and has the same effect as the instrument of which it purports to be a copy. Hence, if it does not show a proper signature, it is not sufficient evidence. McGarrahan *v.* New Idria M. Co. 96 U. S. 316.

1. Finley *v.* Woodruff, 8 Ark. 328; Lee *v.* Hoye's Lessee, 1 Gill (Md.) 188; Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837; Jennings *v.* McDowell, 25 Pa. St. 387; McLenan *v.* Chisholm, 64 N. C. 323; Farr *v.* Swan, 2 Pa. St. 245.

In De France *v.* Stricker, 4 Watts (Pa.) 327, a certified extract from the general draft of donation land, for which a patent had issued, was held admissible. The same principle was applied to an act of assembly in Adle *v.* Sherwood, 3 Whart. (Pa.) 481.

Contra. — Griffith *v.* Evans, Pet. C. C. 166, 11 Fed. Cas. No. 5,822; Griffith *v.* Tunckhouser, Pet. C. C. 418, 11 Fed. Cas. No. 5,823.

Reasons. — "It cannot be deemed necessary for a party to go to the expense of copying large plots and maps containing irrelevant matter." Farr *v.* Swan, 2 Pa. St. 245.

Limitation. — This rule does not prevent the admission of an entire copy. Vastbinder *v.* Wager, 6 Pa. St. 339.

To Prove a Negative. — An extract is not admissible to prove that certain entries were not contained in the original. The entire record should be produced. Polk *v.* Wendell, 5 Wheat. (U. S.) 293.

2. Boatner *v.* Scott, 1 Rob. (La.) 546.

A copy of a patent certified by a county recorder is not admissible (Lyell *v.* Maynard, 6 McLean 15, 15 Fed. Cas. No. 8,619); nor is a book filed in the county clerk's office (Huls *v.* Buntin, 47 Ill. 396).

In Sampson *v.* Overton, 4 Bibb (Ky.) 409, it was held that an attestation by a deputy would be sufficient, while an attestation by a clerk would not.

Certificates of deputies were held sufficient in Urket *v.* Coryell, 5 Watts & S. (Pa.) 60.

It is not necessary to prove the appointment of the deputy. Gourdin *v.* Barino's Heirs, Harp. (S. C.) 221.

Manner of Authentication of Colonial Grants. — In New York, a "commissioner appointed by the governor of this state was authorized, amongst other things, to certify the existence of any patent remaining of record in any public office or official custody in Great Britain and France, and the correctness of a copy thereof, and his certificate, authenticated by the secretary of state, as in said section required, as to the existence or correctness of a copy of such patent, shall have the same effect to authorize the reading in evidence of such patent, as is given by law to the certificates of justices of the Supreme Court, or to any certificate or exemplification by any officer of this state, of any patent." Mackinnon *v.* Barnes, 66 Barb. (N. Y.) 91.

3. England *v.* Vandermark, 147 Ill. 76, 35 N. E. 465. Certificates by an acting commissioner or register are sufficient. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349;

the copy certified is correct, and if that is shown, it is sufficient.[4]

d. *Certificates As To Contents of Records.* — Certificates of a land officer as to his conclusions drawn from an examination of the records in his office are not admissible.[5]

F. STATE PAPERS. — State papers published by the federal government are admissible, and are *prima facie* evidence of the originals on file in the archives of the government, as though they were authenticated in any other manner recognized by law.[6]

G. SURVEYS. — MAPS. — a. *In General.* — A completed official survey or map is admissible to show the fact of survey or the limits

Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505; Ward *v.* Moorey, 1 Wash. Ter. 104.

4. Young *v.* Emerson, 18 Cal. 416; Piatt County *v.* Gumley, 81 Ill. 350; Lee *v.* Hoye's Lessee, 1 Gill (Md.) 188; Stevens *v.* Geiser, 71 Tex. 140, 8 S. W. 610.

A certificate may be sufficient although without seal and without date. Stewart *v.* Trenier, 49 Ala. 492. But see Cockey *v.* Smith, 3 Har. & J. (Md.) 20.

Where the certificate does not state the copy to be a true copy, the certificate is not sufficient. Wilson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37.

A certificate that a copy is a correct representation is not sufficient. Martin *v.* King's Heirs, 3 How. (Miss.) 125.

As to the certificate of correctness of a translation, see Swift *v.* Herrera, 9 Tex. 263; Spillars *v.* Curry, 10 Tex. 143.

Certificate as Evidence. — The certificate of the register is not part of the evidence before the jury, but only the basis for the admission of the copy as evidence. Johnson *v.* Mays, 8 Ark. 386.

5. *Alabama.* — Bonner *v.* Phillips, 77 Ala. 427.

Arkansas. — Driver *v.* Evans, 47 Ark. 297, 1 S. W. 518.

California. — Murphy *v.* Sumner, 74 Cal. 316, 16 Pac. 3.

Kentucky. — Kentucky Sem. *v.* Payne, 3 T. B. Mon. 161.

Louisana. — Judice *v.* Chretien, 3 Rob. 15.

Texas. — Smithwick *v.* Andrews, 24 Tex. 488.

Wisconsin. — Cornelius *v.* Kessel, 53 Wis. 395, 10 N. W. 520; Gates *v.* Winslow, 1 Wis. 650.

Contra. — Talbert *v.* Dull, 70 Tex. 675, 8 S. W. 530. But see Lott *v.* King, 79 Tex. 292, 15 S. W. 231. *Compare* Struthers *v.* Reese, 4 Pa. St. 129.

"Mere certificates of the receiver as to his conclusions drawn from an examination of the records cannot be received, or substituted for those which the court might draw upon an inspection of duly authenticated copies." Bigelow *v.* Blake, 18 Wis. 520. See also Fisher *v.* Ullman, 3 Tex. Civ. App. 322, 22 S. W. 523.

A certificate of what is shown by the records is not admissible. The proper evidence, in the absence of the original, is a certified copy. Driver *v.* Evans, 47 Ark. 297, 1 S. W. 518.

It follows that a letter from a land officer giving his conclusions as to the contents of the records is not admissible. Hendry *v.* Willis, 33 Ark. 833; Preiner *v.* Meyer, 67 Minn. 197, 69 N. W. 887.

6. Magruder *v.* Roe, 13 Fla. 602.

In Bryan *v.* Forsyth, 19 How. (U. S.) 334, the court said: "These state papers were published by order of Congress, and selected and edited by the secretary of the Senate and clerk of the House. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied; and it cannot be denied that a record of the report of Edward Coles, as found in the printed journals of Congress, could be read on mere inspection as evidence that it was the report sent in by the secretary of the treasury. The competency of these documents as evidence in the investigation of claims to lands in the courts of justice has not been controverted for twenty years, and is not open to controversy."

of the land;[7] but an incomplete survey is not admissible.[8] A private survey is not admissible.[9]

b. *Certified Copies.* — A certified copy of a plat or survey from the proper office is admissible in evidence;[10] and a certified copy of

7. O'Flaherty *v.* Kellogg, 59 Mo. 485; Smith *v.* Hughes, 23 Tex. 248; Travis County *v.* Christian (Tex. Civ. App.), 21 S. W. 119; Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716.

As to the admissibility of a surveyor's report, see Pennsylvania Canal Co. *v.* Dunkel, 101 Pa. St. 103. See the numerous Pennsylvania cases cited *post.* Part VI. § 3.

A map from the general land office is admissible upon the certificate of the commissioner, without further evidence of authenticity. Smith *v.* Hughes, 23 Tex. 248.

A certificate of the surveyor attached to a copy from the land office is inadmissible to prove any disputed fact. Kuechler *v.* Wilson, 82 Tex. 638, 18 S. W. 317.

Official plats are *prima facie* evidence of the character of the land at the time the plats were made. Illinois Steel Co. *v.* Budzisz, 115 Wis. 68, 90 N. W. 1019. See also Barrow *v.* Gridley, 25 Tex. Civ. App. 13, 59 S. W. 602, 913.

A tract book from the land office is admissible. Jesse D. Carr L. & L. S. Co. *v.* United States, 118 Fed. 821, 55 C. C. A. 433.

A diagram from the office of the secretary of the interior is *prima facie* evidence of the limits of the grant. Eastern Oregon Land Co. *v.* Andrews, 45 Or. 203, 77 Pac. 117.

A town-site plat is admissible to show that land has been surveyed. Thompson *v.* Thornton, 50 Cal. 142.

Colonial Surveys. — In Baeder *v.* Jennings, 40 Fed. 199, the court said: "It is conceded that no patents have been issued since the surrender of government, in 1702; the titles granted since then all resting on the surveys alone. If a patent was necessary before, why is it not necessary since? No law was ever passed to dispense with a patent; yet no one supposes that it is necessary, in order to perfect the title. A patent, it is true, is authentic evidence of a title; but it is the survey and return that segregate the land from the common domain." See also Jennings *v.* Burnham, 56 N. J. L. 289, 28 Atl. 1048; Estell *v.* Improvement Co., 35 N. J. L. 235; Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356. It is explained in these cases that such surveys are merely evidence of partition between proprietors.

See, however, as to rule in Pennsylvania, Conn *v.* Penn, Pet. C. C. 496, 6 Fed. Cas. No. 3,104, where it was held that payment of the purchase price will not be presumed from mere lapse of time when a patent is not shown.

In Maryland, an equitable interest was acquired by a survey, which was transmissible by will. A grant will be presumed in favor of parties who have been in possession thereunder. Carroll *v.* Norwood, 4 Har. & McH. (Md.) 287; Carroll *v.* Norwood, 5 Har. & J. (Md.) 155.

Presumption of Validity. — Where it is shown that surveys were made by regular and authorized deputies, it will be presumed that they were made legally and on proper authority. McArthur *v.* Nevill, 3 Ohio 178.

A survey regularly entered on the books of the New Jersey proprietors will be presumed to have been properly made and with due authority. And it will be presumed that a warrant was issued, as recited in the survey. Baeder *v.* Jennings, 40 Fed. 199. The presumptions, after a period of nearly two hundred years, are conclusive. Jennings *v.* Burnham, 56 N. J. L. 289, 28 Atl. 1048.

8. Gamache *v.* Piquignot, 17 Mo. 310.

9. Paxton *v.* Griswold, 122 U. S. 441; Rose *v.* Davis, 11 Cal. 133.

It follows that a party introducing a survey must show the authority under which it was made. Rose *v.* Davis, 11 Cal. 133. See also Fothergill *v.* Stover, 1 Dall. (U. S.) 6.

If shown to have been adopted by the land office, a survey may be read in evidence. Shields *v.* Buchanan, 2 Yeates (Pa.) 219.

10. *United States.* — Meehan *v.*

a certificate of a survey has in one case been held admissible.[11]

H. Official Correspondence. — Official correspondence of officers of the land department is admissible to show their action on a claim;[12] but their letters are not admissible to show the contents or existence of documents on file.[13]

I. Assignments. — a. *Admissibility in General.* — Where an assignment is valid, it is, of course, admissible in evidence, and a conveyance of the land and delivery of the certificate is sufficient evidence of an assignment of the certificate and of all rights acquired thereby.[14]

b. *Effect of Issuance of Patent to Assignee.* — Where a patent has issued to an assignee, it will be presumed that the assignment is regular in all respects.[15]

Forsyth, 24 How. (U. S.) 175.

California. — Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705.

Michigan. — Dewey *v.* Campau, 4 Mich. 565.

Minnesota. — Village of Mankato *v.* Meagher, 17 Minn. 265.

Mississippi. — Sessions *v.* Reynolds, 7 Smed. & M. 130.

Missouri. — Wilhite *v.* Barr, 67 Mo. 284; Wood *v.* Nortman, 85 Mo. 298.

Pennsylvania. — Wolf *v.* Goddard, 9 Watts 544.

South Carolina. — M'Creight *v.* Gossitt, 1 Brev. 515.

Texas. — Hollingsworth *v.* Holshousen, 17 Tex. 41; Breckenridge *v.* Neill, 26 Tex. 101; Houston & T. C. R. Co. *v.* Bowie's Heirs, 2 Tex. Civ. App. 437, 21 S. W. 304; Rogers *v.* Mexia (Tex. Civ. App.), 36 S. W. 825.

Virginia. — Pollard *v.* Lively, 4 Grat. 73.

Wisconsin. — Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132.

But such maps must be certified by the proper officer. Millaudon *v.* McDonough, 18 La. 102.

It must be certified by the officer having the custody of the original. Boatner *v.* Scott, 1 Rob. (La.) 546.

Copy of a Copy. — A certified copy of a copy of a map is not generally admissible. Lawrence *v.* Grout, 12 La. Ann. 835. See also State *v.* Cardinas, 47 Tex. 250.

Where no Record. — A certified copy of field notes is not admissible when the original was not properly returned and therefore was not a record of the land office. Patrick *v.* Nance, 26 Tex. 298.

11. Thornton *v.* Edwards, 1 Har. & McH. (Md.) 158.

12. Bellows *v.* Todd, 34 Iowa, 18; Carmen *v.* Johnson, 29 Mo. 84; Fothergill *v.* Stover, 1 Dall. (U. S.) 6; Ewing *v.* M'Knight, 1 Serg. & R. (Pa.) 128.

A letter to a party to the action from an officer of the land department proposing an exchange of location is the best evidence of his contract with the government. Ansley *v.* Peterson, 30 Wis. 653.

13. Steel *v.* Finley, 3 Yeates (Pa.) 169; Struthers *v.* Reese, 4 Pa. St. 129; Hanrick *v.* Dodd, 62 Tex. 75; Bovee *v.* McLean, 24 Wis. 225.

A letter from the secretary of the land office, stating the contents of a letter he had seen, is inadmissible. Steel *v.* Finlay, 3 Yeates (Pa.) 169.

A letter from the commissioner of the general land office to the register of a local office is inadmissible to show cancelation of an entry. Bovee *v.* McLean, 24 Wis. 225.

A letter from an official stating that there is a mistake in the record is not admissible. Campbell *v.* Laclede Gas. Co., 84 Mo. 352.

A report of a register of a state land office showing that certain lands had been patented to a railroad company and were not the property of a party to the suit, is not admissible. Gordon *v.* Bucknell, 38 Iowa, 438.

14. Witcher *v.* Conklin, 84 Cal. 499, 24 Pac. 302; Carroll *v.* Price, 81 Fed. 137.

15. Clark *v.* Hall, 19 Mich. 356. This rests upon the familiar principle that when a patent issues all necessary preliminary steps are presumed

c. *Presumption As To Time Of.* — Where an assignment bears the same date as a patent certificate it will be presumed to have been made after the issuance.[16] Where an assignment in blank is recognized, no presumption as to the time of assignment arises from its date.[17]

d. *Admissibility of Record of Assignment.* — Where an assignment is recorded in the office of the commissioner of the general land office, it may be proved by his certificate, the same as any other record.[18]

4. Extrinsic Evidence. — A. Best Evidence Principle. — The records in the land office are the best evidence of themselves and extrinsic evidence is not, in general, admissible to prove them.[19]

B. To Vary Or Contradict Writings. — Extrinsic evidence is not generally admissible to vary or contradict records in the land office;[20] and under this rule are also included a patent,[21] state

to have been taken. See also Sweatt *v.* Corcoran, 37 Miss. 513.

16. Carson *v.* Railsback, 3 Wash. Ter. 168, 13 Pac. 618.

17. Reynolds *v.* Sumner, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, 1 L. R. A. 327.

18. Clark *v.* Hall, 19 Mich. 356.

19. Godding *v.* Decker, 3 Colo. App. 198, 32 Pac. 832; City of Chicago *v.* McGraw, 75 Ill. 566; Bass *v.* Mitchell, 22 Tex. 285; Cornelius *v.* Kessel, 53 Wis. 395, 10 N. W. 520.

Deposition of Commissioner of Land Office Not Admissible To Prove Records in Office. — Bass *v.* Mitchell, 22 Tex. 285.

Reservations. — The government records furnish the proper evidence of what lands were sold, and what reservations were made for canal or other purposes. City of Chicago *v.* McGraw, 75 Ill. 566.

Confirmation of an Indian Reservation cannot be proved by parol. Harris *v.* Newman, 3 Smed. & M. (Miss.) 565.

Misnomer in Patent. — The best evidence of misnomer in a patent is the survey. Swann *v.* Wilson, 1 A. K. Marsh (Ky.), 99.

Selection. — The only legal evidence of selections of lands embraced by the act of Congress of 1841 is a properly certified list thereof furnished from the office of the secretary of the treasury, if the original is still there. If the original is not there, then, upon proof of that fact, other evidence upon the subject than a copy from that office will be admissible. Stauffer *v.* Stephenson, 1 Ind. 115.

20. Goodloe *v.* Wilson, 2 Overt (Tenn.) 59. As to the conclusiveness of such records, see *ante,* notes 88 and 89.

A memorandum found on the margin of a record is not admissible to contradict the record. Branson *v.* Wirth, 17 Wall. (U. S.) 32. In this case the court said: "Such a memorandum, being no part of the record itself, cannot be received to contradict the record. It would be a very dangerous precedent to allow it to have that effect. It is not the record of any act of the department, nor of any document entitled to registry in its archives. It is nothing but a memorandum of a third person, and hearsay evidence at best."

21. Bruner *v.* Manlove, 2 Ill. 156; Iowa Falls & S. C. R. Co. *v.* Woodbury County, 38 Iowa 498.

Thus, parol evidence is not admissible in an action at law to show that land patented as swamp and overflowed land is not in fact of that character (French *v.* Fyan, 93 U. S. 169), nor to show that land patented under a wagon road grant was in fact swamp land (Cahn *v.* Barnes, 7 Sawy. (U. S.) 48, 5 Fed. 326).

In cases of swamp land grants not affected by the confirmatory Act of 1857, parol evidence is admissible to show the real character of the land. Funkhouser *v.* Peck, 67 Mo. 19.

grant,[22] survey[23] or certificate.[24] Extrinsic evidence is admissible, however, to show fraud,[25] or facts consistent with the recitals in a patent,[26] or location of a survey.[27]

5. Presumption From Possession. — Possession of public land has been held to give rise to a presumption of a license to occupy from the government.[28]

Where land is reserved for military purposes, parol evidence is not competent to show that it has not been so used. Whitney *v.* Nelson, 33 Wis. 365.

22. Spalding *v.* Reeder, 1 Har. & McH. (Md.) 187; Tate *v.* Greenlee, 9 N. C. 231; Polk's Lessee *v.* Hill, 2 Overt. (Tenn.) 118; Fowler *v.* Nixon, 7 Heisk. (Tenn.) 719.

In Pennsylvania, parol evidence is not admissible to contradict a warrant (Nesbit *v.* Titus, 1 Yeates [Pa.] 284); nor to vary a land certificate issued by Virginia land commissioners (Jones *v.* Park, 2 Yeates [Pa.] 448).

Parol evidence is not admissible to prove anything which is not expressed or necessarily implied in an entry. Craig *v.* Pelham, 2 Ky. 242.

See article "Records."

23. Pollard *v.* Dwight, 4 Cranch (U. S.) 421; Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764; Cowan *v.* Harrod, Litt. Sel. Cas. (Ky.) 4; Hammond *v.* Sheredine, 4 Har. & & McH. (Md.) 420; McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 521; White *v.* Crocket, 3 Hayw. (Tenn.) 182; Hartz *v.* Owen (Tex. Civ. App.), 27 S. W. 42.

Thus, a surveyor's declarations, whether oral or written, are not admissible in evidence where they will contradict the official report of such surveyor upon which the commonwealth has issued a grant. Reusens *v.* Lawson, 9 Va. 226, 21 S. E. 347; Barclay *v.* Howell, 6 Pet. (U. S.) 498.

Parol evidence is not admissible to prove that the surveyor never did actually run out or survey the land. Webb's Lessee *v.* Beard, 1 Har. & J. (Md.) 349; Hammond *v.* Norris, 2 Har. & J. (Md.) 130.

Evidence of Surveyor. — Parol evidence of the surveyor himself is not admissible to impeach an official survey in a collateral proceeding. Cain *v.* Flynn, 4 Dana (Ky.) 499.

Pennsylvania Rule. — As to the rule in Pennsylvania, see Democrat *v.* Goodlander, 2 Yeates (Pa.) 313; Bellas *v.* Levan, 4 Watts (Pa.) 294; M'Call *v.* Sybert, 4 Watts (Pa.) 431.

24. Parol evidence is not admissible to contradict a certificate of Virginia commissioners of land in Pennsylvania. Jones *v.* Park, 2 Yeates (Pa.) 448. *Compare* Hyde *v.* Torrence, 2 Yeates (Pa.) 440. See also Montgomery *v.* Landusky, 9 Mo. 714.

25. Iowa Falls & S. C. R. Co. *v.* Woodbury County, 38 Iowa 498. See also cases cited *ante*, notes 77, 78.

26. "The objection of the defendant, that evidence going to show that the plaintiff had acquired a right of preemption, and that the patent was issued in confirmation of such right, was inadmissible, because it tended to contradict the patent, which showed on its face that it was issued upon the location of a soldier's bounty land warrant, cannot be sustained. The Act of Congress of March 22d, 1852, (10 U. S. Stats. at Large, p. 3), provides that land warrants may be used by a person entitled to a preemption right to any land in payment for the same. There is no statute that we are aware of providing that the patent shall recite that it is executed for lands to which the patentee held a right of preemption, nor, when the lands have been located under a soldier's bounty land warrant, that the patent shall recite that fact. We are therefore unable to see how the recital of either of those facts in the patent would exclude proof of the other, or tend to show that it was not true. The one is not inconsistent with the other, and if either or both are wanting from the patent, the proof of either or both, neither adds to, varies nor contradicts the patent." Megerle *v.* Ashe, 33 Cal. 74.

27. Conn *v.* Penn, 6 Fed. Cas. No. 3,104; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

28. In Conger *v.* Weaver, 6 Cal.

6. Informal Evidence. — Informal evidence is admissible to support an ancient colonial grant, upon the theory that it is the best evidence obtainable.[29]

II. EVIDENCE OF PARTICULAR FACTS.

1. Official Character. — The official character of the officers who have executed a patent or certificate may be shown by evidence that they acted in the office which they assumed.[30]

2. Qualifications of Applicant. — A. Acceptance by Land Department. — Testimony that a person has been accepted by the United States land officers as a qualified preemptor, or as one qualified to enter public lands, is *prima facie* proof of such qualification.[31]

B. Evidence of Alienage. — Under some statutes, public land cannot be taken by aliens. The issuance of a patent is evidence of the right and qualification of the patentee,[32] but this may be over-

548, 65 Am. Dec. 528, the court said: "In the face of these notorious facts, the government of the United States has not attempted to assert any right of ownership to any of the large body of lands within the mineral region of the state. The state government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them in some instances, and recognized them in all. Now, can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the doctrine of a presumption of a grant of right, arising either from the tacit assent of the sovereign or from expressions of her will in the course of her general legislation, and, indeed, from both. Possession gives title only by presumption; then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed."

See also article Adverse Possession, Vol. I.

29. "In their search for truth, the courts are required, in instances like the one under consideration, to receive evidence which would be inadmissible if offered respecting events occurring within the memory of living witnesses. Thus, the statements of historians of established merit, the recitals in public records, in statutes and legislative journals, the proceedings in courts of justice, and their averments and results, and the depositions of witnesses in suits or in legal controversies, are from necessity, received as evidence of facts to which they relate, but always with great caution, and with due allowance for its imperfections and its capability of misleading; and restricted, as to historical evidence, to facts of a public and general nature." Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633. See also Woods *v.* Banks, 14 N. H. 101.

Slight proof of seating under a grant made in 1669 is sufficient. Darby *v.* Stringer, Jeff. (Va.) 10.

30. Wickersham *v.* Woodbeck, 57 Mo. 59.

31. Barnhart *v.* Ford, 41 Kan. 341, 21 Pac. 239.

32. "The proper officers in the land offices of the United States were required to ascertain whether the parties possessed the proper qualifications to entitle them to preempt the land, and there can be no doubt that their decision upon questions arising as to such qualifications is binding upon the parties, unless some question of fraud or trust intervenes." Burrell *v.* Haw, 40 Cal. 373. See also Merriam *v.* Bachioni, 112 Cal. 191, 44 Pac. 481.

come by evidence of fraud. Evidence that the patentee had made a declaration of intention to become a citizen is competent, but not conclusive.[33]

3. Identity of Land. — To identify the land described in a patent, an official map in the office of the proper land officer, or authenticated copy,[34] a town-site plat,[35] or parol evidence[36] is admissible in evidence.

4. Cancellation of Entry. — A. Presumption of Notice. Where it is recited that the claimant was given due notice to show cause why his entry should not be canceled, it will be presumed that such notice was given.[37]

B. Effect of Ex Parte Cancelation. — An ex parte cancelation of an entry is not conclusive; but it has the effect of destroying the value of any certificate as evidence, and the claimant must show his right and compliance with the law by other evidence.[38]

33. Such fact is not the ultimate fact to be proved, and does not of itself prove fraud. Burrell *v.* Haw, 40 Cal. 373.

34. Surget *v.* Little, 2 Cushm. (Miss.) 118.

35. Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515. See also Chever *v.* Horner, 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217; Pipe *v.* Smith, 4 Colo. 444.

Admissible Though Incomplete. Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

36. Pipe *v.* Smith, 4 Colo. 444; Hanlon *v.* Hobson, 24 Colo. 284, 51 Pac. 433, 42 L. R. A. 502.

In Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921, it was held that parol evidence to identify the land was incompetent until the plat referred to in the deed was produced, or until the party should show that it was not in his power to produce it.

37. Northern Pac. R. Co. *v.* Amacker, 53 Fed. 48. See also Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11.

In discussing the reasons for this rule the court quoted from Cofield *v.* McClelland, 16 Wall. (U. S.) 331, as follows: "We think this is a case in which the presumption applies that the officer has done his duty, especially as no provision was made in the act for procuring the evidence that notice had been published. The case comes within the rule so well settled in this court, that the legal presumption is that the surveyor, register, governor, and secretary of state, have done their duty in regard to the several acts to be done by them in granting lands, and therefore, surveys and patents are always received as *prima facie* evidence of correctness.' "

Where the claimant appears at the hearing, due notice will be presumed. Caldwell *v.* Bush, 6 Wyo. 342, 45 Pac. 488.

Limitation. — On the other hand it has been held that the presumption will not be indulged as a substitute for proof of an independent and material fact. "It is a mere presumption of law, which operates only in case of absence of evidence. It disappears entirely in the presence of positive, uncontradicted evidence upon the subject." Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

38. Holmes *v.* State, 100 Ala. 291, 14 So. 51. See also United States *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552.

"By showing that he has no opportunity to be heard before the department, the entryman makes out a case for a hearing in court; but, as he assumes the attitude of complaining of the action of the department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must prove by evidence that he has fully earned the same by an honest compliance with the law. The burden is on him, and it cannot be sustained without offering evidence in addition to the certificate and its *ex parte* cancelation." Parsons *v.*

C. Testimony of Officer of Land Department. — Cancelation of an entry may be shown by the deposition of an officer of the land department.[39]

5. Reservations. — A. Presumption of Authority To Make. Where statute authorizes reservations to be made by the President from public lands for governmental purposes, it will be presumed that a reservation made by a cabinet officer was made with the approbation and direction of the President;[40] but this presumption does not extend to reservations made by other officers.[41]

B. Official Correspondence. — Letters sent by federal land officers to state land officers are admissible to show that the land in question had been reserved from entry;[42] and when the letters are on file in the state land office, duly authenticated copies are admissible.[43]

C. Burden of Proving Location. — The burden of proving the location of an exception or reservation is upon the party relying upon it.[44]

6. Entries. — The burden of proving an entry is upon the party claiming under it.[45] The deposition of the register of the land

Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

39. Guidry *v.* Woods, 19 La. 334, 36 Am. Dec. 677.

40. Wilcox *v.* Jackson, 13 Pet. (U. S.) 498, 512; United States *v.* Tichenor, 8 Sawy. (U. S.) 142, 12 Fed. 415, (*dictum*); United States *v.* Blendauer, 122 Fed. 703.

In the case first cited, the court said: "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and indian affairs, including agencies, belong to the war department. Hence we consider the act of the war department in requiring this reservation to be made, as being in legal contemplation the act of the President."

41. In United States *v.* Tichenor, 8 Sawy. 142, 12 Fed. 415, it was held that neither a general nor a lieutenant will be presumed to be acting under direction of the President in making a reservation.

42. It need not be expressly shown that such letters had been sent. "This objection is inconsistent with the custody of the letters. If they had never been sent they would not have been found in the office where they are certified to be on file. That they are thus found where they should be, if sent, is at least *prima facie* evidence that they were sent as directed." Bellows *v.* Todd, 34 Iowa 18.

43. Bellows *v.* Todd, 34 Iowa 18. It was so held in this case by virtue of a statute making certified copies evidence of equal credibility with the original papers on file in the proper office.

A certified copy of the President's order is also admissible. Florida Town Imp. Co. *v.* Bigalsky, 44 Fla. 771, 33 So. 450.

44. McCormick *v.* Monroe, 46 N. C. 13; Gudger *v.* Hensley, 82 N. C. 481; Scott *v.* Elkins, 83 N. C. 424; Bowman *v.* Bowman, 3 Head (Tenn.) 47.

Thus, where the grant is general, the burden is on the party claiming the benefit of the exception to locate the same, "he being supposed to be in possession of the prior grant if he is the owner." Wyman *v.* Taylor, 124 N. C. 426, 32 S. E. 740; Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884; Roan Mountain S. & I. Co. *v.* Edwards, 110 N. C. 353, 14 S. E. 861. *Compare* Madison *v.* Owens, Litt. Sel. Cas. (Ky.) 281; Hall *v.* Martin, 89 Ky. 9, 11 S. W. 953; Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

45. White *v.* Chicago, R. I. & P. R. Co., 46 Iowa 222.

office showing no entry upon his books for the district in which the land is situated, is admissible to show that no entry had been made thereon.[46]

7. Abandonment. — Failure to have a survey returned raises a presumption of abandonment.[47] And the same presumption may arise from failure to take possession or to pay the purchase money.[48]

III. GRANTS IN AID OF RAILROADS.

1. Burden of Proof. — Under a statute providing for indemnity lands, the railroad company has the burden of showing a failure in quantity of land originally granted.[49] A party seeking to show that

The burden of proving that objects called for in an entry for land in the Virginia military district are so sufficiently described, or are so notorious, that others, by using reasonable diligence, could readily find them, is upon the party claiming under it. Watts *v.* Lindsey, 7 Wheat. (U. S.) 158.

It is a well established principle of substantive law that an entry, to be valid, must be so definite that the land can be readily identified. Lindsey *v.* Miller, 6 Pet. (U. S.) 666; Brush *v.* Ware, 15 Pet. (U. S.) 93; Martin *v.* Boon, 2 Ohio 237; McArthur *v.* Nevill, 3 Ohio 178.

46. Lacey *v.* Marnan, 37 Ind. 168. In this case it was objected that the facts could be proved only by the record of the register or a certified copy thereof. In answer to this the court said: "It was not a certified copy of any record that was desired as evidence; but it was proof that no such record existed. If a sale had been made, there would have been a record or entry of the fact, which might have been copied and certified by the register. But when no sale had been made, and consequently no entry, there was nothing of which a copy could be made out, and certified." For the same rule applied to other matters, see Nossaman *v.* Nossaman, 4 Ind. 648; Stoner *v.* Ellis, 6 Ind. 152. In the latter case the court said: "We are aware of no rule of law which authorizes a public officer to certify what does not appear in his office, for the purposes of evidence. His deposition should be taken, to prove that upon diligent search the fact did not appear."

47. Paxton *v.* Griswold, 122 U. S. 441.

48. Lineweaver *v.* Crawford, 26 Pa. St. 417. In this case the court said: "In the case of a *warrant* and *survey*, where the purchase-money is paid, there can be no motive for abandonment. There is therefore no presumption of abandonment of such a title arising from mere lapse of time. But where the purchase-money has not been paid, the applicant may have good reasons for giving up his contract. He may find it inconvenient to pay the money. He may come to the conclusion that the purchase is not likely to turn out a profitable one. He may prefer other investments of more certain profit. In such a case a presumption of abandonment may arise from delay, if it be of long duration and altogether unexplained."

49. By a grant in aid of the Iowa Central Air-Line Railroad, the company was granted every alternate section of land designated by odd numbers, for six sections in width, on each side of said road as definitely located. If any of said lands had been disposed of by the general government there was granted in lieu thereof an equal amount, designated by odd numbered sections, within fifteen miles of the road as definitely fixed. It was *held*, that in order to be entitled to any of the indemnity land, the company must "show that the lands selected had been disallowed, abandoned, or at least in some manner released from the claim made thereto," before other lands could be selected in lieu thereof. Cedar Rapids & M. R. Co. *v.* Herring, 52 Iowa 687, 3 N. W. 786.

the lands embraced within a grant to a railroad were mineral[50] or that the grant was invalid,[51] has the burden of proving such facts.

2. Presumptions. — A. FROM CERTIFIED LIST OF LANDS SELECTED.— A certified list of lands selected to aid in railroad construction, when accepted, approved and made effective by the government raises a presumption of the fulfilment of all prerequisites,[52] and of title in the company,[53]

50. In Merrill *v.* Dixon, 15 Nev. 401, the court said: "After the company's patent from the government was admitted in evidence, the burden of proof was upon plaintiff to show, admitting he was in a situation to demand the right to do so, that the tract described therein was, in fact, such mineral land, that it was excepted from the operation of the grant and by the terms of the patent. Neither the map nor the testimony of Barker tend to show that fact. It can only be claimed that the map showed, *prima facie,* that there was, upon the section, 'copper, gold, and silver-bearing quartz'; but it did not tend to show whether it was there in quantity or quality sufficient to make the land valuable for mining purposes, and if that was not shown, proof of the *prima facie* fact just mentioned did not tend to show such mineral lands as are excluded from the grant. In excluding mineral lands Congress only intended to exclude lands valuable for mining purposes." As to mineral lands in general, see article MINES AND MINERALS, Vol. VIII, p. 589.

51. Thus, the Wills Valley Railroad Company was authorized to sell one hundred and twenty sections, without previous work. It was held that the court would not presume that the company had previously sold the full amount. Hence it followed that the fact must be proved. Swann *v.* Larmore, 70 Ala. 555.

A purchaser from a railroad, defending a suit for the foreclosure of a vendor's lien, has the burden of showing that the land does not lie within the section the corporation was authorized to sell. Mathis *v.* Tennessee & C. R. Co. 83 Ala. 411, 3 So. 793.

52. In Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837, it was objected that the selection was not shown to have been made by the agent appointed by the governor, as required by both the federal and state acts. It was held that the list filed and approved might be assumed to have been properly selected, especially as it appeared to have been acted on; and that it was admissible as evidence of title. See also cases in following note.

53. In Winona & St. Peter R. Co. *v.* Randall, 29 Minn. 283, 13 N. W. 127, the plaintiff introduced in evidence (1) a copy certified by the state auditor of a certificate from the interior department of the general government certifying to the state a list of lands to aid in railroad construction; (2) a deed executed by the governor, reciting performance of all statutory requirements; (3) a copy certified by the register of deeds of a list of lands certified by the state auditor. This evidence was held to constitute a *prima facie* case. By statute, the list filed with the register of deeds is made *prima facie* evidence of title.

The Act of Congress of August 3, 1854, provided: "That in all cases where lands have been or shall hereafter be granted by any law of Congress to any one of the several states and territories, and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the commissioner of the general land office, under the seal of said office, either of originals or of copies of the originals, or records, shall be regarded as conveying the fee simple of all the lands embraced in such list that are of the character contemplated by such act of Congress and intended to be granted thereby." This was held to apply to the Acts of June 10, 1852, and August 3, 1854,

B. From Withdrawal of Lands From Sale. — The withdrawal of lands from sale by an officer of the land department gives rise to the presumption that the railroad company had filed the requisite map, and that the officer acted with authority.[54]

C. Of Selection. — From Acquiescence. — The acquiescence by a railroad company for a period of years in the issuance of a patent to another raises a presumption that it has made a selection of lands in the indemnity limits in lieu of those described in the patent.[55]

IV. SWAMP LANDS.

1. Burden of Proof. — A. Of Character of Land. — One claiming under a state grant, before selection, has the burden of showing that the lands were in fact swamp lands.[56]

B. Of Approval of Selection. — A party claiming swamp land must show, in addition, that the tract has been selected as such, and the selection approved by the secretary of the interior, or that the selection has been confirmed by statute.[57]

granting lands to the state of Missouri, to aid railroad building; and hence such a list is admissible as evidence of title of land claimed under such act. Hannibal & St. J. R. R. Co. *v.* Smith, 41 Mo. 311. See also Chicago, B. & Q. R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842.

54. The seventh section of the Act of July 1, 1862, provides: "That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within twenty-five miles of said designated route or routes to be withdrawn from preemption, private entry and sale." It will be presumed that an order of the commissioner of the general land office withdrawing the land was made by direction of the secretary of the interior. It must also be presumed that the proper evidence was before him on which to base his official action. Hence, the withdrawal raises a presumption of the filing of the required map. Weaver *v.* Fairchild, 50 Cal. 360.

55. Northern Pac. R. Co. *v.* Amacker, 49 Fed. 529, 1 C. C. A. 345, 7 U. S. App. 33.

56. Wright *v.* Roseberry, 121 U. S. 488; Hannibal & St. J. R. Co. *v.* Smith, 9 Wall. (U. S.) 95; Buena Vista County *v.* Iowa Falls & S. C. R. Co., 112 U. S. 165; Kirby *v.* Lewis, 39 Fed. 66; Keeran *v.* Griffith, 31 Cal. 461. See also Kile *v.* Tubbs, 23 Cal. 431; Read *v.* Caruthers, 47 Cal. 181. In this state, swamp lands were disposed of by the state prior to any selection or patent.

"There is no presumption that all the public lands that belonged to the United States on the 28th of September, 1850, were swamp and overflowed lands. In the absence of proof, the contrary presumption must obtain. The grant to the state was of the swamp and overflowed lands. They had to be identified. To perfect the title of the state, or one claiming under her, to land as swamp land, it must be shown to have been such at the date of the grant, in some of the modes prescribed by law and the regulations of the land department, or, in cases where it is admissible, by parol evidence on the trial." Kirby *v.* Lewis, 39 Fed. 66.

"Donations of the public domain for any purpose are never to be presumed." Rice *v.* Sioux City & St. P. R. Co., 110 U. S. 695.

57. Stephenson *v.* Stephenson, 71 Mo. 127. In this case a certificate of

C. In Contest For Privilege of Purchasing. — In a contest between two alleged settlers for the privilege of purchasing swamp lands from the state, each party is an actor, and must prove a complete case in order to prevail.[58]

2. Presumptions. — A. Of Compliance With State Laws. It will be presumed that state officers have complied with the state laws as to the prerequisites for conveyance.[59]

B. As To Character of Land. — Evidence that a state land officer failed to report certain lands as swamp lands raises the presumption that they were not swamp lands.[60]

C. As to Time of Filing Selection. — Under the Act of March 3, 1857, it will be presumed that a selection of an earlier date, made by the proper officer and found on file after 1857, was filed in time.[61]

the register of lands was offered in evidence, to the effect that the land sued for was on a list of swamp lands on file in his office. It was not evidence because it failed to show that the land had been confirmed as such; on the contrary, it showed that it had been "approved to the railroad." See also Dowd *v.* Louisville, N. O. & T. R. Co., 68 Miss. 159, 8 So. 295; Funston *v.* Metcalf, 40 Miss. 504; Lockwood *v.* Hannibal & St. J. R. Co., 65 Mo. 233; Birch *v.* Gillis, 67 Mo. 102; Polk *v.* Sleeper, 143 Cal., 70, 76 Pac. 819.

58. In Goldberg *v.* Thompson, 96 Cal. 117, 30 Pac. 1019, it was urged that this rule did not apply because findings as to fitness for cultivation were beyond the scope of the pleadings. The court held each party to be an actor, and laid down the rule stated in the text. "If land is of the class which can be sold only to residents, and neither contestant is a settler, the court cannot ignore the character of the land, and the question of residence, because it is inconvenient to the parties to do so. On the contrary, it must decide against both if neither is entitled to purchase." See also Garfield *v.* Wilson, 74 Cal. 175, 15 Pac. 620; Lane *v.* Pferdner, 56 Cal. 122.

In Lane *v.* Pferdner, 56 Cal. 122, it was held that each party has the burden of proving the allegations supporting his own claim, notwithstanding certain negative averments in his adversary's pleading. "The fact that plaintiff did not prove his allegations concerning the right of defendants, did not relieve them of the necessity of proving their own affirmative allegations."

59. Thus, in Iowa, the statute conferred authority to sell at private sale, when the land had been appraised, as provided in the act. A private sale was made, and the court, in the absence of evidence to the contrary, presumed that there had been an appraisement. Spitler *v.* Scofield, 43 Iowa 571.

It will be presumed that a certificate recites the truth and was properly issued. Walker *v.* Plumer, 44 Iowa 406.

60. "It is a maxim of the law that a public officer is presumed to have fulfilled every requisite which the discharge of his duty demands * * * and this maxim is applicable to the state agent, and it will be presumed that he selected and reported all the swamp lands in the county in accordance with his official duty; and after the lapse of thirty years, and on the facts of this case, this presumption would seem to be conclusive." Kirby *v.* Lewis, 39 Fed. 66.

61. It is so held in Tolleston Club *v.* State, 141 Ind. 197, 38 N. E. 214, where the court said: "The reasonable presumption is, that the register, having prepared and certified to the list April 15, 1851, would not retain it in his office until after March 3, 1857. The presumption is, also, that the officer did his duty, and sent the list to the general land

D. As to Survey and Approval. — The approval of the selection by the general government raises the presumption that the lands have been surveyed;[62] and the issuance of a patent to the state raises the presumption of approval.[63]

E. Of Knowledge of Officer's Authority. — A purchaser of swamp land is presumed to know the extent of the powers of the public agent who makes the sale, when the authority is a matter of law and public record.[64]

3. Admissibility of Evidence. — A. Deed From State Officers. A deed of swamp lands from the proper state officer is in some jurisdictions *prima facie* evidence,[65] and in others conclusive evidence of legal title.[66] State patents are clearly evidence of such title.[67] Recitals therein are evidence of the facts recited.[68]

B. Evidence as to Character of Land. — a. *Instruments of Title.* — In a contest between a state grant for lands alleged to be swamp and a federal patent for the same, the recitals in the instruments of title are no evidence of the actual character of the land.[69]

b. *Parol Evidence.* — Where the secretary of the interior has neglected to certify lands to the states, parol evidence is admissible to show the character of the lands at the time of the grant.[70] But

office as soon as it was prepared, agreeable to the instructions received from the commissioner." The presumption was raised in Snell *v.* Dubuque & S. C. R. Co., 78 Iowa 88, 42 N. W. 588; 80 Iowa 767, 45 N. W. 763.

This was doubted, however, in Martin *v.* Marks, 97 U. S. 345, where the court said: "It had been filed with and approved by the surveyor-general in Louisiana in 1852, and was found in that office [the general land office at Washington], when a copy was applied for in 1875. If objection had been taken to this defect of proof on the trial, the plaintiff would probably have been required to show when this list was reported to the commissioner."

62. Cole *v.* Thompson, 35 La. Ann. 1026.

63. This is upon the well-recognized ground that a patent is presumptive evidence that all preliminary steps have been taken. Cramer *v.* Keller, 98 Mo. 279, 11 S. W. 734.

64. Thus, a purchaser will be presumed to know that a land agent has no authority to declare a forfeiture. Dart *v.* Hercules, 57 Ill. 446.

65. Carrington *v.* Potter, 37 Fed. 767. This case interprets the law of Missouri. In that state a statute gives deeds the effect of patents. The burden of showing that the sale was void for violation of law, and that the purchaser was not in fact entitled to a deed is upon the party alleging such facts. See also Reed *v.* Hamilton, 18 Ind. 476.

66. Heeler *v.* Gist, 27 Ark. 200.

67. The patents are conclusive evidence that the legal title is in the plaintiff, and that title must prevail unless a prior right or superior equity is shown. Holland *v.* Moon, 39 Ark. 120.

68. A recital that the land was swamp and overflowed land, and had been confirmed to the state, is evidence of those facts. Chrisman *v.* Jones, 31 Ark. 609.

Recitals were held to be *prima facie* evidence in Hendry *v.* Willis, 33 Ark. 833.

69. Keeran *v.* Griffith, 31 Cal. 461. But see French *v.* Fyan, 93 U. S. 169

70. This results partly from the form of the statute. "Any other rule results in this, that because the secretary of the interior has failed to discharge his duty in certifying these lands to the states, they, therefore, pass under a grant from which they are excepted beyond

after the lands have been selected and a patent issued, parol evidence is not competent.[71] And after a selection is made, parol evidence is not admissible to show that other lands within the same section were in fact swamp lands.[72]

c. *Field Notes.* — Field notes of United States surveyors are admissible upon the question of the character of the land.[73]

d. *Condition of Land at Later Time.* — Evidence of the condition of the land at a later time is not generally competent;[74] although

doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from the plaintiff's grant." Hannibal & St. J. R. Co. *v.* Smith, 9 Wall. (U. S.) 95.

Such evidence is not admissible when the issue of the actual character of the lands is not raised by the pleadings, as where reliance is placed upon the decision of a commissioner and not on the actual character. Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388.

71. Chandler *v.* Calumet & Hecla Min. Co., 149 U. S. 79, *affirming* 36 Fed. 665; French *v.* Fyan, 93 U. S. 169; Ehrhardt *v.* Hogaboom, 115 U. S. 67; McCormick *v.* Hayes, 159 U. S. 332; Rogers Locomotive Works *v.* Emigrant Co., 164 U. S. 559; Williamson *v.* Baugh, 71 Ark. 491, 76 S. W. 423; Iowa R. Land Co. *v.* Antoine, 52 Iowa 429, 3 N. W. 468.

Reasons. — "It is the duty of the land department, of which the secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the preemption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. As was said in the case cited of the patent to the state, it may be said in this case of the patent to the preemptioner, it would be a departure from sound principle and contrary to well-considered judgments of this court to permit, in such action, the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony." Ehrhardt *v.* Hogaboom, 115 U. S. 67.

In California it has been held, in an action to quiet title based on a patent issued pursuant to the grant to the Southern Pac. R. Co., that the defendant might show that the land was swamp and overflowed, and hence not included in the grant. Southern Pac. R. Co. *v.* McCusker, 67 Cal. 67, 7 Pac. 122.

72. McCormick *v.* Hayes, 159 U. S. 332; Chandler *v.* Calumet & Hecla Mining Co., 149 U. S. 79, *affirming* 36 Fed. 665.

73. The statutes of the United States provide that "Every surveyor shall note in his field-book * * * all water-courses over which the line he runs may pass; and also the quality of the lands." Rev. Stat. U. S. § 2395, subd. 7. Such notes are most satisfactory evidence and have the force of a deposition. Kirby *v.* Lewis, 39 Fed. 66.

As to the admissibility of such notes for other purposes, see United States *v.* Breward, 16 Pet. (U. S.) 143; United States *v.* Hanson, 16 Pet. (U. S.) 196.

Contra. — Robinson *v.* Forrest, 29 Cal. 317. In this case the court said: "Neither the laws of Congress, nor the statutes of this state, nor the instructions issued from the general land office, have constituted the plat as evidence between the general government and the state, that the lands are or are not such lands as were granted by the act of Congress to the state. It was designed for a very different purpose. It might properly be adopted, as it has been, by the general government and several of the states, as evidence of the character of the lands; but until it is so adopted, it is not competent evidence to prove the fact in question."

74. Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388; Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

it may be if it relates to a time so close as to give rise to the presumption that it remained in the same condition.[75]

e. *List Made by County Officers Not Admissible.* — A list made by county officers in pursuance of a state statute is not admissible to show title or the character of the land,[76] unless the statute makes it evidence.[77] And an unauthorized record is not evidence for any purpose whatsoever.[78]

V. TOWN-SITE LOCATIONS.

1. Presumptions Arising From Trustee's Deed. — Where the judge who holds land under the United States Town-site Act, in trust for the occupants, executes an official deed for a part of it, the presumption obtains that he did his duty in all respects by compliance with all the statutory prerequisites, and that he conveyed to the proper party;[79] and this presumption is conclusive, except upon

75. Bourne *v.* Ragan, 96 Iowa, 566, 65 N. W. 826. The court said: "It is true that none of these witnesses knew this land in the year 1850, but their testimony relates to a time when it is fair to presume that the condition of the land was practically the same as it was when the swamp land grant was enacted. This finding is strongly supported by the fact that the evidence shows that now, after the country has been improved, the land is of a swampy character, and that no more than ten or twelve acres is suitable for cultivation."

76. Buena Vista County *v.* Iowa Falls & S. C. R. Co., 112 U. S. 165, *affirming* 55 Iowa 157, 7 N. W. 474. The reasons are given in the decision of the state court. The statute "does not provide that the lists so made shall be evidence of any fact. They are authorized to be made merely for the purpose of procuring the proper recognition of the same on the part of the United States, and are in the nature of a claim or demand."

77. In Illinois such a list is evidence. The statute provides that the evidence of title of the state shall be filed in the auditor's office, and that he shall cause to be made out, for each of the several counties, a correct abstract or list of such lands, the correctness of which he is required to certify under the seal of his office. And it is provided that the lists so made shall be sufficient evidence of the title of the lands therein described. Dart *v.* Hercules, 34 Ill. 395; Bristol *v.* Carroll County, 95 Ill. 84.

In Arkansas a report to the auditor representing the lands as having been disposed of is conclusive evidence of title, unless impeached for fraud, mistake or some other recognized cause. Brewer *v.* Hall, 36 Ark. 334.

78. In Carrington *v.* Potter, 37 Fed. 767, copies of entries in a book entitled "Record of the Register of Swamp Lands," were rejected because there was no statute requiring the making of such entries or the keeping of such book.

79. *United States.* — Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921; Chever *v.* Horner, 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217.

Kansas. — Marysville Inv. Co. *v.* Munson, 44 Kan. 491, 24 Pac. 977; Mathews *v.* Buckingham, 22 Kan. 166; Marysville Inv. Co. *v.* Holle, 5 Kan. App. 408, 49 Pac. 332.

Minnesota. — Taylor *v.* Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453; Lamm *v.* Chicago, St. P., M. & O. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

Montana. — Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

Nebraska. — Green *v.* Barker, 47 Neb. 934, 66 N. W. 1032.

South Dakota. — Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

Wisconsin. — Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355.

In Cofield *v.* McClelland, 16 Wall.

direct attack in an action which is brought to set aside the deed.[80]

2. Evidence Must Show That Judge Is Trustee in Fact. — In order that the foregoing presumption may arise, it must appear that the judge is in fact a trustee.[81]

VI. STATE LANDS.

1. Patents and Grants. — A. Presumption of Validity. — A state patent or grant is presumed to be valid and to have been made only after all the preliminary prerequisites have been complied with.[82] This presumption is conclusive as against a collateral

(U. S.) 331, it was presumed that the judge had posted a notice, as required by law, the presumption being stronger "especially as no provision was made in the act for procuring the evidence that notice had been published."

See also Burbank *v.* Ellis, 7 Neb. 156, where it was held that it will be presumed that a deed by a mayor of a town, as trustee, was made within the time required by law.

Reasons. — It is an application of the presumption in favor of official acts. "The execution and delivery of a deed to a portion of the Denver town-site by the probate judge * * * is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps and proceedings necessary to be taken to obtain the title." Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225.

80. Anderson *v.* Bartels, 7 Colo. 256, 3 Pac. 225; Chever *v.* Horner, 11 Colo. 68, 17 Pac. 495, 7 Am. St. Rep. 217; Sherry *v.* Sampson, 11 Kan. 611; Taylor *v.* Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453; Lamm *v.* Chicago, St. P., M. & O. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Ming *v.* Foote, 9 Mont. 201, 23 Pac. 515.

View That Presumption Is Rebuttable. — Black *v.* Galindo, 40 Cal. 171; Biddick *v.* Kobler, 110 Cal. 191, 42 Pac. 578; Goldberg *v.* Kidd, 5 S. D. 169, 58 N. W. 574.

This rule is based upon the fact that the statute does not provide that the deed shall be conclusive. The trustee is authorized to convey to occupants.

Of course, only a party who can show that he was in possession is entitled to introduce such evidence against the grantee. Black *v.* Galindo, 40 Cal. 171.

81. Taylor *v.* Winona & St. P. R. Co., 45 Minn. 66, 47 N. W. 453.

82. *United States.* — Huidekoper *v.* Burrus, 1 Wash. C. C. 109, 12 Fed. Cas. No. 6,848; Attorney-General *v.* Grantees, 4 Dall. 237; Brown *v.* Galloway, Pet. C. C. 291, 4 Fed. Cas. No. 2,006.

Arkansas. — Walker *v.* Taylor, 43 Ark. 543.

California. — Hebbron *v.* Graves, 78 Cal. 380, 28 Pac. 740; People *v.* Stratton, 25 Cal. 242; Leviston *v.* Ryan, 75 Cal. 293, 17 Pac. 239.

Georgia. — Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379.

Kentucky. — Bledsoe's Devisees *v.* Wells, 4 Bibb (Ky.) 329.

North Carolina. — Ray *v.* Stewart, 105 N. C. 472, 11 S. E. 182; Coltrane *v.* Lamb, 109 N. C. 209, 13 S. E. 784.

Pennsylvania. — Bixler *v.* Baker, 4 Bin. 213; Burd *v.* Seabold, 6 Serg. & R. 137; Steiner *v.* Coxe, 4 Pa. St. 13; Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631; Bushey *v.* South Mountain M. & I. Co., 136 Pa. St. 541, 20 Atl. 549. See also Caul *v.* Spring, 2 Watts 390.

A patent is *prima facie* evidence of title and survey. James *v.* Betz, 2 Bin. (Pa.) 12.

United States. — Polk's Lessee *v.* Wendal, 9 Cranch 87; Polk *v.* Wendell, 5 Wheat. 293; Polk *v.* Hill, 1 Brunner, Col. Cas. 126, 19 Fed. Cas. No. 11,249.

South Carolina. — Thompson *v.* Hauser, 2 Mill. Const. 356.

Tennessee. — Dodson *v.* Cocke, 1 Overt. 314, 3 Am. Dec. 757; Sevier *v.* Hill, 2 Overt. 23; Overton's Lessee *v.* Campbell, 5 Hayw. 164; Calloway

attack except where there is lack of title or authority to sell.[83]

Extra Territorial Effect. — A patent of one state is not presumptive evidence in another state that the granting state had title at the time of the issuance of the patent,[84] although it may have that effect within the state of issuance. But otherwise, a state patent is entitled to full faith and credit in the other states.[85]

v. Sanford (Tenn.), 35 S. W. 776; Hitchcock *v.* Southern Iron & Timber Co. (Tenn.), 38 S. W. 588.

Virginia. — Harvey *v.* Preston, 3 Call. 495; Smith *v.* Chapman, 10 Gratt. 445.

83. Sykes *v.* McRory, 10 Ga. 465, 54 Am. Dec. 402; Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708; Martin *v.* Anderson, 21 Ga. 301; Patterson *v.* Buchanan, 37 Ga. 560.

Thus, in Vickery *v.* Scott, 20 Ga. 795, the defendant offered evidence to show that the warrant of survey had been made by two justices of the inferior court and one justice of the peace, sitting as a land court, instead of by three justices of the peace sitting as a land court. This was held inadmissible.

Of course, where there was no authority to sell, and the grant is therefore void, the facts may be shown. Harris *v.* Dyer, 27 Ga. 211. And of course it may be shown to have been forged. Sibley *v.* Haslam, 75 Ga. 490.

Parol evidence that the land was never actually surveyed is not admissible at law. Uhl *v.* Reynolds, 23 Ky. L. Rep. 759, 64 S. W. 498. Ashbrook *v.* Quarles' Heirs, 15 B. Mon. (Ky.) 20; Rays *v.* Woods, 2 B. Mon. (Ky.) 17; Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631; Matthews *v.* Burton, 17 Gratt. (Va.) 312. See also *ante*, I, 3, A, e, (1).

84. The Supreme Court of Minnesota, in discussing this, said, in Musser *v.* McRae, 38 Minn. 409, 38 N. W. 103: "We know of no rule or principle of law upon which the declaration or act, however solemn, of the legislature or governor of the state, may stand in lieu of the performance of the things which the acts of Congress made necessary to attach the title to any specific lands. There is a law of Wisconsin . . . which, so far as bearing on this case, reads: 'Every deed or patent which shall have been at any time executed and delivered by the governor, purporting to convey any lands granted to the state by the United States to aid in the construction of railroads, or military roads, or any swamp or overflowed lands, shall be received as presumptive evidence of the facts therein stated, and that the grantee named therein became vested thereby, at the date thereof, with an absolute title in fee to the land therein described.' The patent of a state, when regular on its face,—that is, when it is in proper form, is signed by the proper officer, and has the proper seal,—is everywhere evidence of the passage of the state's title to the land. The patent, like the deed of an individual, passes the title. But if the law we have quoted goes beyond this, and makes the patent presumptive evidence of the state's title, —that, where the United States was the primary source of title, that title has passed to the state,—then it is only a rule of evidence prescribed for the courts of Wisconsin, and not binding upon courts of other states."

85. In Lassly *v.* Fontaine, 4 Hen. M. (Va.) 146, 4 Am. Dec. 510, the court said: "If the courts of this state were to undertake to pronounce the public act of a sister state, thus solemnly authenticated, void, in consequence of any misfeasance or omission of duty in the inferior ministerial officers of that state, whose faithful discharge of their duty the patent supposes, it might lead to consequences far beyond the reach of my foresight. If the patent be void, or voidable, for the reasons suggested in the bill of exceptions, I conceive it to be competent only to the state of *North Carolina*, and its courts, to pronounce it void. . . . But no evidence, not of equal dignity with the patent itself, can, I presume, be admitted in this state, to annul the operation of a grant made in due form by the proper authorities of any other state."

B. Presumption of Grant From Possession. — A grant may be presumed from possession for a long period of time.[86]

C. Payment of Purchase Money. — After the lapse of twenty years from the date of a patent, it will be presumed that the whole purchase money has been paid.[87] A legislative grant to an individual in which no consideration appears is presumed to be a donation.[88]

D. Burden of Proof. — The burden of providing non-recordation of a grant is upon the party making the objection.[89] A party relying upon a curative act to validate a void grant has the burden of proving facts bringing his purchase within the terms of the act,[90] and of proving good faith.[91] Under a special act au-

86. Carroll *v.* Norwood, 4 Har. & McH. (Md.) 287; Reed *v.* Earnhart, 32 N. C. 516; Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378.

"To lay a foundation for the court to direct the jury to presume a patent from the proprietary to any person, it is necessary to show an incipient title from the proprietary; that is an equitable interest derived from the proprietary by a located warrant, and payment of the composition; or a certificate of survey on a common or other warrant, and payment of the composition, and a length of possession consequent on such equitable interest in the person acquiring the same, and those claiming under him." Mundell's Lessee *v.* Clerklee, 3 Har. & J. (Md.) 462.

The mere fact that a town has made a grant of the right to use land is no evidence of a grant to the town. City of Boston *v.* Richardson, 105 Mass. 351.

"It will afford a sufficient ground for the presumption, to show, that, by legal possibility, a grant might have issued. And this appearing, it may be assumed—in the absence of circumstances repelling such conclusion—that all that might lawfully have been done to perfect the legal title, was in fact done, and in the form prescribed by law." Williams *v.* Donell, 2 Head (Tenn.) 695.

"From long possession a presumption arises of everything necessary to contitute a title in the possessor." Candler *v.* Lunsford, 20 N. C. (4 Dev. & B.) 407.

The force of the presumption is not repelled by evidence rendering the making of a grant improbable. "The presumption is not deduced, as an inference of fact, from the possession, as evidence merely and according to its influence on the minds of the jury, in producing or failing to produce, a conviction, that the presumption is according to the truth; but the deduction is made, without regard to the very fact, by a rule in the law of evidence." Bullard *v.* Barksdale, 33 N. C. (11 Ired. L.) 461.

87. Brock *v.* Savage, 46 Pa. St. 83.

88. Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815.

"Where a legislative grant is not made in discharge of some obligation of the government which the law would recognize, it would not, in a legal sense, be anything more than an act of sovereign grace and bounty on the part of the legislature; and it matters not how meritorious the consideration that constitutes the moving cause for making the grant, if it is not such as the law would recognize, the grant is but a gift or donation." Leonard *v.* Rives (Tex. Civ. App.), 33 S. W. 291; Grant *v.* Wallis, 60 Tex. 350; Causici *v.* La Coste, 20 Tex. 269, 285; McKinney *v.* Brown's Heirs, 51 Tex. 94.

89. Van Pelt *v.* Pugh, 18 N. C. 210.

90. For this purpose he may introduce in evidence the rules of the land board, his application to purchase, and the award. Flannagan *v.* Nasworthy, 1 Tex. Civ. App. 470, 20 S. W. 839.

91. Collyns *v.* Cain, 9 Tex. Civ. App. 193, 28 S. W. 544.

When a strict compliance with all the rules of the land board is shown, good faith is presumed; but when the

thorizing the issuance of a patent for vacant land the claimant has the burden of proving that the land was in fact vacant.[92] One claiming under a deed from the surveyor-general has the burden of proving the required notice to the patentee.[93]

2. Certificates and Warrants. — A. In General. — A certificate of commissioners is conclusive evidence of title as against the state and subsequent claimants,[94] but not as against prior claimants not parties to the proceedings.[95] A warrant is admissible in evidence, but should be accompanied with evidence identifying the land.[96]

B. Presumptions From Unconditional Certificates. — The issuance of an unconditional headright certificate raises a presumption of the performance of prerequisites;[97] and this presumption may become conclusive after a long lapse of time.[98] A patent and survey issued on a certificate is evidence of its genuineness.[99] A

rules are not rigidly complied with, the question of good or bad faith becomes one of intent. It is not necessary, however, to show absolute accuracy of description. Of course the other party may introduce evidence showing want of good faith. Thus, evidence that the land is of a different character from what it was represented to be is admissible. Flannagan *v.* Nasworthy, 1 Tex. Civ. App. 470, 20 S. W. 839.

92. Records *v.* Melson, 1 Houst. (Del.) 139.

93. Hill *v.* Draper, 10 Barb. (N. Y.) 454.

94. Consilla *v.* Briscoe, Hughes (Ky.) 84; Ward *v.* Lee, 1 Bibb (Ky.) 18; Marshall *v.* Rough's Heirs, 2 Bibb (Ky.) 628; Speed *v.* Patton's Heirs, 3 Bibb (Ky.) 426; Finlay *v.* Humble, 2 A. K. Marsh (Ky.) 569; McClanahan *v.* Litton, Hughes (Ky.) 337; M'Min *v.* Stafford, 2 Bibb (Ky.) 487.

Thus, it is conclusive evidence of settlement on the land. Fishback *v.* Major, 1 A. K. Marsh. (Ky.) 147.

Reasons. — "The commonwealth, having appointed her officers to judge between herself and her own citizens, ought not to question that adjudication. . . . Another individual, claiming under the commonwealth by a subsequent act of appropriation, can be in no better situation." M'Nitt *v.* Logan, Litt. Sel. Cas. (Ky.) 60.

95. M'Nitt *v.* Logan, Litt. Sel. Cas. (Ky.) 60; Ward *v.* Lee, 1 Bibb (Ky.) 18.

96. Patterson *v.* Ross, 22 Pa. St. 340.

The place where the settlement was made may be identified either by the description contained in the certificate or by extrinsic evidence. Fishback *v.* Major, 1 A. K. Marsh. (Ky.) 147.

97. Capp *v.* Terry, 75 Tex. 391, 13 S. W. 52. *Compare* Ferguson *v.* Johnson, 11 Tex. Civ. App. 413, 33 S. W. 138.

Thus, it was necessary that the applicant appear before the land board and make an oath prescribed by law, before a certificate should issue. The presumption arises from its issuance that he did so appear. Willis *v.* Lewis, 28 Tex. 185.

It will also be presumed that the certificate was issued upon proof given by two credible witnesses, as required by law. Clark *v.* Smith, 59 Tex. 275.

Presumption of Authority. — The authority for the issuance of certificates by the officers charged with the duty of issuing them will be presumed. Quinlan *v.* Houston & T. C. R. Co. (Tex. Civ. App.), 24 S. W. 693; *s. c.*, 89 Tex. 356, 34 S. W. 738.

In Lott *v.* King, 79 Tex. 292, 15 S. W. 231, it was held that it will be presumed that a certificate was not issued until the time authorized by law.

98. Clark *v.* Smith, 59 Tex. 275.

99. Kimbro *v.* Hamilton, 28 Tex. 560; Deen *v.* Wills, 21 Tex. 642.

surveyor's field notes are competent evidence that the survey was made by virtue of a certificate.[1]

C. Assignments. — Assignment of a certificate or claim may be proved in the same manner as any other fact.[2] It may be presumed from claim of right coupled with lapse of time.[3]

D. Identification of Certificate Holder. — The identity of a party to whom certificate was issued will be presumed from identity of name; but this presumption may be rebutted by evidence showing the contrary.[4]

E. Burden of Proof. — A party relying upon a warrant for vacant land, subject to headrights, has the burden of proving, by a sheriff's certificate, either that the occupant was given due notice of the application for a warrant or that the land was vacant.[5] Upon an appeal from an order granting the warrant, the facts

1. Kimbro *v.* Hamilton, 28 Tex. 560.

2. As the assignment may be by parol, evidence of circumstances tending to show that the ownership of the certificate, while unlocated, had been transferred, is admissible without any preliminary proof. Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674.

This rule applies, notwithstanding a statute requiring the commissioner to withhold his approval until the genuineness of the assignment shall be proved by two competent witnesses. This act was not designed "to make the ultimate rights of assignees depend on their ability to produce in the courts that amount of testimony." The right may be established in the courts in the usual way. Palmer *v.* Curtner, 55 Tex. 64.

Evidence that another caused the certificate to be located and the survey made in the grantee's name is not sufficient to prove an assignment. Herndon *v.* Davenport, 75 Tex. 462, 12 S. W. 1111.

An unacknowledged assignment, made by an administratrix after her discharge, is not admissible. Utzfield *v.* Bodman's Heirs, 76 Tex. 359, 13 S. W. 474.

Mere possession of a certificate is not evidence of ownership. Such a certificate is a mere muniment of title. Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

3. But evidence alone of the declarations of the party claiming is hearsay and inadmissible. Herndon *v.* Davenport, 75 Tex. 462, 12 S. W. 1111; Chamberlain *v.* Pybas, 81 Tex. 511, 17 S. W. 50.

And the mere fact that a certificate has been inventoried in a decedent's estate is not sufficient evidence of ownership, although no opposing evidence is offered. Riggs *v.* Nafe (Tex. Civ. App.), 30 S. W. 706.

The approval of a certificate and the issuance of a patent to the original grantee precludes the court from indulging in the presumption of an assignment of the certificate from mere lapse of time. Walker *v.* Caradine, 78 Tex. 489, 15 S. W. 31. See also Parker *v.* Newberry, 83 Tex. 428, 18 S. W. 815.

4. Yarbrough *v.* Johnson, 12 Tex. Civ. App. 95, 34 S. W. 310. *Compare* Robertson *v.* DuBose, 76 Tex. 1, 13 S. W. 300; Chamblee *v.* Tarbox, 27 Tex. 139; Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794.

The presumption may be rebutted by evidence that a recital in the certificate as to the time plaintiff's ancestor came to Texas was incorrect, and that at the date of the certificate he had already taken all the land to which he was entitled. McNeil *v.* O'Connor, 79 Tex. 227, 14 S. W. 1058.

Evidence of declarations of a party and of claims to the land is admissible upon the question of identity. Brown *v.* Brown (Tex. Civ. App.), 36 S. W. 918.

5. Without such evidence, the warrant is not admissible in evidence. Jackson *v.* Moye, 33 Ga. 296.

cannot be presumed;[6] nor is parol evidence admissible to supply the lack of certificate.[7]

3. Surveys. — A. How Proved. — To complete the legal title, the holder must show a legal survey. He must do this by producing the survey, or by parol evidence.[8] Field notes are competent evidence of a survey.[9]

B. Presumption of Validity. — A survey raises a presumption that it was made only after all prerequisites were fulfilled,[10] and

6. "If, as we hold, the certificate be an indispensable preliminary to the warrant, it must be made to appear affirmatively whenever and wherever the parties litigate the right." The presumption that all things required by the law had been rightly done in the court of original jurisdiction does not apply. Jackson *v.* Moye, 33 Ga. 296.

7. Jackson *v.* Moye, 33 Ga. 296. This is because the law prescribes the mode of proof. See also Miller *v.* Woodard, 29 Ga. 753. In Pritchett *v.* Ballard, 102 Ga. 20, 29 S. E. 210, however, a surveyor was allowed to give his opinion that the land was vacant.

8. Dubois *v.* Newman, 4 Wash. C. C. 74, 7 Fed. Cas. No. 4,108.

As to the admissibility of a survey, see Wagner *v.* Wagner, 68 Pa. St. 392.

"Where a survey has been actually made on the ground, that is, where traces of a survey are to be found. I scarcely know anything that has not been admitted, found in the office of a surveyor, that has had relation to it. I might express myself by a strong figure, and say, that almost the *sweepings of an office* had been admitted to go to the jury to be weighed by them under the direction of the court." But a survey made by a deputy for himself is not admissible. Lessee of M'Kenzie *v.* Crow, 2 Bin. (Pa.) 105.

Where an original survey cannot be located, evidence of the location of junior surveys which call for the lines of the elder as adjoiners is admissible. Tyrone Min. & Mfg. Co. *v.* Cross, 128 Pa. St. 636, 18 Atl. 519.

Acts of Deputy Surveyors. — "Any act of a deputy surveyor done in a course of official duty, is evidence to show for whom he made the survey; but if the act be unofficial, it is admissible." Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298.

Hence a certificate of one who had been a deputy surveyor, that at a previous time a party had paid him fees for making a survey, was held incompetent to prove that the survey was made for him. Lessee of Cluggage *v.* Swan, 4 Bin. (Pa.) 150, 5 Am. Dec. 400. For the same reason the declarations of a deputy surveyor, though dead at the time of trial, that he had made a certain survey, under an order from the proprietaries, are not evidence. Lessee of Bonnet *v.* Devebaugh, 3 Bin. (Pa.) 175.

9. Kimbro *v.* Hamilton, 28 Tex. 560.

And in case of preemption claims, such notes are evidence although not returned in time. "In the ordinary cases of surveys upon certificates, the survey is the evidence of [to] direct subsequent locators how to make their selections, so as not to conflict with others. But in the case of preemption rights, the claimant resides upon the land, and that is sufficient to put the locator upon inquiry, from which he may readily ascertain the nature and extent of the claim." Parish *v.* Weatherford, 19 Tex. 209.

10. *United States.* — Griffith *v.* Tunckhouser, Pet. C. C. 418, 11 Fed. Cas. No. 5,823; Griffith *v.* Bradshaw, 4 Wash. C. C. 171, 11 Fed. Cas. No. 5,821; Harris *v.* Burchan, 1 Wash. 191, 11 Fed. Cas. No. 6,117.

Pennsylvania. — Lambourn *v.* Hartswick, 13 Serg. & R. 113; Packer *v.* Schrader Min. & Mfg. Co., 97 Pa. St. 379; Mock *v.* Astley, 13 Serg. & R. 382; Lessee of Wirt *v.* Stephenson, 3 Bin. 35; Renn *v.* Contributors to Penn. Hospital, 2 Serg. & R. 413; Schnable *v.* Doughty, 3 Pa. St. 392; Drinker *v.* Holliday, 2

after the lapse of twenty-one years without objection is conclusive.[11] When a patent has issued it will be presumed that the field notes have been filed in time[12] and that the survey was properly made.[13]

Yeates 87; Meade *v.* Haymaker, 3 Yeates 67.

Thus, it is presumed that the survey was actually made on the land. See cases cited above.

Presumption of Consent. — Every original survey is presumed to be made with the full consent of the party (Steel's Lessee *v.* Finley, 3 Yeates [Pa.] 169; Porter *v.* Ferguson, 3 Yeates [Pa.] 60; Drinker *v.* Holliday, 2 Yeates [Pa] 87), and to be made for him (Urket *v.* Coryell, 5 Watts & S. [Pa.] 60).

But there is no presumption of consent to a subsequent survey. Cassidy *v.* Conway, 25 Pa. St. 240.

How Rebutted. — The presumption that a survey was made with a party's consent may be rebutted by circumstantial evidence. Merchant's Lessee *v.* Millison, 3 Yeates (Pa.) 73. See also Bellas *v.* Cleaver, 40 Pa. St. 260.

Acceptance of Survey. — The acceptance of a survey may be presumed from the granting of a patent. Brandon *v.* Fritz, 94 Pa. St. 88.

A Survey Embracing More Land Than Is Included in Warrant is presumed to be valid; and it is presumed that the surveyor received the additional fees therefor. Smith *v.* Walker, 98 Pa. St. 133.

11. *Pennsylvania.* — Packer *v.* Schrader M. & M. Co., 97 Pa. St. 379; Ormsby *v.* Ihmsen, 34 Pa. St. 462; Norris *v.* Hamilton, 7 Watts 91; Schnable *v.* Doughty, 3 Pa. St. 392; Nieman *v.* Ward, 1 Watts & S. 68; McBarron *v.* Gilbert, 42 Pa. St. 268; Glass *v.* Gilbert, 58 Pa. St. 266; Caul *v.* Spring, 2 Watts 390; Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 18 Atl. 480.

Thus, after the lapse of such time, evidence that the survey was in fact a chamber survey is not admissible. Schraeder M. & M. Co. *v.* Packer, 129 U. S. 688. Evidence of the ancient practice of surveyors is not admissible in rebuttal. Collins *v.* Barclay, 7 Pa. St. 67. *Compare* Fox *v.* Lyon, 27 Pa. St. 9.

Reasons. — This rule is supported on the analogy of the statute of limitations. "This species of right certainly falls within the reason of the law, which gives to the *bona fide* holder of a legal or equitable right the protection of presumption of length of time, of the forms and ceremonies required by law, to complete and perfect his title. * * * It is as difficult for the owner to keep alive his marks on the ground, as it is impossible for him to keep alive the witnesses who made them. Time, the exterminator of all things, accident by tempest and by fire, may prostrate the best marked lines; and when to this is added the destructive hand of man, who is led into the strong temptation of rooting up the distant owner's landmarks, *and thereby, by this accursed thing*— of removing landmarks—making himself the owner of the land; the reasons are very cogent in favor of this legal presumption." Lambourn *v.* Hartswick, 13 Serg. & R. (Pa.) 113.

12. Thus, the law requires an affidavit from the preemptioner as authority for a survey. It is presumed that it was filed "because without it the surveyor had no right to make the survey, and the county surveyor could not and would not have sanctioned the survey; and as the surveyor in verifying his survey alleges that it was made on the preemption claim of the occupant, we must presume that the application for the survey was supported by the affidavit." Bledsoe *v.* Cains, 10 Tex. 455.

It raises a presumption that a valid certificate was in existence. Kimbro *v.* Hamilton, 28 Tex. 560.

It will be presumed that a purchaser accepted by the surveyor is a responsible party. Russ *v.* Telfener, 57 Fed. 973. In general, see Howard *v.* Perry, 7 Tex. 259.

13. Thus, in the absence of evidence to the contrary, it will be presumed that the surveyor actually surveyed the lines called for. Groesbeck *v.* Harris, 82 Tex. 411, 19 S. W.

A failure to institute proceedings to compel the return of field notes raises a presumption of acquiescence.[14]

C. Presumption of Correctness. — A survey, fair on its face, is presumed to be correct.[15] Parol evidence is admissible to explain an apparent discrepancy.[16]

D. Evidence That Survey Was Made Upon Warrant. — It will be presumed that a surveyor saw the necessary warrant before permitting an entry;[17] and a certificate of the surveyor is sufficient evidence that the warrant was in his possession.[18]

E. Informal Surveys. — A survey adopted by the land-office, although not made by the regular officer, or although otherwise informal, may be read in evidence.[19] But a survey made by an unauthorized surveyor, or made on *ex parte* evidence, and not adopted by the land office, is not admissible;[20] although the surveyor may use it as a memorandum to show how the land might be located from the calls of the warrant.[21]

F. Second Surveys. — A second return of survey is admissible to correct an error in the first return.[22]

G. Opinion of Surveyors. — A surveyor may testify as to his conclusion as to the location of certain land.[23]

850; Maddox *v.* Fenner, 79 Tex. 279, 291, 15 S. W. 237.

14. Patrick *v.* Nance, 26 Tex. 298.

15. Forbis *v.* Withers, 71 Tex. 302, 9 S. W. 154.

16. Booth *v.* Upshur, 26 Tex. 64.

17. "**The Entry Was Made**, and by it the warrant is described and identified. It is not probable that the surveyor would have permitted the entry without seeing the warrant. It is a presumption of law that he did his duty. His official acts are to be accredited until they shall be *proved* to have been illegal." Hart *v.* Young, 3 J. J. Marsh (Ky.) 408.

18. Taylor *v.* Brown, 5 Cranch (U. S.) 234.

19. Shields' Lessee *v.* Buchannan, 2 Yeates (Pa.) 219; Funston's Lessee *v.* M'Mahon, 2 Yeates (Pa.) 245; Harris *v.* Monks, 2 Serg. & R. (Pa.) 557; Reynolds *v.* Dougherty, 3 Serg. & R. (Pa.) 325; Burd *v.* Seabold, 6 Serg. & R. (Pa.) 137. *Compare* Dubois *v.* Newman, 4 Wash. C. C. 74, 7 Fed. Cas. No. 4,108. Thus, in Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313, a paper purporting to be the original survey, not returned to the office of the surveyor-general, but found among the papers of a deceased deputy in the hands of his executor, was admitted. It was proved that the body of the writing and the indorsements were in the handwriting of several deceased deputy-surveyors.

An unreasonable delay in making the return will cause the neglect to be imputed to the owner. Zerbe *v.* Schall, 4 Watts (Pa.) 138 (delay for twenty-nine years).

20. Gordon *v.* Kerr, 1 Wash. C. C. 322, 10 Fed. Cas. No. 5,611. Thus, a survey made by a deputy for himself, and not filed, is inadmissible. Lessee of M'Kinzie *v.* Crow, 2 Bin. (Pa.) 105.

21. Gordon *v.* Kerr, 1 Wash. C. C. 322, 10 Fed. Cas. No. 5,611.

22. "It must go to the jury, with the parol testimony of the artists on the ground, together with the first return, and must be judged of by them. It will be the height of injustice to affect an honest claim to lands by the oversight of a surveyor in making his return. Such return is but evidence of the survey. What has been done on the ground is the real survey." Eddy's Lessee *v.* Faulkner, 3 Yeates (Pa.) 580.

23. "The conclusion of a surveyor, derived from his knowledge of lines and corners found on the ground, is certainly one of fact and

4. Entries and Locations. — A. Evidence Of. — **(1.) In General.** The only legal evidence of a mere location sufficient to maintain an action of trespass to try title is some entry, memorandum or other writing made by an applicant for vacant land in a book required to be kept by the rules of the land office.[24]

(2.) Parol Evidence. — Entries in relation to specialty are devisible into three classes — such as are special, vague, or stand indifferent from their face. The first require no auxiliary proof;[25] the second cannot be made good by auxiliary proof;[26] the third admit of evidence which shall make them special or vague.[27] Parol evidence is not admissible to prove anything not necessarily implied in an entry,[28] but such evidence is admissible to show the names

not of law. The question regards location, which is always one of fact, hence, one about which a surveyor who is properly instructed concerning the facts, may alway give his opinion. Jackson *v.* Lambert, 121 Pa. St. 182, 15 Atl. 502. See also Northumberland Coal Co. *v.* Clement, 95 Pa. St. 126; Farr *v.* Swan, 2 Pa. St. 245.

24. "It is believed to be well settled that to make a valid location or entry, it should be attended with such circumstances and facts of notoriety as would furnish a person of ordinary diligence notice that the land had been located. . . . A verbal application only to the surveyor, confined to the knowledge of the applicant and the surveyor, would give no notice, and would leave it in the power of the surveyor and locator to commit fraud on the rights of others entitled to locate lands. It was to prevent evils of this kind and the controversy that would arise between locators from vague and undefined locations that the regulations cited were ordained by the commissioner of the general land office." Lewis *v.* Durst, 10 Tex. 398, 415.

25. Wallen *v.* Campbell, 2 Overt. (Tenn.) 320.

It is clear that no extrinsic proof is required, for the entries, as to locality, containing references to places, historically, traditionally, or well known to the people of the country would not be helped thereby.

26. Winchester *v.* Gleaves, 3 Hayw. (Tenn.) 213.

"The second cannot be made good by any extrinsic proof, either possessing no calls for specialty, or, if any, requiring greater exertions to ascertain such specialty than is reasonable; as, for instance, an entry calling to lie in the woods; in the state or particular county, might properly be said to possess no call or specialty; but, if calling to include a tree marked in a particular manner, the entry would still be void, as requiring greater exertions and industry to find the tree than are consistent with the avocations of mankind." Wallen *v.* Campbell, 2 Overt. (Tenn.) 320.

27. **Evidence Admissible.** "When the surveyor in his plat calls for the specialties of the entry, it is presumptive evidence of the sufficiency of such specialties, and consequently throws the *onus probandi* on the party opposing the validity of the entry." Wallen *v.* Campbell, 2 Overt. (Tenn.) 320.

Presumption of Validity. — An entry not vague on its face is presumed special. Murfree's Lessee *v.* Logan, 2 Overt. (Tenn.) 220.

28. Meredith *v.* Picket, 9 Wheat. (U. S.) 573.

Parol evidence is not admissible to prove anything not necessarily implied in an entry. Craig *v.* Pelham, Sneed (Ky.) 242.

This is merely an application of the parol evidence rule.

Such evidence is admissible to support an entry. Consilla *v.* Briscoe, Hughes (Ky.) 84.

A location with a surveyor cannot be aided by a location with commissioners further than they agree with each other. McClanahan *v.* Litton, Hughes (Ky.) 337.

and notoriety of the places which are mentioned in the entry.[29]

(3.) **Notoriety.** — (A.) PRESUMPTIONS. — It is a universal principle that an entry must call for some notorious object; and the notoriety will not be presumed merely because the survey was made by officers of the government;[30] but an actual settlement will be presumed to be notorious.[31]

After the lapse of twenty-one years from the return of a survey, the presumption is that the warrant was located as returned by the surveyor to the land office; but this presumption is not conclusive, and may be rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances.[32]

(B.) MATTERS JUDICIALLY NOTICED. — The court will take judicial notice of the notoriety of an object which necessarily connects itself with and forms a part of the general history or geography of the country.[33]

(C.) NEGATIVE EVIDENCE. — Negative evidence is entitled to peculiar weight as showing lack of notoriety.[34]

B. PRESUMPTION AS TO OWNERSHIP OF LOCATION. — It will be presumed that a location entered in the name of another was intended for the benefit of the party applying; but this may be rebutted by evidence of constant reputation in the county, and by other evidence showing the real ownership.[35] A location under

29. Meredith *v.* Picket, 9 Wheat. U. S. 573.

Evidence of the notoriety of other objects in the neighborhood is irrelevant. Banta *v.* Clay, 2 A. K. Marsh. (Ky.) 409.

30. Key *v.* Matson, Hard. (Ky.) 70.

Identity of Name. — Where a natural place or object was known by a particular name before an entry was made, and at the trial a place or object of that name is shown, it will be presumed that the one shown was the one intended. Hart *v.* Bodley, Hard. (Ky.) 98.

"Where natural objects are shown, corresponding with the entry, their existence at its date might be presumed; yet it has been held, that in this, springs afford an exception; and it has long been settled, that artificial objects must be proved cotemporary with the entry." Humphreys *v.* Lewis, 2 T. B. Mon. (Ky.) 1; *s. c.*, 4 T. B. Mon. (Ky.) 337.

31. M'Millen *v.* Miller, Hard. (Ky.) 494; Davis *v.* Bryant, 2 Bibb (Ky.) 110.

But it must be a settlement, and not a mere improvement. Davis *v.* Gray, 3 Litt. (Ky.) 450.

32. Clement *v.* Packer, 125 U. S. 309.

33. Thus, in Hart *v.* Bodley, Hard. (Ky.) 98, the court took judicial notice of the notoriety of Blue Licks, a place at which, in 1782, a memorable battle between the indians and the earlier settlers of Kentucky took place.

34. "Notoriety is based on hearsay, and every one, acting on the same theatre where this reputation is alleged to exist, who is ignorant of the matter, excites a strong belief that this reputation was circumscribed, and not general." Banta's Heirs *v.* Clay, 2 A. K. Marsh. (Ky.) 409. See also Wilson *v.* M'Ghee, 1 Bibb (Ky.) 34.

As to the effect of negative evidence generally, see title POSITIVE AND NEGATIVE EVIDENCE, Vol. IX, p. 864.

35. Fogler's Lessee *v.* Evig, 2 Yeates (Pa.) 119; Weidman *v.* Kohr, 13 Serg. & R. (Pa.) 17.

a land certificate jointly owned by two or more is presumed to be for the joint benefit of all the owners.[36]

C. Unofficial Blotters. — Unofficial blotters in the land office are admissible after the death of the party making the entry.[37] Such evidence is generally admitted to prove payment of purchase money.

D. Evidence of Improvements. — Where a warrant refers to an improvement, and names a particular day from which interest is to be paid, evidence of an improvement subsequent to that day

"Superintending the survey, or paying the fees, has generally been deemed sufficient evidence of ownership of an application or warrant, unless rebutted by evidence that the person so superintending or surveying acted as agent, or unless possession or some act of ownership appears in favor of the person in whose name the application was entered or the warrant was issued." Turner *v.* Waterson, 4 Watts & S. (Pa.) 171; Cluggage *v.* Lessee of Duncan, 1 Serg. & R. (Pa.) 111; Campbell *v.* Galbreath, 1 Watts (Pa.) 70.

Rebutting Evidence. — "The original list, with proof of the handwriting of the subscriber, has been very often received as evidence, and indeed is primary evidence of the original owner. This rebuts the first presumption arising from the name, and then another presumption takes place, that the subscriber to the list is the real owner, and the fees of office being paid by him, this creates a resulting trust to his use. . . . It is a mistake to suppose, that the only medium of proof is payment of the surveyor's fees. That is one, and it is for this reason, that it is an important act, denoting ownership; but this does not exclude all other acts tending to prove the same thing." Weidman *v.* Kohr, 13 Serg. & R. (Pa.) 17. See also Galloway *v.* Ogle, 2 Bin. (Pa.) 468.

As to the admissibility of reputation, see Sampson *v.* Sampson, 4 Serg. & R. (Pa.) 329.

36. While it may be shown that the location was intended to inure to the benefit of one only, the evidence must show that, at the time of the location, it was intended to be for the benefit of some particular owner, and it must be designated with certainty which one it was, and the act of such location must be consistent with the rights of such owner in the certificate. Kirby *v.* Estill, 78 Tex. 426, 14 S. W. 695.

As to the right to have separate surveys, see Farris *v.* Gilbert, 50 Tex. 350.

37. Galbraith *v.* Detrich, 8 Watts (Pa.) 104, 112.

Certified Copies. — By an act of 1823, certified copies of such blotters were made admissible. This act did not change their nature as evidence, but only furnished a more convenient means of getting them before courts and juries. Strimpfler *v.* Roberts, 18 Pa. St. 283, 297, 57 Am. Dec. 606; Herron *v.* Dater, 120 U. S. 464.

Reasons. — Effect as Evidence. "The blotters found in the land office are not the records of any public transaction. They are private memoranda kept by a clerk for his own convenience, and that of other officers, in settling their accounts with the government and with one another. But after the death of the person who made them, they were received as evidence on a principle which would admit the private entries of other deceased persons. Their general accuracy is not doubted, but they are open to contradiction, and have been contradicted very often. The written declaration of John Keble that he received the purchase-money on a particular warrant at a certain time, though it was against his interest to make such a declaration, is not better evidence of the fact than the oath of a living witness who saw the money paid. Indeed it is not evidence of so high a grade, for it is only received *ex necessitate rei* after all

but prior to the issue of the warrant is admissible;[38] but evidence of an improvement prior to that day is not admissible on an issue of title.[39] In Arkansas the making of the required improvements may be shown by a certificate of a justice of the peace residing in the township where the land is located, or by parol evidence.[40]

E. Evidence of Residence. — Residence may be proved by a certificate from the commissioner of the land office that the proof is on file.[41]

F. Evidence of Abandonment or Forfeiture. — Abandonment of a location may be presumed from failure to have a survey made within a reasonable time,[42] from withdrawal of a certificate from the surveyor's office,[43] from a resurvey,[44] or failure to do anything with the land for a considerable period.[45] In an action

other evidence is supposed to be extinct." Fox *v.* Lyon, 27 Pa. St. 9.

38. In Pennsylvania, a party who made improvements was allowed time for payment, interest being paid from the time of the improvement. The theory was that the improvements were a security. Evidence of an improvement after the date mentioned in the warrant was admissible because by such reference the locator was compelled to pay more interest than if he had correctly stated the date. Humes *v.* McFarlane, 4 Serg. & R. (Pa.) 427.

39. Humes *v.* McFarlane, 4 Serg. & R. (Pa.) 427.

Such evidence may be admitted, however, to show that another survey could not have taken effect. Coxe's Lessee *v.* Ewing, 4 Yeates (Pa.) 429.

40. McCauley *v.* Six, 40 Ark. 244.

41. This is the result of statute requiring the commissioner to issue such a certificate upon the filing of proofs. Strickel *v.* Turberville (Tex. Civ. App.), 67 S. W. 1058. See also Logan *v.* Curry, 95 Tex. 664, 69 S. W. 129.

But such certificate is not conclusive as against a prior claimant. May *v.* Hollingsworth (Tex. Civ. App.), 74 S. W. 592. See also White *v.* Watson (Tex. Civ. App.), 78 S. W. 237.

Evidence of continued retention of an existing home is not conclusive evidence that the settler did not reside on the land. Anderson *v.* Walker (Tex. Civ. App.), 70 S. W. 1003, denying rehearing 67 S. W. 432.

In a controversy between claimants for school lands, certified copies of proof of occupancy from the general land office are inadmissible. They are *ex parte*. Spence *v.* Dawson (Tex. Civ. App.), 67 S. W. 180, 70 S. W. 73.

42. Lewis *v.* Durst, 10 Tex. 398.

43. Wyllie *v.* Wynne, 26 Tex. 42.

"When that certificate was withdrawn from the office there remained no evidence of the appropriation, or that the holder of the certificate still claimed the land; and a stranger would have the right to suppose that there had never been a location, or if one had been made, then that the same had been withdrawn or abandoned." Frederick *v.* Hamilton, 38 Tex. 321, 338.

44. Austin *v.* Dungan, 46 Tex. 236.

45. Brentlinger *v.* Hutchinson, 1 Watts (Pa.) 46. See also Atchison *v.* M'Culloch, 5 Watts (Pa.) 13.

"A man who sits down upon land, without warrant or location, and after a small improvement moves off; or a man who barely took out a location (for which he paid by seven shillings *fees of office*) and suffered a considerable time to elapse without doing anything, may very well be presumed to have relinquished the intention of purchasing the land; but, where a man has put his location into the hands of a deputy surveyor, *paid the surveying fees,* and *had the survey returned,* the circumstances must be very strong indeed from which the laws would presume that he had relinquished his title to the land, and

involving the question of prior possession only, it is not competent to go beyond the records of the land office to show a forfeiture.[46]

G. Burden of Proof. — The burden of proving settlement on school lands is upon the party claiming it.[47] And when the lands have been leased, the purchaser has the burden of showing a right to purchase.[48] After award, the burden of showing that the land had not been properly appraised,[49] and that he had the right to purchase,[50] is upon the contestant. When facts constituting a forfeiture are shown, the burden is on the plaintiff to show facts excusing it.[51]

thrown it back on the proprietaries." Fisher *v.* Larick, 3 Serg. & R. (Pa.) 319.

46. Renfro *v.* Harris, 28 Tex. Civ. App. 58, 66 S. W. 460, 795.

If a party is actually living on land at the time of another survey, any general presumption of abandonment is overcome. Barton *v.* Glasgo, 12 Serg. & R. (Pa.) 149.

The taking of a warrant for, and having a survey made of, a less quantity of land than the settler is entitled to, is evidence, but not conclusive of abandonment. Porter *v.* M'Ilroy, 4 Serg. & R. (Pa.) 436.

"Nothing short of an actual ouster of the owner from the land, in such case, by taking possession of it, and continuing to keep the same, by exercising acts of ownership at least upon it, for twenty-one years or upwards, will defeat the owner of his right to the land." Urket *v.* Coryell, 5 Watts & S. (Pa.) 60, 83. See also Weidman *v.* Kohr, 13 Serg. & R. (Pa.) 17.

47. Jordan *v.* Payne, 18 Tex. Civ. App. 382, 45 S. W. 189. And he must show that a prior settlement right had terminated. Boaz *v.* Powell, 96 Tex. 3, 69 S. W. 976.

48. Thus, where lands have been leased, they cannot be sold if the lessee has placed thereon improvements of the value of $200. A purchaser has the burden of proving that such improvements were not made. White *v.* Pyron, 23 Tex. Civ. App. 105, 57 S. W. 56.

Where, however, the land has been forfeited by the lessee, and subsequently sold to another, a purchaser of the improvements from the lessee has the burden of proving that he purchased before the forfeiture, and that they were worth $200. Shelton *v.* Willis, 23 Tex. Civ. App. 547, 58 S. W. 176. In general, see McBane *v.* Angle, 29 Tex. Civ. App. 594, 69 S. W. 433.

Where the commissioner of the land office has treated a lease as having expired, the burden of proving that it had not, is upon the party claiming the fact. McGee *v.* Corbin, 96 Tex. 35, 70 S. W. 79, *reversing* 67 S. W. 1068.

It will be presumed that the lands were properly leased. Sanford *v.* Terrell (Tex.), 87 S. W. 655.

49. Davis *v.* McCauley, 28 Tex. Civ. App. 211, 66 S. W. 1124.

In a suit of trespass to try title, the plaintiff has the burden of proving classification and appraisement. Thompson *v.* Gallagher, 32 Tex. Civ. App. 591, 75 S. W. 567. See also Smithers *v.* Lowrance, 35 Tex. Civ. App. 25, 79 S. W. 1088.

But after an award, classification and appraisement will be presumed. Corrigan *v.* Fitzsimmons, 97 Tex. 595, 80 S. W. 989, *reversing* 76 S. W. 68; Stolley *v.* Lilwall (Tex. Civ. App.), 84 S. W. 689. See also Hood *v.* Pursley (Tex. Civ. App.), 87 S. W. 870.

50. The contestant has the burden of showing that he has not already purchased all that the law permits. Nowlin *v.* Hall (Tex. Civ. App.), 66 S. W. 851, 67 S. W. 900. See also Landers *v.* Boliver (Tex. Civ. App.), 73 S. W. 1075; Binion *v.* Harris, 32 Tex. Civ. App. 371, 74 S. W. 580; Jones *v.* Wright, 98 Tex. 457, 84 S. W. 1053, *reversing* 81 S. W. 569.

51. Under the act of February 11, 1881, lands are not subject to relocation until the expiration of ninety days after notice of the forfeiture. In an action of trespass to try title,

VII. SPANISH AND MEXICAN GRANTS.

1. Mode of Proving Title, in General. — A. JUDICIAL NOTICE OF LAWS. — The laws of Mexico relating to land grants, in force before and at the time of the transfer of California to the United States, are judicially noticed;[52] and in noticing them, the courts may inquire into official customs, forms and usages.[53]

B. PRESUMPTIONS. — a. *Of Authority.* — (1.) **In General.** — In general, where an officer was ex-officio authorized to make grants, his authority to make a particular grant will be presumed from the grant itself;[54] and the burden of proof is upon the party alleg-

it was held that the burden was on the plaintiff to prove that the notice was not given, or that, having been given, within the ninety days thereafter he had taken the steps necessary under that act and other statutes regulating the relocation of lands to fix his right to the lands. Garza *v.* Cassin, 72 Tex. 440, 10 S. W. 539.

52. Fremont *v.* United States, 17 How. (U. S.) 542; Bouldin *v.* Phelps, 30 Fed. 547; United States *v.* Turner, 11 How. (U. S.) 663; United States *v.* Perot, 98 U. S. 428; Payne *v.* Treadwell, 16 Cal. 221, 231.

53. "They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts, and the practice of the different tribunals and public authorities. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources. It exercises the same discretion and power, in this respect, which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion as to the unwritten law of the state, or the construction given to one of the statutes." Fremont *v.* United States, 17 How. (U. S.) 542, 557.

54. *United States.*— Winter *v.* United States, Hemp. 344, 30 Fed. Cas. No. 17,895; Cervantes *v.* United States, 5 Fed. Cas. No. 2,560; Delassus *v.* United States, 9 Pet. 117; United States *v.* Peralta, 19 How. 343.

Alabama. — Antones *v.* Eslava, 9 Port. 527, 544; Mayor of Mobile *v.* Eslava, 9 Port. 577, 596, 33 Am. Dec. 325; Stewart *v.* Trenier, 49 Ala. 492.

California. — Reynolds *v.* West, 1 Cal. 322; Payne *v.* Treadwell, 16 Cal. 221; Cohas *v.* Raisin, 3 Cal. 443; Den *v.* Den, 6 Cal. 81.

Louisiana. — Landry *v.* Martin, 15 La. 1; Devall *v.* Choppin, 15 La. 566.

Texas. — Ryan *v.* Jackson, 11 Tex. 391; Johns *v.* Schutz, 47 Tex. 578; Hanrick *v.* Jackson, 55 Tex. 17; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356; Dittmar *v.* Dignowitty, 78 Tex. 22, 14 S. W. 268; Sheldon *v.* Milmo, 90 Tex. 1, 36 S. W. 413. See also Groesbeck *v.* Golden, 7 S. W. 362.

"Where the act is done contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein; and according to some order known to the king and his officers, though not to his subjects." Strother *v.* Lucas, 12 Pet. (U. S.) 410, 438.

A Spanish survey signed by a deputy governor is presumptively issued by authority. Winn *v.* Cole's Heirs, 1 Miss. 119.

Reasons. — "If it were not a legal presumption that public and respon-

ing want of authority for some reason in this particular instance.[55]

(2.) When Not Presumed.— This presumption is not recognized in respect to Mexican titles granted since the act of 18th of August, 1824, and the regulations of 21st of November, 1828;[56] nor in

sible officers claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country; especially in the states whose tenures to land depend on every description of inceptive, vague and inchoate equities, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation, by patent, under the great seal." United States *v.* Arredondo, 6 Pet. (U. S.) 691, 727.

Compare the reasoning of the later cases, *post,* note 57.

Rule Where No Authority Ex-Officio. — "Where the officer who assumed to convey the public domain had no authority *ex officio* to do so, such authority cannot be presumed from the mere fact of the conveyance in the absence of other evidence." Mitchell *v.* Furman, 180 U. S. 402.

It is acts within the general scope of their powers that are presumed to be authorized. Hart *v.* Burnett, 15 Cal. 530.

Where Grant Is Not in Proper Archives. — Such authority is presumed only when the documentary evidence of the grant comes from the proper archives, or where the genuineness is not in question. Owen *v.* Presidio Min. Co., 61 Fed. 6, 9 C. C. A. 338, 13 U. S. App. 248.

55. Delassus *v.* United States, 9 Pet. (U. S.) 117; United States *v.* Peralta, 19 How. (U. S.) 343; United States *v.* Clarke, 8 Pet. (U. S.) 436; Reynolds *v.* West, 1 Cal. 322; Den *v.* Den, 6 Cal. 81.

The courts should require clear proof that the officer has transcended his powers before they so determine it. Strother *v.* Lucas, 12 Pet. (U. S.) 410.

Reasons. — "It is true that a grant made without authority is void under all governments . . . but in all the question is on whom the law throws the burden of proof, of its existence, or non-existence. A grant is void, unless the grantor has the power to make it — but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal, and complete execution of the official grant, under all the solemnities known or proved to exist or to be required by the law of the country where it is made and the land is situated." United States *v.* Arredondo, 6 Pet. (U. S.) 691.

56. Bouldin *v.* Phelps, 30 Fed. 547.

"Authority to make the grants is there expressly conferred on the governors, as well as the terms and conditions prescribed upon which they shall be made. The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise; and they are to be substantially complied with, except so far as modified by the usages and customs of the government under which the titles are derived, the principles of equity, and the decisions of this court." United States *v.* Cambuston, 20 How. (U. S.) 59.

This case is explained in Brown *v.* San Francisco, 16 Cal. 451, where counsel urged that it had overruled the former decisions. "It does not pretend to overrule any of the former decisions of that court with respect to legal presumptions. It simply says, that where the authority to make the grant is expressly conferred, and the terms and conditions expressly prescribed by the law, the court must look to the law for both the power to make the grant, and for the mode and manner of its exercise."

Further light is thrown on the rule by the case of Goode *v.* McQueen's Heirs, 3 Tex. 241. "Presumption in such cases was the best

proceedings under the Act of 1891 for the confirmation of grants.[57]

(3.) Weight of the Presumption. — The weight of the presumption depends upon the circumstances of the case.[58]

b. *Of Validity of Grant.* — If authority is shown, the validity of the grant will be presumed;[59] and long-continued possession under a grant gives rise to a presumption of its validity.[60]

c. *That Acts Are in Due Form.* — It will be presumed that the acts of a Mexican official are in such form as was necessary to give full effect to what he was attempting to do.[61]

evidence of the fact of authority that could in general be obtained." Where the law is clearly accessible, there is no reason for the presumption.

57. The Act of 1891 (U. S. Comp. Stat., 1901, p. 772), § 13, subd. 1, provides: "No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land." This has been construed as requiring evidence of authority. Hayes *v.* United States, 170 U. S. 637. *Compare* Crespin *v.* United States, 168 U. S. 208; Mitchell *v.* Furman, 180 U. S. 402; United States *v.* Ortiz, 176 U. S. 422; Faxon *v.* United States, 171 U. S. 244; Ely's Admr. *v.* United States, 171 U. S. 220.

Authority cannot be presumed from the fact that other similar grants were made. Chavez *v.* United States, 175 U. S. 552.

The claimant has the burden of proving the facts showing the validity of his grant. Apis *v.* United States, 88 Fed. 931; Bergere *v.* United States, 168 U. S. 66 (where grant is made by alcalde, subject to approval of governor, burden is on claimant to show the approval); Whitney *v.* United States, 167 U. S. 529; Hayes *v.* United States, 170 U. S. 637.

58. "Where the officer, as a governor or viceroy, appointed by the king, dependent on his favor and liable to be punished for disobedience; where the act in question is one of a series by which he repeatedly and notoriously assumed the power in question; where no assignable motive appears which could have induced him, in the particular case, to exercise a usurped authority, nor any circumstances either in his own situation or that of the grantee, or in the mode of exercising his power, which suggest doubts as to the *bona fides* of the transaction, the presumption we are considering may be regarded as almost conclusive.

"But where, as in this case, the grant purports to have been made by a governor within a few weeks of the time when the government of the territory passed from his hands, and 'during the very heat and conflict of the struggle in which his power was overthrown' — where the evidence that the formalities required by law were observed, is imperfect and unsatisfactory, and rests wholly in parol — where it does not appear that any preliminary inquiries were made as to the point on which he is supposed to have exceeded his authority — and where the situation of the granting officer, and the mode in which he exercised his authority in other cases at or about the period when the grant purports to have been issued, suggest the suspicion of carelessness, if not recklessness, in the exercise of his powers — under all these circumstances, it must be admitted that the presumption we are considering loses much of its force, if it be not entirely repelled." United States *v.* Cambuston, 7 Sawy. (U. S.) 575, 25 Fed. Cas. No. 14,713.

59. Goode *v.* McQueen's Heirs, 3 Tex. 241.

Thus, it will be presumed that a survey was made by order of the alcalde. Jenkins *v.* Chambers, 9 Tex. 167.

A grant from the political chief is presumed to be valid. Pino *v.* Hatch, 1 N. M. 125.

60. Cavazos *v.* Trevino, 35 Tex. 133.

61. In Palmer *v.* Low, 98 U. S.

d. *Of Grant From Long Possession.* — Where there has been long possession, a grant will be presumed; and evidence of the circumstances is admissible to raise the presumption.[62]

C. DOCUMENTARY EVIDENCE. — a. *In General.* — Any documents showing title under the former sovereign are admissible.[63]

b. *Grant Admissible Although No Legal Effect.* — A Spanish or other grant in due form is admissible in evidence, although it may have no legal effect.[64]

c. *Grant Admissible Notwithstanding State Statutes.* — A valid Mexican grant is admissible in evidence, notwithstanding a state statute, attempting to take away the right.[65].

d. *Proof of Execution of Grant.* — Execution of an instrument found in the public archives must be proved by the subscribing witness, or by evidence of his handwriting if he cannot be produced.[66] If there is no subscribing witness, and the signer cannot

1, a grant was in the following form: "I, the undersigned alcalde, do hereby give, grant, and convey unto George Donner, his heirs and assigns forever," etc. The court said: "These are the operative words of a present grant in fee-simple, and, being found in an official public record, will be presumed, in the absence of anything to the contrary, to be sufficient to accomplish the purpose the parties had in view. While the alcalde was not the sovereign, he was the officer designated by law to make distribution of this kind of property among those to whom, under the Mexican law, it belonged."

62. Landry *v.* Martin, 15 La. 1, 10; Herndon *v.* Casiano, 7 Tex. 322.

Thus, evidence that a colony was settled on the bayou La Fourche by authority of the government; that the ancestor was one of the colonists; that the king's surveyor measured out to each his parcel of land; that the surveyor put the ancestor in possession; that the archives have been destroyed; and that the possession has been long and continuous, is sufficient evidence of title (Sanchez *v.* Gonzales, 11 Mart. [La.] 207) but title cannot be proved by hearsay. Le Blanc *v.* Victor, 3 La. 44.

63. Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

A Mexican grant and the accompanying map are admissible to show that a certain tract was included therein. Cornwall *v.* Culver, 16 Cal, 423.

64. "Whether the land in dispute was, at that time, a proper subject for a grant by this officer — whether, from political changes, his power to make a concession of it had not ceased was certainly a grave question. But it was one as to the *effect* of the instrument, and presented no legal obstacle to its introduction as proof in the cause. Whenever an instrument of writing is legally proven and relevant to the matter at issue, it should be received in evidence. The influence it should obtain in deciding the rights of the parties can only be ascertained when, after all the evidence is received, the cause is examined on its merits." Gayles' Heirs *v.* Gray, 6 Mart. N. S. (La.) 693.

A grant from a political chief is admissible as a foundation of prescription, although not sufficient to pass an absolute title. Pino *v.* Hatch, 1 N. M. 125.

65. The Texas constitution of 1876, (Art. 3, § 4) provided that a claim of title issued prior to November, 1835, should not be used as evidence in any of the courts of the state. In Lerma *v.* Stevenson, 40 Fed. 356, it was held that this provision was invalid; that the grant was under the protection of the treaty of Guadalupe Hidalgo and the constitution of the United States.

66. Fuentes *v.* United States, 22 How. (U. S.) 443.

be produced, such an instrument may be proved by evidence of the genuineness of the signature.[67]

e. *Spanish Surveys.* — A Spanish survey is admissible as evidence of title.[68]

f. *Foreign Records.* — Foreign records relating to land titles may be proved and admitted in the courts in the manner provided by federal statute.[69] The state courts have admitted copies of such records independently of statute.[70]

g. *Certified Copies.* — Certified copies of Spanish grants made by the officer who issued the originals, or by the proper Spanish officer, are admissible as primary evidence.[71]

67. United States *v.* Moreno, 1 Wall. (U. S.) 400; Clay's Heirs *v.* Holbert, 14 Tex. 189.

Where there is no suspicion as to the proceedings, the general rule is that objections to the sufficiency of the proof of its execution must be made in the first instance before the inferior tribunal. Hence, the objection that evidence of the genuineness, of the signature cannot be shown by other evidence until the governor who signed and the secretary of state who attested are called or their absence accounted for is of no avail. United States *v.* Anguisola, 1 Wall. (U. S.) 352.

Where the genuineness is open to suspicion, as where there is no record evidence, proof of the signature is not always sufficient. Thus, in United States *v.* Teschmaker, 22 How. (U. S.) 392, the court said: "We have said that the signatures of the officers to the documentary evidence of the title are genuine, if we can believe the witnesses — Pastenada, Howard, and Vallejo; but, as all of these officials were living after the United States had taken possession of the country during the war, and even after the cession by Mexico, and, with the exception of the governor, resided in California, these signatures may be genuine, and still the title invalid. It was practicable to have made the grant in form genuine, but antedated."

Evidence that a signature is in a style rarely if ever used by the alleged signer is admissible as tending to show forgery. United States *v.* Roland, 27 Fed. Cas. No. 16,190, *affirmed* Roland *v.* United States, 7 Wall. (U. S.) 743.

Where it appears that one paper in a series is fabricated, stronger proof of the genuineness of the other instruments is required.

In United States *v.* Galbraith, 2 Black (U. S.) 394, the signatures to all the documents were proved, but it appeared that the approval of the departmental assembly was fabricated. This was said to throw doubt upon the proof of the other instruments, and to impose the burden of producing further evidence. See also United States *v.* Vallejo, 1 Black (U. S.) 541.

Signatures of officials on genuine documents in the archives are admissible for comparison, and a person familiar with such signatures may testify as an expert. United States *v.* Ortiz, 176 U. S. 422.

68. A survey made under authority of the Spanish government is admissible in connection with a certificate from the commissioners as evidence of title. Litchworth *v.* Bartells, 4 Mart., N. S. (La.) 136.

A plat of survey is not evidence of a complete Spanish grant. Fluker *v.* Doughty, 15 La. Ann. 673.

69. U. S. Comp. Stat. 1901, § 907. For a somewhat similar Texas provision, see Texas-Mexican R. Co. *v.* Jarvis, 69 Tex. 527, 7 S. W. 210. *Compare* Hubert *v.* Bartlett's Heirs, 9 Tex. 97.

70. The difficulty in such cases is to prove the authenticity. When that appears, a testimonio is clearly admissible. Edwards *v.* James, 7 Tex. 372.

71. United States *v.* Percheman, 7 Pet. (U. S.) 51. See also United States *v.* Breward, 16 Pet. (U. S.) 143.

Such copies are admissible al-

h. *Effect of Requirement of Record.* — Under a federal statute of 1805, documentary evidence of an incomplete Spanish or French title in the Louisiana purchase, was not admissible against a purchaser from the United States unless recorded;[72] but this did not apply to complete grants, nor did it prevent the admission of such evidence against the government.[73]

i. *Report of United States Surveyor-General Not Evidence.* The report of the surveyor-general as to the validity of a Mexican grant is not evidence of title.[74]

2. Evidence of Abandonment. — While abandonment may be presumed from unreasonable delay, it must appear from all the circumstances that the delay was unreasonable.[75] As aiding the presumption, evidence that the practice of abandoning possessions

though made long after the protocol. The reason is that they are certified by the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it. United States *v.* Davenport, 15 How. (U. S.) 1.

The certificate of the secretary is *prima facie* proof of the existence of the original grant at the date when the copy was made, and of its contents. United States *v.* Wiggins, 14 Pet. (U. S.) 334. United States *v.* Acosta, 1 How. (U. S.) 24.

72. This act, passed March 2, 1805, required the claimants, on or before the 1st day of March, 1806, to record written evidence of incomplete titles, and provided that any such incomplete grant, not recorded, should never after be considered or admitted in evidence, in any court of the United States, against any grant derived from the United States. See Barry *v.* Gamble, 3 How. (U. S.) 32. See also De La Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599.

73. The limitations and true extent of this act are fully and clearly stated in United States *v.* Power, 11 How. (U. S.) 570.

In Murdock *v.* Gurley, 5 Rob. (La.) 467, it was held that this statute does not bind the state courts. In the subsequent case of Lobdell *v.* Clark, 4 La. Ann. 99, however, it was held that it creates a rule of property binding on the state courts.

74. Pinkerton *v.* Ledoux, 129 U. S., 346; United States *v.* Cameron (Ariz.), 21 Pac. 177.

75. The court seeks to determine "whether there has been such unreasonable delay or want of effort on the part of the grantee to fulfill the conditions as will justify the presumption that he had abandoned the claim, and is now seeking to resume it from the enhanced value of the land." Chabolla *v.* United States, Hoff Land Cas. 130, 5 Fed. Cas. No. 2,566; Armijo *v.* United States, Hoff Land Cas. 248, 1 Fed. Cas. No. 536; Pico *v.* United States, Hoff Land Cas. 116, 19 Fed. Cas. No. 11,127; *s. c.*, Hoff Land Cas. 142, 19 Fed. Cas. No. 11,128; Pacheco *v.* United States, Hoff Land Cas. 113, 18 Fed. Cas. No. 10,641.

Thus, delay in settling upon dangerous frontier lands is not alone sufficient to raise the presumption. Fremont *v.* United States, 17 How. (U. S.) 542.

A delay from 1785 to 1818 was held evidence of abandonment in Strother *v.* Lucas, 6 Pet. (U. S.) 763, *affirmed* 12 Pet. (U. S.) 410.

When a grantee allows years to pass after the date of his grant without any attempt to perform conditions, and without any explanation for not having done so, and then for the first time claims the land, after it had passed by treaty from the national jurisdiction which granted it to the United States, such delay is unreasonable, and amounts to evidence that the claim has been abandoned. Fuentes *v.* United States, 22 How. (U. S.) 443. See also Fine *v.* St. Louis Public Schools, 23 Mo. 570.

was not unusual is competent.[76] Evidence of the surrounding circumstances is admissible to show the intention.[77] Generally the burden of proving abandonment is upon the party alleging it.[78]

3. Confirmation. — A. How Shown. — a. *In General.* — Confirmation of a Spanish or Mexican grant is generally proved by a certificate of confirmation or a patent, but it may also be shown by extracts from the books and records of the land office.[79]

b. *By Judgment of Board of Land Commissioners.* — A judgment of the Board of Land Commissioners is sufficient evidence of confirmation, unless shown to have been reversed or suspended by a pending appeal.[80]

c. *Legislative Confirmation.* — A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant or quit-claim from the government.[81]

B. Conclusiveness. — a. *Of Certificates.* — **(1.) In General.** — A

76. Thus, in Fine *v.* St. Louis Public Schools, 23 Mo. 570, extracts from old Spanish records, showing entries of abandonment were admitted. The court said: "The jury which tried the cause were living under our system of laws, where such a thing as abandoning the right, title or claim to real estate is not known. . . . The idea of an abandonment being foreign to the notions of our jurors, it was right not only that they should know that there was a law on the subject, but that acts of abandonment did actually take place. As the fact was an ancient one and one that transpired under another government, the jury should have been put in the same situation, as to knowledge of surrounding circumstances, as their own experience and observation would have furnished had they been trying a fact which occurred in their own times and under their own government."

77. Fine *v.* St. Louis Public Schools, 30 Mo. 166. In this case the court said: "The Spanish law on the subject of abandonment declares that if a man be dissatisfied with his immovable estate and abandon it, immediately he departs from it corporeally with an intention that it shall no longer be his it will become the property of him who first enters thereon. . . . Abandonment is a question for the consideration of the jury and depends upon the intention, which is to be ascertained from circumstances."

Correspondence between the land commissioner and the surveyor is not admissible to show abandonment. Hanrick *v.* Dodd, 62 Tex. 75.

78. White *v.* Holliday, 11 Tex. 606.

79. McGill *v.* Somers, 15 Mo. 80. A certificate of confirmation made by the recorder under the Act of 1824, is admissible. Janis *v.* Gurno, 4 Mo. 458; Gurno *v.* Janis, 6 Mo. 330. See also Cerre *v.* Hook, 6 Mo. 474. And an abstract from the record of confirmations is also admissible. Biehler *v.* Coonce, 9 Mo. 347.

A certified copy of the opinion of the recorder recommending a claim for confirmation under the Act of 1816, is admissible to bring the case within the provisions of the act. Roussin *v.* Parks, 8 Mo. 528.

Depositions of witnesses accompanying the record of confirmation are not evidence of the facts stated in them. Clark *v.* Hammerle, 27 Mo. 55. See also Cabanne *v.* Walker, 31 Mo. 274.

80. Sanders *v.* Whitesides, 10 Cal. 88.

81. Langdeau *v.* Hanes, 21 Wall. (U. S.) 521.

A confirmation by Congress is to be treated as an adjudication, and the courts cannot revise it. Catron *v.* Laughlin, 11 N. M. 604, 72 Pac. 26.

certificate of confirmation is conclusive evidence of title against one whose rights depend upon mere occupancy.[82]

(2.) Under Act of 1824.— The certificate of confirmation issued by the recorder under the Act of 26th of May, 1824, is only *prima facie* evidence of a confirmation by the Act of 13th of June, 1812.[83]

b. *Of Patent.* — A patent issued in confirmation is conclusive evidence of title against all but those holding prior superior titles.[84]

c. *Of Survey.* — **(1.) In General.**— The official survey, made after confirmation, is conclusive as to the extent of the grant, as against

82. "If his claim was deemed sufficient to entitle him to a patent, by the tribunal established by the government to investigate it, the sufficiency or competency of the evidence on which that tribunal acted, cannot be questioned by one" relying upon mere occupancy. Richardson *v.* Hobart, 1 Stew. (Ala.) 500, 18 Am. Dec. 70.

It was held to be *prima facie* evidence under the act of 1812. Bompart *v.* Stumpff, 40 Mo. 446.

83. Biehler *v.* Coonce, 9 Mo. 347; McGill *v.* Somers, 15 Mo. 80; Soulard *v.* Allen, 18 Mo. 590; Joyal *v.* Rippey, 19 Mo. 660; Bompart *v.* Stumpff, 40 Mo. 446; Vasquez *v.* Ewing, 42 Mo. 247. See also Macklot *v.* Dubreuil, 9 Mo. 477. *Compare* Rhodes *v.* Rhodes, 10 La. 85.

The certificate is *prima facie* evidence of all the facts upon which the confirmation rests. Soulard *v.* Allen, 18 Mo. 590.

The emanation of title, however, did not depend upon the certificate. It arose from the act itself. Langlois *v.* Crawford, 59 Mo. 456.

84. *United States.* — Adam *v.* Norris, 103 U. S. 591; More *v.* Steinbach, 127 U. S. 70; Knight *v.* United Land Assn., 142 U. S. 161; Boyle *v.* Hinds, 2 Sawy. 527, 3 Fed. Cas. No. 1,759; Mora *v.* Nunez, 7 Sawy. 455, 10 Fed. 634.

California. — Waterman *v.* Smith, 13 Cal. 373; Moore *v.* Wilkinson, 13 Cal. 478; Durfee *v.* Plaisted, 38 Cal. 80; Boggs *v.* Merced Min. Co., 14 Cal. 279; Stark *v.* Barrett, 15 Cal. 361; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Leese *v.* Clark, 18 Cal. 535; *s. c.*, 20 Cal. 387; Kimball *v.* Semple, 25 Cal. 440; Hagar *v.* Lucas, 29 Cal. 309; Miller *v.* Dale, 44 Cal. 562; Chipley *v.* Farris, 45 Cal. 527; Cruz *v.* Martinez, 53 Cal. 239; Steinback *v.* Perkins, 58 Cal. 86; Hale *v.* Akers, 69 Cal. 160, 10 Pac. 385; United Land Assn. *v.* Knight, 85 Cal. 448, 24 Pac. 818; Valentine *v.* Sloss, 103 Cal. 215, 37 Pac. 326, 410.

Louisiana. — Boatner *v.* Ventress, 8 Mart. (N. S.) 644, 20 Am. Dec. 266.

Evidence of fraud is not admissible in suit by parties not holding prior superior title. Field *v.* Seabury, 19 How. (U. S.) 323.

Of course, a recital of law in a patent is not conclusive. McGarrahan *v.* New Idria M. Co., 49 Cal. 331.

"This instrument is record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and it is correctly located now, so as to embrace the premises as they were surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. . . .The term 'third persons,' [as used in the staute] does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." Beard *v.* Federy, 3 Wall. (U. S.) 478. See also De Arguello *v.* Greer, 26 Cal. 615.

the government and third persons;[85] but to have this effect it is necessary that the prescribed formalities be observed.[86]

(2.) Under Act of 1824, surveys of confirmations made under the reports and lists of the recorder, returned to the surveyor-general as directed by the Act of 1824, are *prima facie* evidence of the true location of the land confirmed.[87]

4. Lands in California. — A. Documentary Evidence. — a. *Best*

The item "third person" does not include a state. People *v.* San Francisco, 75 Cal. 388, 17 Pac. 522.

85. *United States.* — Alviso *v.* United States, 8 Wall. 337; Stoneroad *v.* Stoneroad, 158 U. S. 240, *reversing* 4 N. M. 181, 12 Pac. 736; Knight *v.* United Land Assn., 142 U. S. 161; United States *v.* Bidwell, 24 Fed. Cas. No. 14,592; Russell *v.* Maxwell Land Grant Co., 158 U. S. 253. See also Carondelet *v.* City of St. Louis, 1 Black 179.

California. — De Arguello *v.* Greer, 26 Cal. 615; United Land Assn. *v.* Knight, 85 Cal. 448, 24 Pac. 818; City of San Diego *v.* Allison, 46 Cal. 162.

Louisiana. — Fay *v.* Chambers, 4 La. Ann. 481.

Missouri. — Boyce *v.* Papin, 11 Mo. 16; Magwire *v.* Tyler, 25 Mo. 484; *s. c.*, 30 Mo. 202; Cutter *v.* Waddingham, 33 Mo. 269; O'Flaherty *v.* Kellogg, 59 Mo. 485. See also City of Carondelet *v.* City of St. Louis, 29 Mo. 527.

It follows, of course, that evidence of errors in the survey is not ordinarily admissible. Colorado Fuel Co. *v.* Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. 556.

A private survey does not have this effect. Boggs *v.* Merced Min. Co., 14 Cal. 279.

Decrees Approving Surveys. — "Originally surveys were left entirely to the action of the local surveyor and the land department. Great complaints were sometimes made that surveys thus established were unjustly extended in directions so as to include the settlements and improvements of others; and contests over them were, in consequence, often prolonged for years. To prevent possible abuses in this way, the Act of Congress of June 14, 1860, was passed, allowing surveys, when objection was made to their correctness, to be brought before the court and subjected to examination, and requiring them to be corrected if found to vary from the specific directions of the decrees upon which they were founded; or, if the decrees contained no specific directions, from the general rules governing in such cases. The approval of the court established the fact, that the survey was in conformity with the decree of confirmation; or, if the decree was for quantity only, that the survey was authorized by it; and in either case the approval rendered the survey conclusive as to the location of the land against all floating grants not previously located." Miller *v.* Dale, 92 U. S. 473.

Jurisdiction of Courts Independent of Statute. — "The courts can only examine into the correctness of a survey when, in a controversy between parties, it is alleged that the survey made, infringes upon the prior rights of one of them; and can then look into it only so far as may be necessary to protect such rights." United States *v.* Flint, 4 Sawy. 42, 61, *affirmed* 98 U. S. 61; United States *v.* San Jacinto Tin Co., 10 Sawy. 639, 23 Fed. 279.

Approved Surveys Do Not Have the Effect of a Patent. — Miller *v.* Dale, 44 Cal. 562.

86. Thus, it was essential that a publication be made; and the certificate of the surveyor is only *prima facie* evidence thereof. LeRoy *v.* Jamison, 3 Sawy. 369, 15 Fed. Cas. No. 8,271. Notice will be presumed, however, after a patent has issued. Cruz *v.* Martinez, 53 Cal. 239.

A survey is not conclusive until it has become final. Mahoney *v.* Van Winkle, 21 Cal. 552.

87. Joyal *v.* Rippey, 19 Mo. 660; Soulard *v.* Allen, 18 Mo. 590; City of St. Louis *v.* Toney, 21 Mo. 243.

Evidence. — Archives. — The best evidence of a Mexican grant of land in California, as against the government, must be found in the proper office, among the public archives.[88] Secondary evidence is admissible only upon proof of the loss or destruction of the records;[89] and the preliminary evidence must show, in addition, a judicial survey, actual possession and acts of ownership.[90]

88. *United States.*— United States *v.* Castro, 24 How. 346; United States *v.* Bolton, 23 How. 341; United States *v.* Teschmaker, 22 How. 392; United States *v.* Osio, 23 How. 273; White *v.* United States, 1 Wall. 660; Romero *v.* United States, 1 Wall. 721; United States *v.* Neleigh, 1 Black 298.

It follows that parol evidence is not admissible to establish the making and contents of a grant when the archives contain no trace of its having been issued. United States *v.* Berreyesa, 24 Fed. Cas. No. 14,585.

"Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed." Peralta *v.* United States, 3 Wall. (U. S.) 434.

In Luco *v.* United States, 23 How. (U. S.) 515, the court said: "No grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the expediente, or some part of it, be found on file among the archives, where other and genuine grants of the same year are found; and that owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives." See also Palmer *v.* United States, 24 How. (U. S.) 125.

Where an expediente is on file and contains a memorandum of the issuance of a grant, it may be presumed that it was registered. United States *v.* Green, 185 U. S. 256.

Reasons. — "Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the department of California, when a short entry was made in a book kept for the purpose, specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued." United States *v.* Osio, 23 How. (U. S.) 273.

89. United States *v.* Castro, 24 How. (U. S.) 346; United States *v.* Teschmaker, 22 How. (U. S.) 392; Peralta *v.* United States, 3 Wall. (U. S.) 434.

In Fuentes *v.* United States, 22 How. (U. S.) 443, the evidence showed the destruction of a book of records, that the records for a certain year were missing, and witnesses testified that they were under the impression that the book destroyed contained the grants for that year. The evidence was held too indefinite. Evidence that a book for the year 1846 was destroyed is insufficient in the absence of evidence showing that the grant was recorded therein. United States *v.* Knight, 1 Black (U. S.) 227, 488.

The claimant must show that the records existed at the time an alleged copy was given. United States *v.* Bolton, 23 How. (U. S.) 341. *Compare* United States *v.* Cazares, Hoff Land Cas. 90, 25 Fed. Cas. No. 14,761.

"There is a wide difference in the cases, where the contents of a lost original are endeavored to be proved by parol, and when its loss is to be supplied by copy taken from a record not suspicious. In the former case, we should require much stronger evidence of the loss than in the latter." Lavergne's Heirs *v.* Elkins' Heirs, 17 La. 220, 229.

90. Pico *v.* United States, 2 Wall.

b. *Expediente Filed After Admission to Union.* — An expediente not placed among the records until after the admission of California to the union is not the best evidence.[91]

c. *Approval of Departmental Assembly.* — As evidence of title, under the Mexican laws, the approval of the Departmental Assembly was next in importance to the grant itself.[92]

d. *Record of Alcalde Grants.* — The record of alcalde grants of public lands, kept by the alcalde in accordance with Mexican law, is admissible as primary evidence of title.[93]

e. *Jimeno's Index.* — *Hartnell's Index.* — Jimeno's index is not authoritative proof of the grants enumerated in it, although it is evidence.[94] The fact that an expediente is not mentioned therein

(U. S.) 279; United States *v.* Polack, Hoff Land Cas. 284, 27 Fed. Cas. No. 16,061; United States *v.* Bernal, 24 Fed. Cas. No. 14,579.

Parol evidence of destruction of the record and long possession may be sufficient. United States *v.* Pendell, 185 U. S. 189.

Reasons. — "The survey and possession are open and public acts, and would support the parol evidence of its former existence and destruction or loss. It would show the knowledge of the officers of the government of the title claimed, and their acquiescence in the justice and legality of the claim.

But without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, resting only in the knowledge of individual witnesses; for if what purports to be a grant is produced by the party from some private receptacle, and the handwriting of the official signatures proved by witnesses, and even proved to have been executed when it bears date, it is but parol testimony, open to doubt, since its authenticity depends upon the truth or falsehood of the witnesses, instead of resting upon the certainty of the public records of the nation." United States *v.* Castro, 24 How. (U. S.) 346, per Taney, C. J.

91. Thus, in United States *v.* Teschemacher, 28 Fed. Cas. No. 16,455, the expediente was not placed among the records until the year 1855. The court held that it was not archive testimony.

92. United States *v.* Galbraith, 2 Black (U. S.) 394.

93. In Palmer *v.* Low, 98 U. S. 1, such a record, contained in a book found in the recorder's office of the city and county of San Francisco, was admitted. In Donner *v.* Palmer, 31 Cal. 500, the same principle was followed, and the court said: "The entire proceedings were to be first entered in the official book required to be kept for that purpose, signed and attested in due form by the proper officer. A copy or summary statement of the proceedings as contained in the official book, also duly signed and attested by the proper officer was then to be given to the grantee as evidence of his title; and in the event of its loss, the officer in whose official custody the book might be at the time was authorized and required to give him another 'like copy' of the original proceedings. The record so kept became an official and public record of the transactions of the alcaldes in the matter of granting town lots; and, as such, primary evidence of the acts they recited, under any system of law with which we are acquainted." See also Gregory *v.* McPherson, 13 Cal. 562; Downer *v.* Smith, 24 Cal. 114, 122 (*dictum*).

It follows, of course, that it is not necessary to account for the certificate of grant issued to the grantee. See cases just cited.

Words "not taken" written on the margin, and cross lines of cancelation, are part of the record, and admissible. Parol evidence of the alcalde is admissible in explanation. Rice *v.* Cunningham, 29 Cal. 492.

94. It may be referred to as an auxiliary memorandum made by

is not conclusive as to its non-existence.[95] Hartnell's index is not conclusive.[96]

B. Presumption of Validity of Grant. — When the evidence of title is found in the archives, and no defect appears upon the face thereof, it will be presumed that all prerequisites have been fulfilled and that the grant is valid;[97] but where the evidence of title is not found in the proper place, the presumption does not arise, even though full performance is recited in the grant.[98]

C. Effect of Recitals. — Recitals of fact in a grant are presumptive evidence of such facts.[99]

D. Parol Evidence. — The testimony of the officers of the Mexican government in California, who were in office at the time of the cession to the United States, or of third persons,[1] cannot be admitted to supply or contradict the public records, or supply a title of which there is no trace to be found in the public archives.[2]

5. Lands in Texas. — A. Burden of Proof. — The burden of proving the origin of title,[3] or the approval of the federal executive,[4] is upon the claimant. The burden of proving forgery of a protocol is on the party alleging it.[5]

Jimeno himself of his action on a certain petition. United States *v.* West, 22 How. (U. S.) 315.

95. United States *v.* Auguisola, 1 Wall. (U. S.) 352.

96. The fact that an expediente is indexed in Hartnell's index is not conclusive evidence that it bore the correct date. It may have been antedated and placed in the archives during the Mexican war. United States *v.* Galbraith, 2 Black (U. S.) 394.

97. Reynolds *v.* West, 1 Cal. 322; Payne *v.* Treadwell, 16 Cal. 220; Brown *v.* City and County of San Francisco, 16 Cal. 451.

98. Fuentes *v.* United States, 22 How. (U. S.) 443. Hence, the validity of the grant can be established only by the clearest proof of genuineness. Pico *v.* U. S., 2 Wall. (U. S.) 279.

99. Thus, where it is recited that the grantee was a naturalized citizen of Mexico, such fact will be presumed. United States *v.* Reading, 18 How. (U. S.) 1. *Compare* United States *v.* Cambuston, 7 Sawy. (U. S.) 575, 24 Fed. Cas. No. 14,713.

And a recital that land is "within the demarkation of Yerba Buena," is presumptive evidence of that fact. United States *v.* Sherebeck, 27 Fed. Cas. No. 16,275.

When a Mexican title has issued, and possession taken thereunder, mere loose admissions of the grantee that he was not a citizen will not suffice to overthrow the record. Dalton *v.* United States, 22 How. (U. S.) 436.

1. This rule was established because of the "weakness of memory" of these officers. Experience showed that their testimony could not be relied upon. Luco *v.* United States, 23 How. (U. S.) 515, 543; Palmer *v.* United States, 24 How. (U. S.) 125.

2. As against a formal record of a Mexican grant, the testimony of aged, illiterate and infirm witnesses, upon whose depositions the alcalde acted in fixing the boundaries of a grant, as to what was done or intended by the alcalde is, even if admissible, entitled to no weight whatever. United States *v.* Payson, 27 Fed. Cas. No. 16,015.

3. Under a Texas statute for the confirmation of Mexican grants, it was essential that the title should have had its origin prior to the 19th day of December, 1836. The burden of proving this is upon the party seeking confirmation. Garza *v.* State, 64 Tex. 670.

4. Yancey *v.* Norris, 27 Tex. 40.

5. Howell *v.* Hanrick, 88 Tex. 383, 29 S. W. 762.

B. Evidence of Execution. — Titles executed by Texas commissioners were required to be attested by two witnesses; but where there are no attesting witnesses, execution may be proved by other evidence.[6]

C. Testimonio. — Protocol. — Where there is a testimonio, it is presumed that the original, or protocol, is among the archives in its proper place of deposit,[7] and that prerequisites have been fulfilled.[8] A testimonio is an original, and is admissible as primary evidence.[9] The protocol is also admissible.[10] A testimony

6. Grimes *v.* Bastrop, 26 Tex. 310; Clay *v.* Holbert, 14 Tex. 189; Ruis *v.* Chambers, 15 Tex. 586; State *v.* De Leon, 64 Tex. 553.

The fact that an original concession was recognized as genuine and acted upon by the political chief is evidence of its genuineness. McGehee *v.* Dwyer, 22 Tex. 435.

7. Gonzales *v.* Ross, 120 U. S. 605; Byrne *v.* Fagan, 16 Tex. 391; King *v.* Elson, 30 Tex. 246.

The production of a certified copy from the land office is *prima facie* evidence that the original was deposited in that office in due time. Nicholson *v.* Horton, 23 Tex. 47. See also Texas-Mex. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

8. Gonzales *v.* Ross, 120 U. S. 605; Williams *v.* Conger, 125 U. S. 397.

This rests upon the principle "that where a state officer does an act which would be a violation of his duty, unless certain terms or conditions had been first performed by an individual, such performance shall be deemed, *prima facie*, between the individual and the state, to have taken place. And this would be much stronger against the government where the individual had done everything that the law required him to do, and the omission, if any, was on the part of the officer, in not doing things required of him by the government in matters in which the individual could not participate, but it was wholly between the officer and his government." Titus *v.* Kimbro, 8 Tex. 210.

9. Herndon *v.* Casiano, 7 Tex. 322.

It is the only evidence of title which the party interested was entitled to retain in his possession. Titus *v.* Kimbro, 8 Tex. 210; Smith *v.* Townsend, Dall. (Tex.) 569.

Weight as Evidence. — "That the testimonio is a higher grade of evidence than the certified copy from the land office, seems to me clear and demonstrable. If the certified copy is used, it is to supply the absence of the testimonio; and it is therefore a substitute for an original paper title, and of course secondary in grade as evidence to the original, for which it has been substituted. Again, it is better evidence, for another reason, than the certified copy when applied to titles extended by a land commissioner, because the commissioner, after making out his protocol or matrix of the title, may, for good and sufficient reasons, withhold and refuse to extend the title; and it may never have issued and no title passed. This would not appear from the certificate of a copy of the protocol." Titus *v.* Kimbro, 8 Tex. 210.

10. Williams *v.* Conger, 125 U. S. 397. In this case the court said: "It is true that the *testimonio* given out to the interested party is a second original, and is treated as an original, and may be admitted in evidence as such; but it does not take away from the validity and faith of the first original. . . . It is true, it may be deemed a matter of public policy in some states to prohibit public records from being removed from their places of deposit; but if their removal is allowed, or in any legitimate way effected, they certainly constitute the best evidence of their contents and authenticity."

In Texas, a protocol from the archives of a Mexican state not filed in the Texas land office until 1873, is evidence of title; and a copy thereof, certified by the land officer,

may be used to aid a protocol and a protocol a testimonio.[11]

D. Certified Copies of Records. — Certified copies of records properly in the Texas land office are admissible where the original would be;[12] but copies of records not properly in that office are not admissible.[13]

E. Translations. — Translated copies of records in the Texas land office are admissible when the originals would be admissible.[14]

F. Evidence of Incomplete Grant. — Documentary evidence of an incomplete grant is competent only in connection with some other evidence of a grant, either direct and positive or presumptive.[15]

G. Colonization Grants. — A grant of lands to a colonist raises a presumption that the lands are within the limits of the colony.[16] It is sometimes stated that the fact and extent of a grant to a colony will be judicially noticed.[17] The report made by

is admissible in evidence. Airhart *v.* Massieu, 98 U. S. 491.

11. Hanrick *v.* Dodd, 62 Tex. 75, 88. In this case the court said: "If one appears to be changed, or if suspicion is cast upon it, by reason of erasures or interlineations, its verity may be shown by the production of the other."

12. Paschal *v.* Perez, 7 Tex. 348; Herndon *v.* Casiano, 7 Tex. 331; Texas-Mex. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

13. Requisites of Admission to Land Office. — "A paper, then, to be entitled to admission into the general land office, must have constituted an archive or record of some former office. It is immaterial in whose possession the paper may have been before its deposit, whether in that of 'an empresario, political chief, alcalde, commissary, or commissioner for issuing land titles, or of any other person, * * * provided it shall have been an archive, or an original document or register in some office, and appertained to the lands of the Republic.'" Paschal *v.* Perez, 7 Tex. 348.

14. Hatch *v.* Dunn, 11 Tex. 708; Hubert *v.* Bartlett, 9 Tex. 97; Spillars *v.* Curry, 10 Tex. 143.

"The law declares that translated copies of all records in the land office certified to under the hand of the translator and the commissioner, attested with the seal of the general land office, shall be *prima facie* evidence in all cases in which the originals would be evidence." Swift *v.* Herrera, 9 Tex. 263, 280.

The translation is admissible, however, only on the supposition that the original document could be offered in evidence without proof of execution. Houston *v.* Perry, 3 Tex. 390; Texas-Mex. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

15. Edwards *v.* Roark, 19 Tex. 184.

An incomplete or blank grant is admissible as an additional fact or circumstance in connection with a claim of ownership, from which a grant may be presumed. Grimes *v.* Bastrop, 26 Tex. 310.

Evidence of preliminary steps taken to secure a grant is not admissible to raise a presumption of a grant. Ballard *v.* Perry, 28 Tex. 347.

16. Hatch *v.* Dunn, 11 Tex. 708; Robertson *v.* Teal, 9 Tex. 344.

17. Hatch *v.* Dunn, 11 Tex. 708; Texas-Mex. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

In Robertson *v.* Teal, 9 Tex. 344, the court said: "The fact that this section of the country was comprehended within the limits of their contract from February, 1831, until the rights of Robertson were established by the decree of the 29th April, 1834, is public and notorious. It is a matter belonging to the public history of the times. * * * It, as a fact, is as much entitled to judicial recognition and to become the basis of judicial action as any other matter on the records of history."

the secretary of state to the political chief is admissible as evidence of title,[18] as is also a certified copy of the application.[19]

VIII. DEPREDATIONS ON PUBLIC LANDS.

1. Civil Actions. — A. Burden of Proof. — In an action of trespass for taking timber from public land, or of trover or replevin, the burden is on the government to prove all the essential facts.[20] It then devolves upon the defendant to show a right.[21]

18. "Those papers were not irrellevant, but tended to show that the concessions through which appellee's claim was made, and made before the dates these reports bear date, and further that the colonization contract with Grant and Beales was in existence when the reports were made. Taken in connection with the laws then in force, they further tended to show that the colony, as well as the lands in controversy, were to some extent within the territory over which the political chief of the department of Bexar exercised jurisdiction." Texas-Mex. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

19. Texas-Mex. R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

20. United States *v.* Taylor, 35 Fed. 484; United States *v.* Gumm, 9 N. M. 611, 58 Pac. 398; Denver & R. G. R. Co. *v.* United States, 9 N. M. 382, 54 Pac. 241.

Thus, the government has the burden of showing that the timber was taken from public land. United States *v.* Denver & R. G. R. Co., 31 Fed. 886.

The government cannot, by seizing logs alleged to have been cut from public lands, throw the burden of proof upon the claimant. It must resort to the courts, the same as any other suitor. Handford *v.* United States, 92 Fed. 881, 35 C. C. A. 75.

21. Thus, the burden is on a railroad defendant to show that timber was taken from public land adjacent to its road (United States *v.* Denver & R. G. R. Co., 31 Fed. 886), and that the timber was cut by mistake (United States *v.* Baxter, 46 Fed. 350), and that it was cut after the date when it was authorized to take (United States *v.* Eccles, 111 Fed. 490).

Indians have only a right of occupation, and the presumption is against their authority to cut and sell timber. Purchasers are charged with notice of this presumption, and have the burden of overcoming it. United State *v.* Cook, 19 Wall. (U. S.) 591.

Under the rules and regulations of the land department, "the owner or manager of a sawmill or other person felling or removing timber upon or from the public lands, is required to keep a record of all timber so cut or removed, stating the time when cut, the names of the parties cutting or in charge of the work; describing the land from which it was cut by legal subdivisions, or as near as practicable is unsurveyed, the character of the land, how much lumber was manufactured, how much sold, and to whom; and required that none shall be sold unless a written agreement is taken from the purchaser that the same shall not be used except for building, agricultural mining or other domestic purposes, within said territory or state, as the case may be. It is apparent that such information is peculiarly within the knowledge of the defendants sued for cutting and removing such timber, and, as such facts are necessary of a license to cut or remove timber from the public lands, it was for the defendants, and not the plaintiff, to establish them." United States *v.* Gumm Bros., 9 N. M. 611, 58 Pac. 398.

The law casts upon the defendant the burden not only of producing his license, but of showing that it was broad enough to authorize the acts complained of. "This burden * * * must not be confounded with the preponderance of evidence, the establishment of which usually rests upon the plaintiff." United States *v.* Denver & R. G. R. Co., 191 U. S. 84, *reversing* 9 N. M. 389, 54 Pac. 336.

The government is not obliged to prove its case beyond a reasonable doubt.[22]

B. Rules of Land Department. — The rules of the land department in regard to the cutting of timber will be judicially noticed.[23]

C. Evidence of Character of the Land. — The character of the land may be shown by evidence of parties who have been upon it and by records of the land department;[24] but the records are not conclusive upon the government.[25]

D. Official Plats and Books. — Official plats and books from the land office are admissible to show that the land has not been disposed of by the government.[26]

E. Evidence of Value. — Upon an issue of the value of logs at a certain place, it is error to allow testimony as to the value generally;[27] but it may be shown in the same manner as in suits between individuals.[28]

F. Evidence of Good Faith. — Evidence tending to show that the trespass was or was not wilful is competent.[29]

2. Criminal Actions. — In a criminal prosecution for cutting timber on public land, an intent to remove unlawfully will be pre-

See also Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366.

22. United States *v.* Taylor, 35 Fed. 484.

23. United States *v.* Gumm, 9 N. M. 611, 58 Pac. 398. See also Caha *v.* United States, 152 U. S. 211. *Compare* Denver & R. G. R. Co. *v.* United States, 9 N. W. 389, 54 Pac. 336.

24. Lynch *v.* United States, 138 Fed. 535.

It is provided by statute that timber may be taken from mineral lands for certain purposes. Hence evidence of the character of other land in the vicinity, as well as the land from which the timber was taken, is admissible. United States *v.* Rossi, 133 Fed. 380, 66 C. C. A. 442.

Parol evidence is not admissible on behalf of a defendant to show land upon which he had cut timber to be swamp land. Bly *v.* United State, 4 Dill. (U. S.) 464, 3 Fed. Cas. No. 1,581.

25. Lynch *v.* United States, 138 Fed. 535.

26. Bly *v.* United States, 4 Dill. (U. S.) 464, 3 Fed. Cas. No. 1,581. In this case the court said: "These plats and books are the official records of the office, and are kept by the register so as to show what lands are taken under the preemption, homestead, or other laws of the general government. These official records, in connection with the testimony of the register, showed that the *locus in quo* was vacant land which had never been disposed of by the United States, and were sufficient *prima facie* to establish that fact."

27. United States *v.* Baxter, 46 Fed. 350.

28. In an action by the United States to recover the value of timber, evidence as to what officers of the state had appraised the timber at, under a state statute, or of the actual price it was sold for, is admissible. Lynch *v.* United States, 138 Fed. 535.

29. United States *v.* Teller, 106 Fed. 447, 45 C. C. A. 416.

Such evidence is to be considered in connection with the measure of damages. As to the effect, see Bolles Woodenware Co. *v.* United States, 106 U. S. 432, and cases cited.

Evidence of the advice of counsel is admissible to show good faith (United States *v.* Eccles, 111 Fed. 490) but such evidence is not admis-

sumed from evidence of knowledge of the character of the land.[30] This is the only intent which need be proved.[31] The burden of proving the guilt of the defendant is, of course, on the government.[32]

IX. PROCEEDINGS IN LAND OFFICE.

1. Mode of Presenting Case. — A. Order of Proof. — While, in general, the order of introducing testimony according to the rules of law should be followed, great latitude is allowed; and a case will not be reversed because of a failure to observe legal rules when no prejudice results.[33]

B. Cross-Examination. — An adverse party has the right to cross-examine his opponent's witnesses; but if opportunity for cross-examination is allowed, it cannot be objected that he was not informed of his right.[34]

sible unless the facts are pleaded (United States *v.* Mullan Fuel Co., 118 Fed. 663).

30. United States *v.* Niemeyer, 94 Fed. 147.

31. Teller *v.* United States, 113 Fed. 273. In this case the court said: "For the purpose of protecting the public domain from the invasion of trespassers, Congress denounced as a crime the cutting of timber on public land, 'with the intent to export and dispose of the same.' This is the intent that is made criminal by law, and the only intent necessary to establish the crime in a given case." It follows that evidence that the timber was cut with an honest intention is immaterial. If material, it could not be shown by evidence of custom to cut timber on public land, by evidence that the defendant had bought and paid for other land, or by evidence that the officers of the land department had acquiesced in other offenses.

The prosecution has the burden of proving the facts constituting the offense. United States *v.* Reder, 69 Fed. 965.

32. Where the defendant shows that he had a mineral entry on the land and was therefore entitled to cut timber for certain purposes, the government has the burden of proving beyond a reasonable doubt that the timber was cut for other than lawful purposes. It will not be presumed that it was cut for other than mining purposes. United States *v.* Routledge, 8 N. M. 385, 45 Pac. 883.

In civil cases, however, it is held that the presumption is that the cutting is illegal. Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366; United States *v.* Denver & R. G. R. Co., 191 U. S. 84, *reversing* 9 N. M. 389, 54 Pac. 336.

33. Thus, in Devore *v.* Riehl, 25 L. D. 380, the contestant made a *prima facie* case of settlement. This the other party undertook to break down, and in a measure succeeded. The contestant was then permitted to introduce other witnesses on the same issue. This was approved by Secretary Bliss, who said: "The order in which the contestant was permitted to introduce his testimony was irregular, but the inadequate provisions of law governing trials before local officers, and more especially the lack of authority in those officers to issue compulsory process to secure the attendance of witnesses, render their attendance capricious and uncertain, so that the ordinary rules of introducing testimony must often be departed from to meet the demands of a more substantial justice."

Such matters are generally within the discretion of the local officers Smith *v.* Washburn, 12 L. D. 14.

34. Durkin *v.* Lindstrand, 11 L. D. 418.

As to the right of cross-examination in general, see Gibson *v.* Chaney, 14 L. D. 471.

A party cannot be cross-examined upon his final proof testimony at a later hearing; but he may be made

Effect of Refusal to Submit to Cross-Examination. — Where witnesses refuse to submit to a proper cross-examination, their testimony will be disregarded.[35]

C. EXTENT OF EXAMINATION. — a. *In General.* — So far as possible, the rules as to examination of witnesses prevailing at law are applied.[36] The officers are allowed a sound discretion as to the extent of the examination.[37]

b. *Can Exclude Only Evidence Obviously Irrelevant.* — Under rule 41, registers and receivers cannot exclude testimony objected to, unless obviously irrelevant.[38]

c. *Right to Exclude When Unnecessary Expense Will Follow.* Local officers may, in their discretion, exclude additional testimony which will only result in unnecessary expense, unless the party desiring it will bear the expense.[39]

a witness on behalf of the other party. Peterson *v.* Birch, 21 L. D. 458.

35. Mann *v.* Huk, 3 L. D. 452. In Harris *v.* Mayne, 5 L. D. 599, an entryman refused to answer pertinent questions on cross-examination as to his good faith. This was held to be such an irregularity as to warrant the general land office in a re-examination of the case though no appeal was taken. See also Melcher *v.* Clark, 1 Copp's Pub. Land Laws, 120.

36. Letter of Harrison, 2 L. D. 234.

37. McCarter *v.* Dunn, 5 Copp. 21. In Letter of Harrison, 2 L. D. 234, Acting Commissioner Harrison said: "While I do not deem it expedient to lay down any fixed rule as to how far the examination may be protracted beyond the redirect and recross examination, you are nevertheless authorized to impress upon the attorneys the necessity, in order to avoid prolixity and delay, of so conducting the examination that all the facts within the witness's knowledge upon the issue raised may be drawn from him on his examination-in-chief and cross-examination. And where you have reason to believe from the nature of the examination that such a course is not being pursued, you may personally direct the examination, under the authority delegated to you by Practice Rule 36."

Local officers may summarily stop obviously irrelevant questioning; or, in their discretion allow the examination to proceed at the sole cost of the party making the same. Taylor *v.* Foote, 18 L. D. 559. See also Robb *v.* Howe, 18 L. D. 31; Ware *v.* Judson, 9 L. D. 130; Trotter *v.* Yowell, 21 L. D. 54.

38. Rule 41 provides: "No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objection is made to testimony offered, the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questions." This has been interpreted as rendering the register and receiver incompetent to judge of the relevancy or admissibility of the testimony offered. Instructions from Commissioner McFarland, 1 L. D. 106. See also Robb *v.* Howe, 18 L. D. 31; Ware *v.* Judson, 9 L. D. 130; Grengs *v.* Wells, 11 L. D. 460; Trotter *v.* Yowell, 21 L. D. 54.

39. McCarter *v.* Dunn, 4 Land Owner, 76; Foster *v.* Breen, 2 L. D. 232; Hasek *v.* Klineicki, 1 Copp's Pub. Land Laws, 219.

Thus, where it is evident that no amount of evidence can counteract testimony already given, such evidence may be excluded, otherwise than at the cost of the party asking for it. Drumm *v.* Tormey, 12 L. D. 109.

The rule as laid down by the

D. Oral Examination May Be Waived. — Oral examination before the register and receiver may be waived by the parties.[40]

E. Testimony Must Be Written Out and Signed. — Testimony must ordinarily be written out and signed at the time of taking;[41] and if not so signed it cannot be considered.[42] But the parties may waive this requirement;[43] and in the discretion of the officer, a certificate may be substituted for signature.[44]

F. Depositions. — a. *Upon Oral Questions.* — (1.) In General. Testimony may be taken, at the discretion of the register and receiver, before other officers at places near the land in controversy, and other than the offices of the department.[45] But the testimony,

department is as follows: "When it is clear that the line of cross-examination, or the testimony offered, is intended to vex or delay, or cause unnecessary expense to the contestant, the local officers may, and they should, preemptorily end it. On the other hand, the ruling is designed to protect the contestant, but not to shut out testimony; and, therefore, when the local officers have exercised their discretion by barring testimony on the grounds above stated, the contestee should be allowed to proceed upon paying the additional expense himself." Case of Bell & Barrett, 2 L. D. 196. See also Letter of Harrison, 2 L. D. 234; Foster *v.* Breen, 1 Copp's Public Land Laws, 236.

40. Thus, in De Mott *v.* Day, 2 L. D. 225, the attorney for plaintiff submitted written testimony of his witnesses, prepared at his office, with a proposition to permit the defendant to cross-examine. The defendant agreed to this. It was held that such written testimony should be received.

41. Instructions, 3 L. D. 105; Dingee *v.* Dameron, 18 L. D. 577; Austin *v.* De Groat, 17 L. D. 133.

But failure to sign may be cured by signing and making oath at a subsequent hearing. Heartley *v.* Ruberson, 11 L. D. 575.

42. Dingee *v.* Dameron, 18 L. D. 577; Instructions, 3 L. D. 121.

43. Circular to Registers and Receivers, 28 L. D. 301.

44. The reasons and extent of this rule will be found in the Instructions of Secretary Noble to Townsite Trustees in Oklahoma, 12 L. D. 186. "It has been brought to my attention that the provisions of rule 42, for the guidance of registers and receivers in taking testimony in contest cases, which are made a part of the rules for your observance in allotting lots on town-sites in Oklahoma, may delay the progress of your work by requiring each witness in the case on trial to await the transcribing of the stenographer's notes to sign his testimony before you can proceed to the consideration of another case; the rule is, therefore, so far as your duties are concerned, modified in all cases or instances you deem fit to omit transcribing testimony until it is required for use in the case on appeal, or otherwise. You will, in such cases, direct the testimony to be written out, and, as a board, certify that the evidence so transcribed is the true and correct transcript thereof as given by the witnesses upon the trial, which certificate shall stand in lieu of the signature of the witnesses, and the evidence so certified shall be treated on appeal by the commissioner of the general land office, and the secretary of the interior and given the same consideration as though signed by each witness in accordance with the provisions of said rule 42. Any witness may, however, be detained and required to sign, whenever the board requires it."

45. O'Connell *v.* Rankin, 9 L. D. 209.

Rule 35 provides: "In the discretion of registers and receivers, testimony may be taken near the land in controversy before a United States commissioner, or other officer, authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing."

to be admitted before the department, must be taken in accordance with its rules.[46]

(2.) Rules Governing. — The officer appointed to take the testi-

In the absence of a gross abuse of discretion, the decisions of the registers and receivers in these matters will not be disturbed. Still *v.* Oakes, 25 L. D. 466.

Abuse of Discretion. — Where there has been a gross abuse of discretion, the ruling of the register will not be sustained. Thus, where the land is ninety miles from the office of the register and but three miles from the place where it is desired to take the deposition, and the parties are poverty stricken, it is error to refuse to order the taking of a deposition. United States *v.* Lopez, 17 L. D. 321. See also United States *v.* Raymond, 4 L. D. 439.

It is too late to apply to have evidence taken near the land after notice of a hearing has been given. Ismond *v.* Canning, 16 L. D. 360.

It is not necessary to issue a commission to the officer who takes the testimony. McGrade *v.* Murray, 23 L. D. 140.

The local office cannot direct that testimony be taken before a commissioner in the absence of an application therefor. Dorman *v.* McCombs, 14 L. D. 700.

Before Whom Testimony May Be Taken. — The testimony may be taken before a notary public (Bushnell *v.* Earl, 17 L. D. 4; Tonsfeldt *v.* McKeever, 20 L. D. 18; Hall *v.* Wade, 6 L. D. 788); or before a state superior judge (Lehman *v.* Snow, 11 L. D. 539); or before a clerk of court (Doherty *v.* Robertson, 12 L. D. 30).

An officer designated by the land department to take testimony in a contest case may properly authorize any other qualified officer to take such testimony. Durkin *v.* Lindstrand, 11 L. D. 418.

Where both parties appear at the day set for taking testimony, an objection that the evidence was not taken before the officer named in the notice should be overruled, when the local land officers named the officer before whom the evidence should be taken and it was so taken. Dallas *v.* Jones, 19 L. D. 125.

Under an order appointing a commissioner to take the testimony of certain witnesses named in the application for the order the commissioner is not authorized to take the testimony of any witness not thus specified therein. Leimbach *v.* Lane, 9 L. D. 135.

After submission, a party is not entitled to have a commission issue to take further evidence. Snider *v.* Wright, 16 L. D. 88.

Registers and receivers cannot require parties to appear before them or take supplementary testimony when they have directed the testimony to be taken before some other officer. Cusaden *v.* Perley, 3 L. D. 145.

Effect of Failure To Appear at Hearing. — Where one of the parties is in default, and the commissioner subsequently declines to receive the testimony on behalf of the said party, the local office may, on proper showing, at the final hearing, allow said party an opportunity to submit his testimony. Tonsfeldt *v.* McKeever, 20 L. D. 18.

An objection that the officer before whom the testimony was taken was prejudiced is no excuse for failure to appear at the hearing. Doherty *v.* Robertson, 12 L. D. 30.

46. Mere technical non-compliance with the rules of the department will not justify the exclusion of depositions. Fierce *v.* McDougal, 11 L. D. 183 (failure to endorse title on envelope); Heartley *v.* Ruberson, 11 L. D. 575 (failure to sign may be cured by subsequent signing and making oath).

And a technical objection cannot be raised by one who participated in the hearing. Fierce *v.* McDougal, 11 L. D. 183. See also Roots *v.* Emerson, 10 L. D. 169.

Nor for the first time on appeal. Hall *v.* Wade, 6 L. D. 788; McCallen *v.* Lerew, 7 L. D. 291; Smith *v.*

mony will be governed by the rules applicable to trials before the register and receiver.[47]

b. *Upon Interrogatories.* — Depositions upon interrogatories may be taken under rule 23, in cases similar to those in which depositions may be taken and used in courts of law.[48] But they cannot be used in evidence unless the rules of the department are followed.[49]

c. *May Be Used By Either Party.* — Depositions by whichever

Smart, 7 L. D. 497; Gehman *v.* Culp, 7 L. D. 447.

But failure to observe rules which are mandatory will operate to exclude the testimony. Thus, where, instead of being mailed to the register and receiver, the testimony was allowed to remain in the hands of one of the parties for a considerable time, it was proper to exclude it. McKinney *v.* Dooley, 5 L. D. 362.

Evidence taken before a notary public not properly designated can not be considered. Windsor *v.* Sage, 6 L. D. 440.

47. "The officer designated to take testimony will be governed by the rules applicable to trials before the register and receiver, . . . and may therefore personally direct the examination of witnesses when necessary to draw from the witnesses all the facts within their knowledge pertinent to the issue raised, and reduce the questions and answers to writing. Such officer has also the authority to allow cross-examination in the absence of cross-interrogatories, which are not required to be filed." Case of William French, 2 L. D. 235. See also Warner *v.* Finnerty, 10 L. D. 433.

48. Requisites to the Taking of Depositions. — Rule 23. "Testimony may be taken by deposition in the following cases:

"1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office.

"2. Where the witness resides more than fifty miles from the place of trial, computing distance by the usually traveled route.

"3. Where the witness resides out of, or is about to leave, the state or territory, or is absent therefrom.

"4. Where, from any cause, it is apprehended that the witness may be unable or will refuse to attend; in which case the deposition will be used only in event that the personal attendance of the witness cannot be obtained."

Rule 24. "The party desiring to take a deposition under Rule 23 must comply with the following regulations:

"1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

"2. He must file with the register and receiver the interrogatories to be propounded to the witness.

"3. He must state the name and residence of the witness.

"4. He must serve a copy of the interrogatories on the opposing party, or his attorney."

For the other rules, see 4 L. D. 39 ff.

The opposing party has the right to file cross-interrogatories. If he fails to do so, he loses his right of cross-examination. Jackson *v.* Farrall, 4 L. D. 377.

A deposition taken for the reason that the witness cannot be produced at the trial is not admissible where the witness is present at the hearing, although he may refuse to testify. Hartman *v.* Warren, 19 L. D. 64.

49. Hartman *v.* Lea, 3 L. D. 584.

The fact that a commission to take a deposition was signed by the register only is no objection to the use of the deposition as evidence. Bruner *v.* Mitchell, 25 L. D. 438.

A deposition should not be ordered in the absence of the required affidavit. McCoy *v.* Stocking, 16 L. D. 97.

Failure to Give Notice. — A deposition cannot be read in evidence when due notice has not been served upon the adverse party. Nor can

party taken and transmitted to the department may be used by either party to the issue.[50]

G. Objection to Testimony Cannot be First Raised on Appeal. — An objection to the admissibility of evidence comes too late when raised for the first time on appeal.[51]

2. Burden of Proof. — A. Where Entry Is Attacked. — a. *By Government.* — In a proceeding against an entry on a special agent's report, the burden of proof is upon the government.[52]

b. *By Individual.* — In a contest case between individuals, the burden is upon the contestant to prove his allegations.[53] In a case

it be read when interrogatories have not been served. Manuel *v.* Miller, 7 L. D. 433.

Rule in Ex Parte Contest Cases. — Even in *ex parte* contest cases, depositions taken before the day fixed in the notice cannot be considered. Instructions, 3 L. D. 195.

Effect of Failure to Object in Time. An objection to the admissibility of a deposition comes too late when raised for the first time on appeal. Stowell *v.* Clyatt, 10 L. D. 339.

50. Burton *v.* Howe, 29 L. D. 581.

51. Benesh *v.* Kalashek, 22 L. D. 530.

52. Case of John W. Hoffman, 5 L. D. 1; Case of George T. Burns, 4 L. D. 62; Case of Henry C. Putnam, 5 L. D. 22; United States *v.* Robinson, 5 L. D. 371; United States *v.* Barbour, 6 L. D. 432; Case of Perry Bickford, 7 L. D. 374; Case of John A. McKay, 8 L. D. 526; Case of Andrew J. Healey, 4 L. D. 80; Case of William W. Wilson, 6 L. D. 395, 398.

The burden of proof is upon the party attacking the entry. United States *v.* Copeland, 5 L. D. 170, 171.

Amount of Proof Required in Case of Fraud. — Where fraud is alleged, this burden must be sustained by a clear preponderance of evidence. Case of Perry Bickford, 7 L. D. 374.

Effect of Compelling Defendant to Introduce His Evidence First. — While ordinarily the government should present its case first, a departmental decision will not be disturbed because the defendant was compelled to introduce his evidence first, when the government has afterwards established its case by a preponderance of evidence. Case of Albert H. Cornwell, 9 L. D. 340.

As Against Bona Fide Purchaser. In a proceeding to cancel an entry after transfer to a third party, the burden of establishing the facts is upon the government, and it must be sustained by clear, convincing and conclusive evidence. Colorado Coal & Iron Co. *v.* United States, 123 U. S. 307; Maxwell Land Grant Case, 121 U. S. 325.

53. Ballard *v.* McKinney, 1 L. D. 477; Moss *v.* Quincey, 7 L. D. 373; Creswell Mining Co. *v.* Johnson, 8 L. D. 440; Scott *v.* King, 9 L. D. 299; Tangerman *v.* Aurora Hill Min. Co., 9 L. D. 538; Borchardt *v.* Brown, 1 Copp's Pub. Land Laws, 144.

Thus, a contestant claiming that a party taking under the timber culture laws has not done the planting required thereby has the burden of proving such fact. Flynn *v.* Stiles, 1 L. D. 129. The burden of proof is upon one alleging priority of settlement right as against the subsisting entry of another. Willis *v.* Parker, 8 L. D. 623.

Effect of Citation to Show Cause Why an Entry Should Not be Canceled. — The fact that these allottees were called upon to show cause why their allotments should not be canceled in no wise affected their status. It is the duty of these contestants to affirmatively show such a state of facts as will necessitate the canceling of the allotments already made. It was not even incumbent upon the defendants to enter an appearance; had they not done so it would have been no less the duty of these contestants to present the requisite showing of superior rights. Case of Philomme Smith, 24 L. D. 323. *Compare* Webb *v.* Davis, 22 L. D. 113.

involving a forfeiture the burden is upon the contestant to prove his case by clear evidence.[54]

c. *Character of Land.* — A state, claiming as swamp lands subdivisions of the public domain not so shown by field notes, has the burden of proving the actual character of the land.[55] Where the field notes show the character of the land, the burden is on the contestant.[56] And after an adjudication as to the character of the land, the burden is on the contestant.[57]

d. *After Non-Compliance With Law Is Shown.* — Non-compliance with the law being shown, the burden of proof is thereafter upon the entryman to show his good faith and satisfactory reasons for his failure to meet the requirements of the law.[58]

e. *After Final Judgment.* — After final judgment of cancelation, the party asking a new hearing has the burden of showing why the cancelation should not stand.[59]

B. Where There Is No Entry. — In a hearing directed to determine superiority of right as between adverse applicants, where no entry has been allowed, the burden of proof cannot be said to rest upon either of the applicants.[60]

3. Presumptions. — A. Entry Presumed Valid. — An entry, once allowed, is presumptively valid, and should be disturbed only upon the clearest proof of fraud.[61]

B. Officers Presumed to Have Performed Their Duty. — It

54. Lawrence *v.* Phillips, 6 L. D. 140. Williams *v.* Price, 1 Copp's Pub. Land Laws 87; Brannan *v.* Rose, 1 Copp's Pub. Land Laws, 243.

It was originally said that the evidence must establish the case beyond a doubt. "In a proceeding involving forfeiture, the same strictness of proof is invariably required as under a penal statute. The whole burden is on the party alleging want of compliance, and the acts of abandonment or failure to comply with legal requirements must be affirmatively shown." Ewing *v.* Rickard, 1 L. D. 146. But this has been since overruled; and it is now necessary to establish the case only by a clear preponderance of evidence. Tibergheim *v.* Spellner, 6 L. D. 483.

Forfeiture of Improvements. — To secure a forfeiture of improvements, the contestant must prove his case by a clear preponderance of evidence. Neff *v.* Cowhick, 6 L. D. 660.

55. State of Wisconsin *v.* Wolf, 8 L. D. 555.

56. In a circular issued by commissioner Sparks, December 13, 1886, approved by Secretary Lamar, (5 L. D. 280), it was provided: "Where swamp land selections are based upon the field notes of survey, and the land is alleged not to have been in fact swamp and overflowed, and rendered thereby unfit for cultivation at the date of the swamp land grant, the burden of proof will be upon the contestant or adverse claimant under the public land laws."

57. Majors *v.* Rinda, 24 L. D. 277.

58. Donly *v.* Spring, 4 L. D. 542. The burden of proving a special defense is upon the defendant.

Thus, where it is shown that part of the land has not been cultivated as required by law, the burden is upon the entryman to explain his failure to cultivate. Anderson *v.* Hamilton, 5 L. D. 363.

59. Weber *v.* Shappell, 1 L. D. 76.

60. Dever *v.* Ayars, 28 L. D. 169.

The matter in dispute must be decided upon the preponderance of the evidence. Central Pac. R. Co. *v.* Shepherd, 9 L. D. 213.

61. Arnold *v.* Langley, 1 L. D. 439; Case of Lewis F. Spink, 4 L.

will generally be presumed that public officers upon whom the law has imposed certain duties have performed them properly.[62]

C. Payment of Fees. — Payment of land office fees will in general be presumed.[63]

D. Fraud. — Fraud in making an entry may be presumed from a relinquishment within a short time.[64] An attempted sale of land embraced in a homestead entry raises a presumption of bad faith.[65]

4. Admissibility. — A. Evidence Is Confined to Issues. — In contests before the land department, evidence should be confined to the allegations, as in trials at law.[66]

B. Best Evidence. — The best evidence principle applies to proceedings before the land department.[67]

C. Records. — a. *In General.* — The records of the land office are competent evidence of the facts there set forth.[68]

D. 292; Case of Gilbert E. Read, 5 L. D. 313; United States *v.* O'Dowd, 11 L. D. 176.

62. Case of F. P. Harrison, 2 L. D. 767. In this case the court said: "It is an elementary principle of law that when any judicial or official act is shown to have been performed in a substantially regular manner, it is presumable, and it may be generally assumed, that the formal prerequisites have been complied with."

Thus, it will be presumed that officers to whom the government has intrusted the duty of determining when the necessity for a survey exists, and of supervising such survey, have properly discharged their duties. Case of Pierre Dolet, 2 L. D. 463.

63. Case of Eugene Q. Powlison, 2 L. D. 323. But see Central Pac. R. Co. *v.* Orr, 2 L. D. 525. In this case the statute provided: "Nor shall the provisions of this act be available to any person or persons who shall fail to make proof and payment" within a certain time. The records did not show payment, and it was therefore assumed that it had not been made.

64. Thus, in the case of Allen B. Lemmon, 2 L. D. 92, the entryman, upon making his entry, made oath "that it was for the cultivation of timber and for his own exclusive use and benefit, and that he made the application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever." A little more than a month thereafter he relinquished his entry for a valuable consideration. This was held to raise a presumption that the entry was fraudulent in its inception.

65. Guyton *v.* Prince, 2 L. D. 143.

66. Shull *v.* McCormick, 1 L. D. 470; Miller *v.* Worner, 27 L. D. 247.

Thus, in Schelter *v.* Off, 1 L. D. 113, it was alleged that land had been abandoned and that it was not cultivated. It was held that testimony as to the character of the land was immaterial.

Evidence showing want of cultivation is not admissible under a charge of failure to plant. Leavenworth *v.* Bibbey, 4 L. D. 299.

Under a charge of failure to comply with the law the third year of the entry, evidence is not admissible as to improper preparation of the soil during the preceding years. Nelson *v.* Phelps, 5 L. D. 329.

Evidence tending to show that the entry was made and held for speculative purposes is not admissible under a general charge of non-compliance with law in the matter of cultivation and planting. Cropper *v.* Hoverson, 13 L. D. 90.

It is competent for the defendant to introduce evidence relative to the exact allegations of the complaint. The contestant is bound by his allegations. Prince *v.* Wadsworth, 5 L. D. 299.

67. St. Paul M. & M. R. Co. *v.* Morrison, 4 L. D. 509.

68. The character of such evidence is well set forth by Commissioner McFarland, in the case of Antonio D. Martinez, 1 L. D. 18, quot-

b. *Judicial Notice.* — The officers of the department will take judicial notice of facts disclosed by their records.[69]

c. *Records in Other Cases.* — Where facts appear of record in the land office although in another matter, an applicant to purchase will not be required to furnish additional evidence;[70] but in a contest case, such records will not be admitted against those not represented in the prior proceeding.[71]

d. *Certificate as to Contents.* — A certificate that a fact appears of record is not admissible before the officers of the department.[72]

ing from McGarrahan *v.* New Idria M. Co. "The record of this patent is evidence of the grant, but not the grant itself. It is evidence of equal dignity with the patent, because, like the patent, it shows that a patent containing the grant had been issued. The record called for by the act of Congress is made by copying the patent to be issued into a book kept for that purpose. The effect of the record, therefore, is to show that an instrument such as is there copied has actually been prepared for issue from the general land office. If the instrument as recorded is sufficient on its face to pass title, it is presumed that the grant has actually been made, but if it is not sufficient no such presumption arises. The public records of the executive departments of the government are not like those kept pursuant to ordinary registration laws intended for notice, but for the preservation of the evidence of the transactions of the department."

See also Kime *v.* Smith, 19 L. D. 207.

69. In Leightner *v.* Hodges, 3 L. D. 193, Commissioner McFarland said: "All cases involve the records of the local office. In your examination of any case, whether the oral testimony is taken before you or before another authorized officer, it is of course a material part of your duty to consult your records, and you must make up your judgment upon the facts as shown by the record, together with facts brought out in the testimony taken for the purposes of the hearing. You are not expected, nor would you be authorized to ignore facts of record, because testimony is taken before another officer."

Improper Record. — It is not competent to take cognizance of a record that constructively never existed, as where a contest has been declared nil. Wilson *v.* French, 2 L. D. 286.

Effect of Judicial Notice upon Admissibility of Records. — Although the officers of the land department will take judicial notice of their records, it is still competent for a party to introduce such records in evidence as a part of his case, if he sees fit. Kime *v.* Smith, 19 L. D. 207.

70. Thus, in the case of the Alta Mills Site, 9 L. D. 48, proof of the filing of articles of incorporation of the applicant was made under a patented entry and appeared of record in the General Land Office. It was held unnecessary to prove incorporation in another application by the company. In the case of George Leinen, 8 L. D. 233, it was held unnecessary to make further proof of a fact proved in the same matter, but prematurely. But see Croughan *v.* Smith, 4 L. D. 413.

71. Case of Orlando Blackman, 7 L. D. 496. In the latter case the secretary of the interior said that the right of the contestant should not be affected by the testimony offered in another case to which he was not a party and had not opportunity to reply. See also Bright *v.* Elkhorn Mining Co., 9 L. D. 503.

72. This is an application to proceedings in the land department of the general rule that a certificate that a certain fact appears of record is not sufficient. The officer must certify a transcript of the entire record relating to the matter. St. Paul M. & M. R. Co. *v.* Morrison, 4 L. D. 510.

A mere certificate that a certain document is of record in a certain office is inadmissible. Weyher *v.* Smith, 13 L. D. 489.

e. *May Be Supplemented By Parol.* — It is competent to supplement the record of the land office by extrinsic evidence showing facts which do not appear therein.[73] But *prima facie,* the records are deemed correct;[74] and they cannot be defeated by *ex parte* affidavits.[75]

D. Admissions. — Admissions of a party to the proceeding will be received as in courts of law.[76]

E. Evidence of Acts Performed After Commencement of Contest. — Evidence as to acts performed on the land after the initiation of the contest, and notice thereof, is not, in general, admissible;[77] although it may be, in some cases, to show good faith.[78] Evidence of acts performed before notice of contest is admissible to show compliance with the law.[79] And such evidence is admissible for the same purpose, although the acts were performed after notice, where a hearing is ordered on a special agent's report.[80]

73. Thus, extrinsic evidence is admissible to identify the claimant. Kime *v.* Smith, 19 L. D. 207.

Such evidence is admissible to show facts which should have appeared in the records, and would so have appeared but for the omissions of the local office. Sheldon *v.* Roach 22 L. D. 630; Mallett *v.* Johnston, 14 L. D. 658; Case of Charles S. Phillips, 17 L. D. 53; Case of Frederick Tielebein, 17 L. D. 279.

74. Pollard *v.* Rethke, 8 L. D. 294.

75. Jacobson *v.* Remender, 10 L. D. 256.

76. In a proceeding against original entrymen and persons claiming to be *bona fide* purchasers to cancel an entry for fraud, evidence of the admissions of the entrymen have been held admissible. United States *v.* Allard, 14 L. D. 392. The facts in this case, however, were somewhat peculiar. It was said: "It must be remembered that the government was without power to have compelled their attendance at the trial as witnesses. . . . That the intervenors have not had the opportunity to cross-examine the entrymen is in great measure their own fault, inasmuch as the record shows that their attorneys at the trial not only advised that the entrymen could not be compelled to attend and testify, but also took active measures to secure, and did secure, the defeat of the government in its effort to obtain compulsory process against them and other witnesses in the state courts of California. They cannot now be heard to complain that they have not been allowed the privilege of cross-examination."

After the death of an entryman his alleged admissions of fraud in obtaining the dismissal of a contest cannot be proved by the testimony of the contestant alone, on a motion for review of the dismissal of the contest, where the fact of such alleged fraud was known and might have been proven on another and earlier motion to reinstate the contest. Peacock *v.* Shearer's Heirs, 20 L. D. 213.

77. Knox *v.* Bassett, 5 L. D. 351. See also Yeutsch *v.* Ryan, 6 L. D. 368.

Acts done toward curing default, after initiation of contest, will not be considered as affecting the case made out by the contestant. Donly *v.* Spring, 4 L. D. 542.

78. Farnsworth *v.* Hudson, 5 L. D. 315. See also case of W. W. Wishart, 13 L. D. 211.

79. Seitz *v.* Wallace, 6 L. D. 299.

The fact of compliance with the law after affidavit of contest is filed, and before legal notice thereof, goes to the weight, and not to the admissibility of the testimony. Scott *v.* King, 9 L. D. 299.

80. In the case of Mary H. Burnham, 7 L. D. 486, distinguishing between the cases, it was said: "The rule invoked by your office applies to cases of contest, in which the rights acquired by the contestant cannot be

F. Evidence of Acts Performed After Final Proof. — Evidence of acts subsequent to final proof may be admitted to show a prior intent; but to be entitled to weight, it must be clear and convincing.[81]

G. Testimony Taken Informally or in Another Proceeding. a. *Effect of Stipulation.* — By stipulation, testimony taken in one case may be used in another.[82]

b. *Effect of Premature Hearing.* — Where a hearing is premature, but all parties are present, the matter may be decided, when it properly comes up, upon the testimony formerly taken.[83] And upon a rehearing, the testimony formerly given may be considered.[84]

c. *To Determine Necessity for Further Hearing.* — While evidence secured on an informal proceeding before a special agent cannot be made the basis of a final decision, it can be considered in determining whether a further investigation of the case by the department is justified.[85]

d. *Where Attorneys Taking Have Been Disbarred.* — Testimony taken before a commissioner cannot be considered when the attorneys for the contestant are debarred by the law from practice before the land department.[86]

H. Impeaching Evidence. — In proceedings before the land department, as in actions at law, it is competent to introduce evidence impeaching the character of a wintess.[87]

I. Admissibility of Evidence. — a. *In General.* — In general, evidence inadmissible at law will not be considered in a proceeding before the department.[88]

b. *Reports of Special Agents.* — A special agent's reports are not

defeated by a claimant's doing the requisite amount of breaking, cultivation or planting after service of notice of the contest. It has no application to a case like the present one, where there is no contest or adverse claim and the question is one solely between the claimant and the government, and no bad faith is shown."

81. Bennett *v.* Cravens, 12 L. D. 647.

Such evidence is admissible for the purpose of ascertaining the *bona fides* of the claimant during the period covered by the proof. Case of W. W. Wishart, 13 L. D. 211.

82. Davison *v.* Parkhurst, 3 L. D. 445; Fall *v.* Taylor, 13 L. D. 140.

A stipulation as to matters of evidence to be considered on the trial is within the province of attorneys of record, and such action is binding upon the parties, in the absence of misconduct on the part of the prevailing party. Kirkpatrick *v.* Brinkman, 11 L. D. 71; Molen *v.* Bartlett, 16 L. D. 197.

83. Parris *v.* Hunt, 9 L. D. 225.

84. Croal *v.* Boetler, 20 L. D. 369.

85. Burns *v.* Smith, 28 L. D. 263.

86. Thus, in Sharitt *v.* Wood, 11 L. D. 25, it was held that testimony taken before a commissioner could not be considered because one of the contestant's attorneys had been disbarred and the other was an employe of the department.

87. "Where a party finds himself liable to loss and injury through false testimony, the impeachment of the character of the witness is his only recourse." Packard *v.* Jackson, 1 L. D. 105.

88. Thus, confidential communications between attorney and client will not be considered. Robb *v.* Howe, 18 L. D. 31; Sutton *v.* Abrams, 7 L. D. 136.

evidence, but simply the basis upon which hearings are ordered.[89]

c. *Hearsay.* — Hearsay evidence is not generally admissible;[90] although it may be received, in the absence of better evidence, to prove the death of a party.[91]

d. *Ex Parte Testimony.* — Where a hearing is ordered on the report of a special agent, the local office should not consider the *ex parte* testimony submitted by the claimant in making his final proof;[92] nor should *ex parte* affidavits be considered as evidence in a contest case.[93]

e. *Motive.* — Evidence of the motive of the contestant is immaterial.[94]

f. *Opinions.* — Opinions as to acreage broken are not admissible, when the subject is capable of mathematical measurement.[95]

g. *Inspection of Land.* — The officers hearing a contest case have a right to inspect the land upon notice to the parties; but they cannot, after the case is closed, and without notice, inspect the ground and base their judgment upon such inspection.[96]

89. Case of John W. Hoffman, 5 L. D. 1; Case of Abraham L. Burke, 4 L. D. 340; Case of Etienne Martel, 6 L. D. 285.

"Where the special agent has reported an entry, upon which final certificate has regularly issued, illegal or fraudulent, and a hearing has been ordered, under the circular of May 8, 1884, *he should offer the proof in support of his allegations*, after which the entryman should present his defense." Case of George T. Burns, 4 L. D. 62. The government "will be required to establish the truth of the charge at the time of the hearing by the examination of the special agent or such other witnesses as may be produced, so that the entryman may have the opportunity of cross-examination as allowed by law." Case of Henry C. Putnam, 5 L. D. 22. An unsworn statement of a special agent should not be considered in evidence. Case of Edward Wiswell, 6 L. D. 265.

90. Case of Lewis F. Spink, 4 L. D. 292.

On a charge that a deceased entryman in his life-time had agreed to convey to others the land in dispute, hearsay testimony as to such agreement is incompetent. United States *v.* Lopez, 17 L. D. 321.

91. Senholt *v.* Reynolds, 6 L. D. 241.

92. Case of James Copeland, 4 L. D. 275; Case of Etienne Martel, 6 L. D. 285; United States *v.* O'Dowd, 11 L. D. 176.

93. Statements of a special agent made privately to the local officers, and *ex parte* affidavits cannot be considered as legal proof, upon which final action may be taken. Case of Mark L. Campbell, 4 L. D. 228. See also Smith *v.* Edelman, 4 L. D. 168; Kendrick *v.* Doyle, 12 L. D. 67; Foltz *v.* Soliday, 13 L. D. 663; McGlashan *v.* Rock, 15 L. D. 262; Potter *v.* Lawrence, 18 L. D. 167.

An affidavit filed with an appeal to the department cannot be received as evidence in a contested case. Conn *v.* Carrigan, 11 L. D. 353.

94. In Wazuzer *v.* Kropitzky, 5 L. D. 296, it was urged that the contestant was a personal enemy of the claimant, and did not make the contest in good faith, but for the purpose of gratifying a grudge. This was held immaterial. "There is nothing in the law or the regulations of the land department which provides that a contest shall be initiated only by the entryman's friends."

95. Boyd *v.* Batdorff, 7 L. D. 441. The opinions of experts, even, should not be admitted in such a case.

96. Tannehill *v.* Shannon, 6 L. D. 626.

The reason is that the officers act

5. Sufficiency. — Where the testimony taken at a hearing shows that an entry should be cancelled, such action will be ordered, although the evidence may not fully sustain the charge upon which the contest was brought.[97]

judicially, and must consider only evidence properly before them.

To the effect that the officers may inspect the land after notice, see Majors v. Rinda, 24 L. D. 277.

Effect of Inspection. — "While from an inspection . . . the register and receiver would know the facts, yet they may not substitute their own views and judgment for the evidence offered upon the trial. They may, however, call their examination and observation of the premises to their aid in determining the credibility of the witnesses; who is most worthy of credit and to enable them to better understand and apply the evidence." Menzel v. Valear, 16 L. D. 95. But the report of a register, based on such inspection, may be properly treated as the basis for a rehearing. Jeardoe v. Shannon, 8 L. D. 38.

97. Downey v. Briggs, 5 L. D. 590; Murphy v. Longley, 4 L. D. 239; Seitz v. Wallace, 6 L. D. 299; Litten v. Altimus, 4 L. D. 512.

Reasons. — "In contests of this nature the government is necessarily a party, acting on the information of the contestant, and whenever such a state of facts is developed as establishes conclusively that an attempt is being made to acquire title to public land in fraud of the existing laws, this department, in the exercise of its supervisory powers, has always maintained the right of the government to take such summary action as may be necessary to protect its interests." Smith v. Brandes, 2 L. D. 95.

The government is not precluded by the entryman's withdrawal from considering the evidence in the case with the view of ascertaining and adjudicating upon the right of the entryman as between himself and the government. Overton v. Hoskins, 7 L. D. 394; Taylor v. Huffman, 5 L. D. 40; Hegranes v. Louden, 5 L. D. 385.

The government is entitled to judgment on the facts, however such facts may have been disclosed, and whatever the rights of the private parties to the contest may be. Saunders v. Baldwin, 9 L. D. 391.

But the government will not cancel an entry in such a case unless bad faith is clearly shown. Bell v. Bolles, 1 Copp's Pub. Land Laws 243.

PUBLIC MEETINGS.—See Disturbance of Public Assemblages; Unlawful Assembly.

PUBLIC NUISANCE.—See Nuisance.

PUBLIC OFFICERS.—See Officers: Sheriffs and Constables.

PUBLIC POLICY.

CROSS-REFERENCES:

Compounding Offenses;
Confessions;
Contracts;
Customs and Usages;
Physical Examination;
Privileged Communications.

I. MODE OF DETERMINING PUBLIC POLICY.

1. In General. — In general, evidence is not admissible to show what public policy is, or what it requires in a given instance. The question is one of law for the court.[1] The constitutions, statutes

1. Pierce *v.* Randolph, 12 Tex. 290. In this case the court, after laying down the rule that the question is for the court, said, referring to the contention that it is for the jury: "No doctrine more subversive of law and of public and private rights could have been devised. In fact it sets them afloat upon public sentiment, to fluctuate and rise and fall with the ebbs and flows of popular opinion, and when brought to trial, to succeed or fail, not according to established rules of law, but upon the belief, the private opinions, or in other words the whims and caprices of the jury before whom they are presented. The most sacred rights, those most cherished by the law, may be frustrated and defeated, if, without any regard to the law, a Justice of the Peace with his jury, might deem them against morals, good order, or public policy. Under this doctrine, not only would contracts for the sale of spirituous liquors, for public barbecues, or secular exhibitions of any kind, which would attract masses of people together, most likely be deemed nullities, but the regular physician might fail to recover for his rights and his services if his rights were submitted

and decisions of the various jurisdictions are the principal sources of information.[2]

2. Of Another Jurisdiction. — Where it becomes necessary to prove the public policy of another state or jurisdiction, only evidence of its constitution, statutes and decisions can be considered.[3] In the absence of all evidence, it will be presumed that the policy is

to a jury of hydropathists, who might believe them to be dangerous to the health and life of the patient. The rights to lands, however clear, under patents and deeds, might suddenly be lost under the operation of agrarian principles by which the jury or some of them might be infected, and who, in their conscience, might believe that one hundred and sixty or three hundred and twenty acres were the extreme limit which should be allowed to any single individual, and to suffer more to be recovered or enjoyed would be destructive of the equal rights of others, and at war with sound public policy." See Smith *v.* DuBose, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260; Beadles v. Bless, 27 Ill. 320, 81 Am. Dec. 231.

2. Vidal *v.* Girard's Exrs., 2 How. (U. S.) 127; Swann *v.* Swann, 21 Fed. 299; United States *v.* Trans-Missouri Freight Assn., 58 Fed. 58, 7 C. C. A. 15, 19 U. S. App. 36, 24 L. R. A. 73; Smith *v.* DuBose, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260; Orrell *v.* Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

"The real question for consideration is, how shall it be determined whether the contract is or is not concontrary to public policy? The subject-matter of the contract may be such that it affects the country at large, or it may be local in its nature. The nature of the subject-matter determines the source from which light must be sought upon the question of fact whether the provisions of a given contract are or are not contrary to public policy. In other words there is a public policy of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the national government, and coextensive with the boundaries of the union, and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state, and applicable to all matters within state control. . . . In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the constitution of the United States, the statutes enacted by congress, and the decisions of the courts, federal and state; and in case there should be a divergence in the views of the federal and state courts upon a question of national public policy, the conclusion reached in the federal courts must be accepted as the best evidence of what the requirements of the national public policy are. On the other hand, when seeking to determine the public policy of the state towards a subject within state control, the principal sources of information are the state constitution and statutes and the decisions of the courts, state and federal; and, in case of a divergence between them, the decisions of the state court must be accepted as the best evidence of the public policy of the state." Hartford F. Ins. Co. *v.* Chicago, M. & St. P. R. Co., 62 Fed. 904.

It is the public policy at the time of suit that controls. The public policy at the time of making the contract is immaterial. Hartford F. Ins. Co. *v.* Chicago, M. & St. P. R. Co., 62 Fed. 904.

3. Vidal *v.* Girard's Exrs., 2 How. (U. S.) 127; Swann *v.* Swann, 21 Fed. 299; Smith *v.* Du Bose, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260.

In Swann *v.* Swann, 21 Fed. 299, the court said: "The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must ap-

the same as that of the forum.[4] In the federal courts the public policy of the various states will be judicially noticed.[5]

II. MODE OF PROVING VIOLATION OF PUBLIC POLICY.

1. Parol Evidence. — Where a contract does not show upon its face that it violates public policy, parol evidence is admissible to show that it is of such character.[6]

2. Evidence of Injurious Effect. — But evidence is not admissible to show that a contract will have an injurious effect upon the public.[7]

3. Evidence That No Injury Will Result. — Intent. — When a contract belongs to a class which is reprobated by public policy, evidence is not admissible to show that no harm will result to the public in the particular instance;[8] nor is evidence of innocent intent competent.[9]

4. Evidence Should Be Clear. — A contract should not be held void as against public policy, unless it is clearly shown to be obnoxious to that objection.[10]

peal to determine the public policy of a state. The term, as it is often popularly used and defined, makes it an unknown and variable quantity, — much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws, and judicial decisions." See also Stephens *v.* Southern Pac. Co., 109 Cal. 86, 41 Pac. 783, 50 Am. St. Rep. 17, 29 L. R. A. 751. And see article "FOREIGN LAWS." Vol. V.

4. Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540; Sayre *v.* Wheeler, 31 Iowa 112; Bean *v.* Briggs, 4 Iowa 464; Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118; Cooper *v.* Reaney, 4 Minn. 528. But see O'Rourke *v.* O'Rourke, 43 Mich. 58, 4 N. W. 531; Cutler *v.* Wright, 22 N. Y. 472. See also article "FOREIGN LAWS."

5. Swann *v.* Swann, 21 Fed. 299.

6. See article "PAROL EVIDENCE," Vol. IX. See also Fearnley *v.* De Mainville, 5 Colo. App. 441, 39 Pac. 73.

It will not be presumed that a contract violates public policy. Bedford Belt R. Co. *v.* McDonald, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. Rep. 172.

7. Beadles *v.* Bless, 27 Ill. 320, 81 Am. Dec. 231. In this case, a wager that a railroad would be completed within a certain time was held valid. At the trial, evidence was offered that "this bet or transaction was talked of by the public about Lewistown a great deal when subscriptions were being obtained to the stock of said railroad." The court excluded the evidence, and its ruling was sustained on appeal.

8. Firemen's Charitable Assn. *v.* Berghaus, 13 La. Ann. 209; Tarbell *v.* Rutland R. Co., 73 Vt. 347, 51 Atl. 6, 87 Am. St. Rep. 734, 56 L. R. A. 656.

9. Church *v.* Proctor, 66 Fed. 240, 13 C. C. A. 426; Nichols *v.* Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262; Brown *v.* First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; Webster *v.* Sanborn, 47 Me. 471.

10. Swann *v.* Swann, 21 Fed. 299; Stephens *v.* Southern Pac. Co., 109 Cal. 86, 41 Pac. 783; 50 Am. St. Rep. 17, 29 L. R. A. 751; Equitable Loan & S. Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; Bedford Belt R. Co. *v.* McDonald, 17 Ind. App. 492, 46 N. E. 1022; 60 Am. St. Rep. 172; Richmond *v.* Dubuque & Sioux City R. Co., 26 Iowa 191; Malli *v.* Willet, 57 Iowa 705, 11 N. W. 661; Kellogg *v.* Larkin,

III. EXCLUSION BASED ON PUBLIC POLICY.

1. In General. — A number of the familiar rules of exclusion are based entirely upon public policy, the theory being that "greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it."[11] Among the most familiar of these are those relating to privileged communications and to the privilege of witnesses.[12]

2. Indecent Evidence. — While the mere fact that evidence is indecent will not prevent its introduction when it is essential, it may prevent a parent from giving certain testimony as to the legitimacy of a child born in wedlock,[13] and it may prevent the physical examination of a party.[14]

3. Matters of State. — The President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them when, in their own judgment, the disclosure would, on public grounds, be inexpedient.[15]

3 Pin. (Wis.) 123, 3 Chand. 133, 56 Am. Dec. 164.

11. Greenleaf Ev. §236.

12. See articles "Privileged Communications;" "Witnesses."

13. See article "Legitimacy," Vol. VIII.

14. See article "Physical Examination," Vol. IX.

15. Beatson *v.* Skene, 5 Hurlst. & N. (Eng.) 838; Appeal of Hartranft, 85 Pa. St. 433, 27 Am. Rep. 667; Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23.

To the effect that a governor cannot be compelled to testify to a matter of state, see Thompson *v.* German Val. R. Co., 22 N. J. Eq. 111. For a full discussion of this subject, and a citation of authorities, see article "Privileged Communications."

PUBLIC PURPOSE.—See Dedication; Eminent Domain.

PUBLIC RECORDS.—See Municipal Corporations; Records.

PUNITIVE DAMAGES.—See Damages.

QUALIFICATION.—See Officers.

QUIETING TITLE.—See Title.

QUO WARRANTO.

By A. P. Rittenhouse.

I. BURDEN OF PROOF.

1. General Rule. — In proceedings by *quo warranto* to test the right to hold an office or franchise, as a general rule, the state is not required to prove anything, and it is incumbent upon the defendant to prove with particularity the facts which vested him with a legal title to such office or franchise;[1] and he must further prove

1. *England.* — Rex *v.* Leigh, 4 Burr. 2143.

Arkansas. — State *v.* McDiarmid, 27 Ark. 176; State *v.* Ashley, 1 Ark. 513, 553.

Colorado. — People *ex rel.* Saunier *v.* Stratton, 33 Colo. 464, 81 Pac. 245.

Connecticut. — State *ex rel.* Southey *v.* Lashar, 71 Conn. 540, 42 Atl. 636, 44 L. R. A. 197; State *ex rel.* Reiley *v.* Chatfield, 71 Conn. 104, 40 Atl. 922.

Florida. — State *ex rel.* Atty.-Gen. *v.* Gleason, 12 Fla. 190, 265.

Illinois. — McGahan *v.* People *ex rel.* Deneen, 191 Ill. 493, 61 N. E. 418; People *ex rel.* Lord *v.* Bruennemer, 168 Ill. 482, 48 N. E. 43; Poor *v.* People *ex rel.* Selby, 142 Ill. 309, 31 N. E. 676; People *ex rel.* Samuel *v.* Cooper, 139 Ill. 461, 497; 29 N. E. 872; Swarth *v.* People *ex rel.* Paxton, 109 Ill. 621; Chicago City R. Co. *v.* People *ex rel.* Story, 73 Ill. 541; People *ex rel.* Koerner *v.* Ridgley, 21 Ill. 65; Clark *v.* People *ex rel.* Crane, 15 Ill. 213; Garms *v.* People, *ex rel.*, 108 Ill. App. 631; Latham *v.* People, *ex rel.*, 95 Ill. App. 528; Gorman *v.* People *ex rel.* Manley, 78 Ill. App. 385.

Indiana. — Relender *v.* State *ex rel.* Utz, 149 Ind. 283, 49 N. E. 30.

that such legal title continued and was vested in him at the time when the proceedings to oust him were commenced.[2]

Kansas. — Brown *v.* Jeffries, 42 Kan. 605, 22 Pac. 578.

Michigan. — People *ex rel.* Larke *v.* Crawford, 28 Mich. 88; People *ex rel.* Keeler *v.* Robertson, 27 Mich. 116, 129; People *ex rel.* Tinnegan *v.* Mayworm, 5 Mich. 146.

Minnesota. — State *v.* Sharp, 27 Minn. 38, 6 N. W. 408.

Missouri. — State *ex rel.* Walker *v.* Powles, 136 Mo. 376, 37 S. W. 1124.

New York. — People *ex rel.* Atty. Gen. *v.* Utica Ins. Co., 15 Johns. 357, 8 Am. Dec. 243; People *ex rel.* Garmo *v.* Bartlett, 6 Wend. 422.

Rhode Island. — State *v.* Kearn, 17 R. I. 391, 22 Atl. 322.

Tennessee. — State *ex rel.* Atty.-Gen. *v.* Allen (Tenn. Ch. App.), 57 S. W. 182.

Utah. — State *v.* Beardsley, 13 Utah 502, 45 Pac. 569; People *ex rel.* Dickson *v.* Clayton, 4 Utah 421, 11 Pac. 206.

In State *ex rel.* Little *v.* Foster, 130 Ala. 154, 30 So. 477, the defendant admitted in his answer that he was exercising the functions of the office in question, and asserted that he was the lawful incumbent thereof. *Held*, that the burden of proof was upon him to establish his right of title to the office.

It is a well established proposition that in proceedings in the nature of *quo warranto* to try the right to hold an office, the burden of proof rests upon the respondent, and if he fails in his proof judgment of ouster may follow. Montgomery *v.* State, 107 Ala. 372, 385, 18 So. 157.

It was held in State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460, that in proceedings by *quo warranto* the law imposes upon the defendant the burden of showing such grant or authority as invests him with the legal title to the office or franchise in question, and he must show a complete title.

In People *v.* Volcano Canyon T. Co., 100 Cal. 87, 34 Pac. 522, the information charged that the defendant was exercising the franchise of collecting tolls for the privilege of traveling upon and passing over a certain road, and maintaining toll-gates thereon, without right or authority of law. The answer admitted, by not denying, that defendant claimed and was exercising the disputed franchise, but denied that it was doing so without right. *Held*, that the burden was upon the defendant to show by what warrant or authority it claimed to exercise the franchise.

In Lyons & E. P. Toll Road Co. *v.* People *ex rel.* Sprague, 29 Colo. 434, 68 Pac. 275, the court said: "In *quo warranto* the form of the issue as between the state and the respondent is not like that in ordinary civil proceedings. In the latter the burden rests upon the plaintiff to allege and prove his title to the thing in controversy; whereas the rule is reversed in cases of *quo warranto*, and the respondent, or defendant, is required to disclose his title to the alleged franchise, and if in any particular he fails to show a complete title, judgment must go against him."

Proceedings by *quo warranto* were brought to determine the validity of a claimed incorporation of a village, under a law which required that a village should contain at least three hundred inhabitants in order to become incorporated. Parol evidence was introduced tending to prove that there was not a population of three hundred inhabitants residing on the territory sought to be incorporated, at and before the time when the petition for incorporation was presented to the county judge. There was a finding by the jury, based upon this parol evidence, that there was not that amount of population residing on the described territory at the time mentioned. The court held that the people were not bound to show anything; that it was incumbent on the appellants to prove the fact of residence of the requisite number of inhabitants, and that the parol evidence mentioned sustained the finding of the jury. Kamp *v.* People *ex rel.* Selby, 141 Ill. 9, 17, 30 N. E. 680, 33 Am. St. Rep. 270.

2. People *ex rel.* Atty.-Gen. *v.* Devers, 29 Colo. 535, 69 Pac. 515; State *ex rel.* Law *v.* Saxon, 25 Fla. 342, 5 So. 801.

2. Distinction Between Public and Private Actions. — As to the burden of proof there is a marked distinction between actions brought by the state to determine the right of an incumbent to hold an office or franchise, and an action instituted by a private person to test the right to an office as between himself and another. In the latter class of cases, the burden of proof is upon the relator to show that he has a lawful right to the office.[3]

3. Forfeiture. — Where it is sought in *quo warranto* proceedings to show that a franchise which was valid in the beginning has been forfeited by misconduct on the part of those holding it, the burden is upon the relator to prove such misconduct as will warrant the forfeiture.[4]

3. *Connecticut.* — Phelan *v.* Walsh, 62 Conn. 260, 310, 25 Atl. 1, 17 L. R. A. 364.

Kansas. — Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935.

Kentucky. — Tillman *v.* Otter, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110.

Louisiana. — State *ex rel.* Ford *v.* Miltenberger, 33 La. Ann. 263.

Michigan. — Attorney-General *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. 749.

Mississippi. — Andrews *v.* Covington, 69 Miss. 740, 13 So. 853.

Missouri. — State *ex rel.* Bornfeld *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

Nebraska. — State *ex rel.* Birkhauser *v.* Moores, 52 Neb. 634, 72 N. W. 1056; State *ex rel.* Thayer *v.* Boyd, 34 Neb. 435, 51 N. W. 964; State *ex rel.* Sabin *v.* Tillma, 32 Neb. 789, 49 N. W. 806; State *ex rel.* Cooper *v.* Hamilton, 29 Neb. 198, 45 N. W. 279; State *ex rel.* Glenn *v.* Stein, 13 Neb. 529, 14 N. W. 481.

Wisconsin. — State *ex rel.* Swenson *v.* Norton, 46 Wis. 332, 343, 1 N. W. 22.

In State *ex rel.* Blessing *v.* Davis, (Neb.) 90 N. W. 232, the court said: "The rule, without exception, is that, where a private party institutes an action of this kind to obtain possession of an office held by another, the facts showing his title to the office must be stated in his petition, and the burden is upon him to establish his right thereto."

State *ex rel.* Brun *v.* Oftdal, 72 Minn. 498, 75 N. W. 692, was on an information in the nature of *quo warranto*, to oust respondents from the offices of trustees of Augsburg Seminary. *Held*, that the sole question was, which of the parties, relators or appellants, had the title to an office in a private corporation, and therefore it devolved upon the relators to show title in themselves, before they could properly inquire by what authority the respondents (appellants) exercised the office.

In *quo warranto* to test title to office, as between the relator and the defendant, the burden is upon the former to prove a better title. People *ex rel.* Watkins *v.* Perley, 80 N. Y. 624.

In *quo warranto* to test the right of office as between the relator and the defendant, the presumption is that the incumbent was regularly elected and is entitled to hold the office, and the burden is on the relator to show the contrary. State *ex rel.* Danforth *v.* Hunton, 28 Vt. 594.

4. Under a statute providing for the forfeiture of an office for official misconduct, the law presumes good faith and uprightness on the part of the defendant in *quo warranto* proceedings, in the discharge of his official duties, and the burden of proving the contrary is upon the state. State *v.* Trinkle, 70 Kan. 396, 78 Pac. 854.

In order for the state to attack a corporation for acts of its officers *ultra vires*, or contrary to the constitution or laws of the state, it devolves upon it to charge and prove the abuse or misuse of its franchises, relied upon as a ground of forfeiture. State *ex rel.* Walker *v.* Talbot, 123 Mo. 69, 27 S. W. 366.

4. Shifting of Burden. — Where a defendant in *quo warranto* proceedings shows a *prima facie* right to the office or franchise in question, the burden is then cast upon the relator to prove that such office or franchise is held by the defendant without right or authority.[5]

II. NATURE OF EVIDENCE.

1. Acts of Election Officers. — Returns and certificates made and filed by officers and boards charged with the execution of election laws are admissible, but they constitute only *prima facie* evidence of the facts stated therein.[6] But a certificate of election held by a re-

State *v.* Haskell, 14 Nev. 209, was a proceeding by *quo warranto*, for the purpose of having a toll-road franchise declared forfeited. The court said: "The general rule in cases of this character is that the person claiming the franchise must plead and prove a good title thereto, and that the state is bound to prove nothing; but when, as in this case, it is admitted that the defendant has had a good title, and the only ground of the proceeding is a claim of abandonment or forfeiture, the affirmative of the issue and the burden of proof is on the state."

5. In People *ex rel.* Bush *v.* Thornton, 25 Hun (N. Y.) 456, the court said: "He [the defendant] was charged by a direct proceeding in the name of The People, by the attorney-general, with unlawfully intruding himself into the office of county judge. . . . Thus he was required in due form of law to show his right to the office. Now, in the first instance, the burden of proof was on the defendant. He was bound to show his title to the office. This requirement was met and answered by the production of the record of his election, made and filed by the proper officers, showing his due election to the office, and also by proof that he had subscribed and taken the requisite oath. It was averred and admitted in the pleadings that he held a certificate of election from the board of county canvassers, in due form, and correctly made from the regular returns of the votes cast at the election. This certificate declared him to have been duly elected to the office according to law. This was his muniment of title to the office, and was a perfect protection to him against the charge of usurpation, so long as its integrity and validity remained unimpeached. On this state of facts the case was with the defendant, and now the burden of proof was cast upon the relator to show that the former held and exercised the right of office without authority of law, notwithstanding he held the certificate of his election in due form."

Where it is shown that the defendant has been declared elected to an office, by the board of election canvassers, and has received his certificate of election, and is holding the office by virtue thereof, the presumption is that he received the number of votes stated in the certificate, and this casts upon the relator the burden of showing that the certificate is false, and if this be done by competent evidence, it then devolves upon the defendant to establish his right by other evidence in order to prevent a judgment of ouster. State *ex rel.* Leonard *v.* Rosenthal 123 Wis. 442, 102 N. W. 49.

6. People *ex rel.* Bush *v.* Thornton, 25 Hun (N. Y.) 456, 460; People *ex rel.* Judson *v.* Thatcher, 55 N. Y. 525, 14 Am. St. Rep. 312; People *ex rel.* Lauchantin *v.* Lacoste, 37 N. Y. 192; Attorney-General *ex rel.* Bashford *v.* Barstow, 4 Wis. 567.

In Magee *v.* Supervisors Calaveras county, 10 Cal. 376, the court said: "The certificate of election is merely *prima facie* evidence of title to an office; but it is not conclusive; nor is it the only evidence by which the title may be established. It is the fact of election which gives title to the office, and this fact may be es-

lator cannot be attacked by evidence on the part of the defendant that a third party was elected to the office.[7]

2. Ballots. — In *quo warranto* proceedings to test the right to an elective office, the original ballots are primary, and the best, evidence.[8]

3. Admissions in Pleadings. — Where *quo warranto* proceedings are brought against a corporation by its corporate name, it is an admission of its corporate existence, which cannot afterwards be controverted.[9] But the contrary has been held.[10]

tablished, not only without, but against, the evidence of the certificate."

In State *ex rel.* Waymire *v.* Shay, 101 Ind. 36, it was held that the certificate of the election officers was not conclusive evidence of the relator's election, but only *prima facie* evidence of that fact. The court said: "As the certificate of the election officers conferred only a *prima facie* right to the office, the appellee was entitled to overthrow it by showing that it had been ascertained, in the method prescribed by law, that the certificate was founded upon an unsubstantial basis, and that the appellee, and not the relator, had received the highest number of votes.

Where the acts of officers and boards charged with the execution of election laws are brought into question by *quo warranto* proceedings, in testing the right to an office, such acts are but *prima facie* evidence in favor of the incumbent, and may be shown to have been given under a mistake, or to have been procured by fraud, or by proof that the majority certified was made by the votes of those who were not qualified to vote. People *ex rel.* Smith *v.* Pease, 30 Barb. (N. Y.) 588.

7. In proceedings by *quo warranto* to oust a person from office, in favor of another holding a certificate of election as successor to the incumbent, the latter cannot attack such certificate by showing that the holder was not elected to such office, and that a third person was elected. Parmater *v.* State *ex rel.* Drake, 102 Ind. 90.

8. *California.* — Gibson *v.* Board Suprs. Trinity Co. 80 Cal. 359, 22 Pac. 225; People *ex rel.* Budd *v.* Holden, 28 Cal. 123.

Indiana. — State *ex rel.* Wagmire *v.* Shay, 101 Ind. 36.

Michigan. — People *ex rel.* Keeler *v.* Robertson, 27 Mich. 116, 129.

New York. — People *ex rel.* Dailey *v.* Livingston, 79 N. Y. 279, 291.

Texas. — Gray *v.* State *ex rel.* Langham, 19 Tex. Civ. App. 521, 49 S. W. 699; Hunnicutt *v.* State *ex rel.* Witt, 75 Tex. 233, 241, 12 S. W. 106; Davis *v.* State *ex rel.* Wren, 75 Tex. 420, 430, 12 S. W. 957; Owens *v.* State *ex rel.* Jennett, 64 Tex. 500, 508.

9. People *ex rel.* Atty.-Gen. *v.* Stanford, 77 Cal. 360, 19 Pac. 693, 2 L. R. A. 92; Mud Creek Draining Co. *v.* State *ex rel.* Marley, 43 Ind. 236; State *v.* Indiana School Dist., 44 Iowa 227; Commercial Bank *v.* State, 6 Smed. & M. (Miss.) 599; State *v.* Commercial Bank, 33 Miss. 474; State *ex rel.* Atty.-Gen. *v.* Cincinnati Gas Light Co. 18 Ohio St. 262.

The effect of filing an information against a corporation by its corporate name, to procure the forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchises, is to admit the existence of the corporation. When such an information is filed against a defendant in its corporate capacity, and process is issued and served accordingly, and the defendant appears and pleads in the same corporate capacity, its corporate existence cannot afterwards be controverted. North & S. R. S. Co. *v.* People *ex rel.* Schaefer, 147 Ill. 234, 245, 35 N. E. 608.

10. State *ex rel.* Wetzel *v.* Tracy, 48 Minn. 497, 51 N. W. 613, was an information in the nature of *quo warranto*, to test the validity of a village incorporation. The court said: "There is no sound reason

III. SUFFICIENCY OF EVIDENCE.

Good and Complete Title. — A party exercising an office or franchise of a public nature, whose right is questioned by the state in *quo warranto* proceedings, cannot establish his right by proof of a defective or even an equitable title to the office or franchise. He must show a good and complete title in every respect.[11]

IV. JUSTIFYING ACTS.

Where an information in *quo warranto* charges the defendants as individuals with usurping and exercising the rights of a corporation, they may defend by proving that the acts complained of were done by them as *bona fide* stockholders and officers of such corporation.[12]

V. FRAUD.

In *quo warranto* proceedings, evidence tending to show that they were instituted for a fraudulent purpose is admissible.[13] But evi-

* * * which would warrant the court in holding, in a case like this, that, by proceeding against a *de facto* or unauthorized corporation by name, the legal existence of the corporation is admitted." See People *v.* Montecito Water Co., 97 Cal. 275.

11. Gunterman *v.* People *ex rel.* Bechdoldt, 138 Ill. 518, 28 N. E. 1067, was an action by *quo warranto* to test the validity of a ferry franchise. The defendant claimed he had a legal right to use it. It was admitted that the legislature granted the franchise to one Geo. W. Babbitt, and that by valid deeds from him through other parties, one Peter Van Meter became the owner thereof. The appellant showed an equitable title to the franchise by proving a verbal contract of sale by Van Meter, payment of purchase money, and delivery of possession under said contract to those from whom appellants purchased. *Held*, insufficient to show valid title in appellants, the court saying: "A defectiv title will not do, much less a mere equitable right to a title. . . . A defective title is understood to be, and is, in contemplation of law, the same as no title whatever, and a party exercising an office or franchise of a public nature is considered as a mere usurper, unless he has a good and complete title in every respect."

12. State *v.* Brown, 33 Miss. 500; State *v.* Bank of Manchester, 33 Miss. 474.

In State *v.* Brown, 34 Miss. 688, the issue was whether the defendants had as individuals usurped, and were exercising, the banking franchise of the Commercial Bank of Manchester. The evidence for the state tended to show that they were acting as individuals under color of the charter of the bank. The defendants proved by cross-examination of the state's witness, and by production of the bank charter, that the bank had been duly chartered and organized as an incorporated bank, and that the defendants were only concerned in the operations carried on, as stockholders, and that Johnson's agency in its operations was as its president, and that the acts complained of in the information were the acts of the president and directors of a legally constituted bank, and not of the defendants or either of them as individuals. This testimony was held to be clearly legal, and sufficient to sustain a verdict for the defendants.

13. State *ex rel.* Atty.-Gen. *v.* Wood, 13 Mo. App. 139, was a *quo warranto* proceeding to forfeit the franchises of a private corporation. Evidence that one of the corporators in bad faith, and for his own private purposes, caused the proceeding to

dence that a person holding an appointive office received it by means of a fraud practiced upon the officer who appointed him is not competent.[14]

be instituted, was held admissible.

14. In State *v.* Adams, 2 Stew. (Ala.) 231, a petition of citizens to the governor which induced him to appoint the respondent to the office of sheriff of a county was offered in evidence with a view to show that fraud was practiced on the governor in procuring the appointment of the respondent. *Held,* incompetent.

RAILROADS.

I. INJURIES TO PERSONS AT CROSSINGS AND ON OR NEAR RAILROAD TRACK.

1. Presumptions and Burden of Proof. — A. NEGLIGENCE OF DEFENDANT. — In an action against a railway company for killing or injuring a person at a crossing, or at some point on the track, there is no presumption of the negligence of the defendant or its servants from the mere happening of the injury,[1] but the burden is upon the plaintiff to prove negligence[2] and to show that the

1. *United States.* — Lucas *v.* Richmond & D. R. Co., 40 Fed. 566.

Iowa. — Case *v.* Chicago, R. I. & P. R. Co., 69 Iowa 449, 29 N. W. 596, *affirming* 64 Iowa 762, 21 N. W. 30.

Kansas. — Atchison, T. & S. F. R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788.

Kentucky. — Louisville, St. L. & T. R. Co. *v.* Terry, 20 Ky. L. Rep. 803, 47 S. W. 588.

Maryland. — Philadelphia, W. & B. R. Co. *v.* Stebbing, 62 Md. 504.

Massachusetts. — Robinson *v.* Fitchburg & W. R. Co., 7 Gray 92.

Nebraska. — Spears *v.* Chicago, B. & Q. R. Co., 43 Neb. 720, 62 N. W. 68.

Texas. — Tucker *v.* International & G. N. R. Co. (Tex. Civ. App.), 67 S. W. 914.

Negligence will not be presumed from the fact of the injury where nothing is done out of the usual course of business, unless that course is in itself improper. Chicago & E. I. R. Co. *v.* Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243, refusing to apply the doctrine of *res ipsa loquitur* to the injury received by the plaintiff from a piece of lumber projecting about two feet from a passing train, the injury being received at night while the plaintiff was standing at a crossing waiting for the train to pass, there being nothing to show that the defendant was in any way negligent in the matter.

In an action for injuries received in a collision at a railway crossing, proof of the accident alone raises no presumption of the defendant's negligence. Burk *v.* President, etc., of Delaware & H. Canal Co., 86 Hun 519, 33 N. Y. Supp. 986; Reed *v.* Queen Anne's R. Co., 4 Pen. (Del.) 413, 57 Atl. 529; Griffith *v.* Baltimore & O. R. Co., 44 Fed. 574.

The presumption is that the defendant's servants on the engine kept a proper lookout, and this presumption is not overcome by mere proof of the unexplained killing of the plaintiff's intestate and of the engineer's defective vision, there being also a fire on the engine. Texas & P. R. Co. *v.* Shoemaker, 98 Tex. 451, 84 S. W. 1049.

Contra. — Sims *v.* Western & A. R. Co., 111 Ga. 820, 35 S. E. 696; St. Louis & S. F. R. Co. *v.* Townsend, 69 Ark. 380, 63 S. W. 994. (But this presumption is overcome by showing that the deceased was lying upon the track of the railroad at the time he was struck.)

Where the killing of the deceased by the defendant's cars has been shown, the burden is on the defendant to show that it was guilty of no negligence in failing to comply with the requirements of § 1166 *et seq* of the Code for the prevention of accidents or in any other respect, this statute being merely a reaffirmance of the common law. Louisville & N. R. Co. *v.* Connor, 9 Heisk. (Tenn.) 19. But where a trespasser on a railroad train is killed the defendant need not show the absence of negligence on its part "by satisfactory affirmative evidence." Sommers *v.* Mississippi & T. R. Co., 7 Lea (Tenn.) 201."

2. Wilkinson *v.* Pensacola & A. R. Co., 35 Fla. 82, 17 So. 71; Frech *v.* Philadelphia, W. & B. R. Co., 39 Md. 574; Paducah & M. R. Co. *v.* Hoehl, 12 Bush (Ky.) 41; Gulf, C. & S. F. R. Co. *v.* Riordan (Tex. Civ. App.), 22 S. W. 519.

In an Action for Injuries Received at a Crossing the burden is

negligence was the direct and proximate cause of such injury.[3]

B. Contributory Negligence. — The authorities are in conflict as to the presumption and burden of proof on the question of contributory negligence.[4] By the weight of authority, however, there is no presumption that the injured person was guilty of contributory negligence;[5] on the contrary in the absence of evidence he is presumed to have exercised due care because of the instinct of self-preservation;[6] thus the presumption is that he stopped, looked and listened before crossing the track,[7] unless the evidence shows that he must have seen the train if he had looked.[8] Where there is di-

on the plaintiff to show the defendant's negligence. Morris *v.* Chicago, M. & St. P. R. Co., 26 Fed. 22; Benton *v.* Central R. of Iowa, 42 Iowa 192; Stepp *v.* Chicago, R. I. & P. R. Co., 85 Mo. 229; Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177. See also Quincy, A. & St. L. R. Co. *v.* Wellhoener, 72 Ill. 60.

3. Willoughby *v.* Chicago & N. W. R. Co., 37 Iowa 432.

4. See article "Negligence," Vol. VIII.

5. There is no presumption in the absence of evidence that a person killed at a public crossing was negligent. Louisville & N. R. Co. *v.* Clark, 105 Ky. 571, 49 S. W. 323; Baltimore & P. R. Co. *v.* Carrington, 3 App. D. C. 101; Cowen *v.* Merriman, 17 App. D. C. 186; McVey *v.* Chesapeake & O. R. Co., 46 W. Va. 111, 32 S. E. 1012.

6. A Person Crossing a Railroad Track at a public crossing will be presumed to have exercised due care and diligence in the absence of evidence to the contrary. Crumpley *v.* Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820. But see Skipton *v.* St. Joseph & G. I. R. Co., 82 Mo. App. 134.

7. *United States.* — Baltimore & P. R. Co. *v.* Landrigan, 191 U. S. 461; Chesapeake & O. R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81.

Kansas. — Chicago, R. I. & P. R. Co. *v.* Hinds, 56 Kan. 758, 44 Pac. 993.

Missouri. — Weller *v.* Chicago, M. & St. P. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

Pennsylvania. — Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387; Blauvelt *v.* Delaware, L. & W. R. Co., 206 Pa. St. 141, 55 Atl. 857; Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468.

Washington. — Steele *v.* Northern Pac. R. Co., 21 Wash. 287, 57 Pac. 820.

Sufficient To Warrant a Recovery in the absence of countervailing testimony. Northern Pac. R. Co. *v.* Spike, 121 Fed. 44, 57 C. C. A. 384.

Not Conclusive. — Crawford *v.* Chicago, Gt. W. R. Co., 109 Iowa 433, 80 N. W. 519.

Where There Is No Direct Evidence that a traveler did not stop, look and listen before stepping on to a crossing, the presumption of law is that he did his full duty and observed the precautions which it prescribed. McBride *v.* Northern Pac. R. Co., 19 Or. 64, 23 Pac. 814.

This Presumption Is a Very Weak One and is completely overcome by affirmative proof that he was struck the moment he set foot on the track. Pennsylvania R. Co. *v.* Mooney, 126 Pa. St. 244, 17 Atl. 590.

8. Lamport *v.* Lake Shore & M. S. R. Co., 142 Ind. 269, 41 N. E. 586.

The presumption that the deceased, before stepping upon the track, stopped, looked and listened, is based upon the fact that the natural instinct of men lead them to avoid injury. "It prevails in the absence of direct testimony upon the subject, but it may be rebutted by the proof of facts and circumstances as well as by direct evidence." And where it is demonstrated that if he did so he must have seen or heard the approaching train there is a conclusive presumption that he disregarded the rule of law requiring such action. Sullivan *v.* New York, L. E. & W. R. Co., 175 Pa. St. 361, 34 Atl. 798.

rect evidence as to the conduct of the injured person there is no presumption either way as to the care exercised by him.[9] The burden of showing contributory negligence, by the weight of authority, is upon the defendant,[10] unless it appears from the pleadings or

One struck at a railroad crossing by a moving train which must have been plainly visible from the point he occupied when it became his duty to look and listen must be conclusively presumed not to have looked, or, if he did, to have negligently disregarded the knowledge thus obtained; and the mere fact that he says that he looked and saw nothing would not under such circumstances justify the jury in finding that it was true. Miller *v.* Truesdale, 56 Minn. 274, 57 N. W. 661. See also Brown *v.* Milwaukee & St. P. R. Co., 22 Minn. 165.

Where an approaching train is in full sight of a person attempting to cross a track and he apparently looks but does not see the train it will be presumed that he did not look. "The law will not tolerate the absurdity of allowing a person to testify that he looked, but did not see the train, when the view was unobstructed, and where, if he had properly exercised his sight, he must have seen it." Chicago, P. & St. L. R. Co. *v.* DeFreitas, 109 Ill. App. 104.

9. Golinvaux *v.* Burlington, C. R. & N. R. Co., 125 Iowa 652, 101 N. W. 465.

When there is direct evidence as to what a traveller killed by a train at a grade crossing did or omitted to do for his own protection, the inference arising from the natural instinct of self preservation does not perform the function of evidence, but "Its only office would be to furnish a test by which to determine the reasonableness of his known acts—not to contradict them or minimize their importance." Waldron *v.* Boston & M. R., 71 N. H. 362, 52 Atl. 443.

10. *United States.* — Northern Pac. R. Co. *v.* Spike, 121 Fed. 44, 57 C. C. A. 384; Toledo, P. & W. R. Co. *v.* Chisholm, 83 Fed. 652, 27 C. C. A. 663.

District of Columbia. — Baltimore & P. R. Co. *v.* Carrington, 3 App. D. C. 101; Cowen *v.* Merriman, 17 App. D. C. 186.

Kansas. — St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37.

Kentucky. — Paducah & M. R. Co. *v.* Hoehl, 12 Bush 41.

Maryland. — Frech *v.* Philadelphia, W. & B. R. Co., 39 Md. 574.

Texas. — Gulf, C. & S. F. R. Co. *v.* Shieder (Tex. Civ. App.), 26 S. W. 509, *affirmed* in 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; International & G. N. R. Co. *v.* Brooks (Tex. Civ. App.), 54 S. W. 1056; Missouri, K. & T. R. Co. *v.* Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196; Kroeger *v.* Texas & P. R. Co., 30 Tex. Civ. App. 87, 69 S. W. 809.

Virginia. — Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

Washington. — Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, 20 Pac. 601.

Injuries at Crossing. — Houston & T. C. R. Co. *v.* Laskowski (Tex. Civ. App.), 47 S. W. 59; Crumpley *v.* Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820; Weller *v.* Chicago, M. & St. P. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592; Chesapeake & O. R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81; Weiss *v.* Pennsylvania R. Co., 79 Pa. St. 387; Baltimore & O. R. Co. *v.* Stumpf, 97 Md. 78, 54 Atl. 978.

The Fact That the Plaintiff Did Not Stop, Look or Listen Does Not Shift This Burden where there is evidence that the train gave no signals and there were obstacles to the plaintiff's view of the train approaching the crossing. Dalwigh *v.* International & G. N. R. Co. (Tex. Civ. App.), 42 S. W. 1009.

Where It Appears That The View of the Deceased Along the Tracks Was Obscured Until He Reached the Crossing and Statutory Signals Were Not Given by the approaching train the plaintiff need not show the absence of contributory negligence. Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 51 N. W. 1044, 32 Am. St. Rep. 540, 16 L.

the other facts proved.[11] In some jurisdictions, however, the burden is on the plaintiff to show the absence of contributory negligence.[12]

R. A. 261. See also Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253.

11. Gulf, C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538; Bellefontaine R. Co. *v.* Snyder, 24 Ohio St. 670.

May Sufficiently Appear From Plaintiff's Evidence. — Van Winkle *v.* New York Cent. & St. L. R. Co., 34 Ind. App. 476, 73 N. E. 157.

The plaintiff's own evidence may show his contributory negligence, in which case the burden is upon him to show that he was not at fault, even though the burden of showing contributory negligence is upon the person alleging it. Hunter *v.* Montana Cent. R. Co., 22 Mont. 525, 57 Pac. 140.

12. *Idaho.* — Haner *v.* Northern Pac. R. Co., 7 Idaho 305, 62 Pac. 1028.

Illinois. — Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203.

Indiana. — Lamport *v.* Lake Shore & M. S. R. Co., 142 Ind. 269, 41 N. E. 586.

Iowa. — Benton *v.* Central R. of Iowa, 42 Iowa 192; Carlin *v.* Chicago, R. I. & P. R. Co., 37 Iowa 316; Crawford *v.* Chicago, G. W. R. Co., 109 Iowa 433, 80 N. W. 519.

Massachusetts. — Gahagan *v.* Boston & L. R. Co., 1 Allen 187, 79 Am. Dec. 724; Robinson *v.* Fitchburg & W. R. Co., 7 Gray 92; Livermore *v.* Fitchburg R. Co., 163 Mass. 132, 39 N. E. 789.

Plaintiff in an action for the killing of his intestate has the burden of proving the exercise of due care by the deceased; and the fact that all the witnesses who could have testified to the facts showing due care are dead does not change the rule that absence of evidence of due care on the part of the deceased will defeat the action. Day *v.* Boston & M. R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

Requirement Easily Satisfied. While the burden of showing due care by the deceased is on the plaintiff, this rule is "easily satisfied, and the exercise of such care may be shown by circumstantial as well as by direct proof. It even may, under some circumstances, be inferred from the ordinary habits and dispositions of prudent men, and the instinct of self-preservation." Lyman *v.* Boston & M. R., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

In an Action for Injuries Sustained at a Crossing the burden is on the plaintiff to show the absence of contributory negligence.

Indiana. — Pittsburgh, C. C. & St. L. R. Co. *v.* Fraze, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377; Indiana, B. & W. R. Co. *v.* Greene, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736.

Michigan. — Guggenheim *v.* Lake Shore & M. S. R. Co., 66 Mich. 150, 33 N. W. 161.

New Hampshire. — Waldron *v.* Boston & M. R., 71 N. H. 362, 52 Atl. 443.

New York. — Warner *v.* New York Cent. R. Co., 44 N. Y. 465; Coleman *v.* New York Cent. & H. R. R. Co., 98 App. Div. 349, 90 N. Y. Supp. 264; McAuliffe *v.* New York Cent. & H. R. R. Co., 85 App. Div. 187, 83 N. Y. Supp. 200.

Where a Person Is Injured Either in Person or Property while crossing a railroad track by collision with a train, the fault is *prima facie* his own and he must affirmatively show that he exercised due care. Louisville, N. A. & C. R. Co. *v.* Stommel, 126 Ind. 35, 25 N. E. 863; Cincinnati, I., St. L. & C. R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

Although the Defendant's Train Was Running at a Rate of Speed Prohibited by Ordinance, nevertheless the burden is upon plaintiff to show that he himself, or his intestate, was in the exercise of ordinary care. Imes *v.* Chicago, B. & Q. R. Co., 105 Ill. App. 37.

From the Mere Fact of Injury No Presumption Arises as to the guilt or innocence of either party, but the plaintiff in suits for injury upon a railway crossing is bound to prove

2. Facts and Circumstances Attending the Accident. — It is competent to show all the facts and circumstances attending the accident which throw light upon its cause and the manner in which it occurred and tend to explain the acts of the parties.[13]

that his injury was not due to his own fault. Gahagan *v.* Boston & M. R., 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426.

Rule Changed by Statute in Indiana so that now the burden of showing contributory negligence is upon the defendant. Van Winkle *v.* New York Cent. & St. L. R. Co., 34 Ind. App. 476, 73 N. E. 157.

A legislative act making contributory negligence a matter of defense and thereby placing the burden of showing it upon the defendant does not change the legal requirements as to the care one must use when crossing a railroad track, nor does it change the rule that it is presumed that such person saw and heard what he might have seen and heard had he taken the ordinary precaution. Southern R. Co. *v.* Davis, 34 Ind. App. 377, 72 N. E. 1053. See also Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308.

Circumstantial Evidence Sufficient. — Due care on the part of the injured person need not, however, be proved directly but may sufficiently appear from the circumstances, even in those jurisdictions where the plaintiff has the burden of proof. Stepp *v.* Chicago, R. I. & P. R. Co., 85 Mo. 229; Cleveland, C. C. & St. L. R. Co. *v.* Oliver, 83 Ill. App. 64; McSorley *v.* New York Cent. & H. R. R. Co., 60 App. Div. 267, 70 N. Y. Supp. 10 (where no eye-witnesses).

The burden is upon the plaintiff to negative contributory negligence and the same rule applies in case of an action by an administrator. "In the latter class of cases, however, and especially where no one saw the killing, direct testimony as to such care is not necessary, but may be inferred from the circumstances of the case, as shown by the evidence." Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358. In this case there were no witnesses to the occurrence but it appeared that the deceased was killed while attempting to cross the railroad track at the crossing; that he was a sober, industrious man possessed of all his faculties at the time of the accident. It was contended by the defendant that "inasmuch as the burden of proof is upon the plaintiff to show due care on the part of deceased, there must be testimony tending to prove that he did certain things usually done by one about to cross a railroad track and which generally should be done, as, looking and listening for approaching trains. If such proof were necessary in cases of this kind, a recovery could seldom, if ever, be had, however inexcusable the negligence of the defendant. The law is not so unreasonable." The court cites Chicago & A. R. Co. *v.* Carey, 115 Ill. 115, 3 N. E. 519; Way *v.* Illinois Cent. R. Co., 40 Iowa 341; Gay *v.* Winter, 34 Cal. 153, and Teipel *v.* Hilsendegen, 44 Mich. 461, 7 N. W. 82.

13. Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418; New York, C. & St. L. R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897 (evidence as to where the injured person was going when injured, where this was in dispute); Cincinnati, I. St. L. & C. R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593 (what was said as to plaintiff's destination when he left home shortly before the accident is part of the *res gestae*); Reardon *v.* Missouri Pac. R. Co., 114 Mo. 384, 21 S. W. 731 (that the engineer and fireman were in charge of the engine attached to the portion of the train which ran over the plaintiff); Cleveland, C. C. & St. L. R. Co. *v.* Moss, 89 Ill. App. 1 (testimony as to how fast the deceased was driving about a quarter of a mile from the crossing is admissible because tending to show his rate of speed at the time he was struck). See Griffith *v.* Baltimore & O. R. Co., 44 Fed. 574.

"Upon the question of the defendant's negligence it was proper, as

3. Precautions by Railroad Company. — A. Customary Precautions. — Evidence as to the customary precautions taken by the defendant at the crossing in question to prevent accidents, such as maintaining flagmen, automatic signals, gates, etc., is admissible as bearing upon the defendant's alleged negligence in failing to take such precautions on the occasion in question.[14] Such evidence is also relevant on behalf of the plaintiff to show his reliance upon such precautions and thus rebut a claim of contributory negli-

bearing upon the degree of care which the defendant should exercise, to show the general character of the highway, and the safeguards, if any, provided to avert accidents; and upon the question of contributory negligence it was competent to show, in addition to the difficulty of perceiving danger, all the circumstances which would bear upon the manner in which the accident happened, and everything relating to the highway as a thoroughfare, the extent of travel upon it, and whether at that point many persons were obliged at all times of the day to cross, from all of which the inference might be drawn that the intestate would not reasonably anticipate that a train would approach without warning and at a high rate of speed." McSorley *v.* New York Cent. & H. R. R. Co., 60 App. Div. 267, 70 N. Y. Supp. 10.

"It may be proved that the collision took place in the night time, in a rain storm, that the train was running fast or slow, with or without head lights, that it was backing or going forward, that it was running in a city in a crowded thoroughfare, or in the country, that there were many or few tracks, that there were obstructions making it impossible to see the train before the crossing was reached. These circumstances are proved, not to impose upon the railroad company any duty which the law does not impose, or any duty to do any acts collateral to the running and management of its trains in a lawful manner upon its road, but as bearing upon the question of the manner in which it has run and managed its train." McGrath *v.* New York Cent. & H. R. R. Co., 63 N. Y. 522.

Where the plaintiff while walking in the highway was injured by a stick which was thrown or fell from a passing train, it is competent to show that just prior to and at the time of the injury wood was thrown from the locomotive. Turney *v.* Southern Pac. Co., 44 Or. 280, 75 Pac. 144, 76 Pac. 1080.

The Watch Which Was in the Decedent's Pocket when the collision occurred and which had stopped was held properly admitted in connection with other evidence upon the questions of darkness and whether the train was running on schedule time. Stone *v.* Boston & M. R., 72 N. H. 206, 55 Atl. 359.

The mere fact that a train was running behind its schedule time is not evidence which tends to prove negligence. Omaha & R. V. R. Co. *v.* Talbot, 48 Neb. 627, 67 N. W. 599.

The Appearance of Deceased's Injuries at the time of the accident may be shown as part of the circumstances of the accident, and also for the purpose of determining his position when struck by the engine. Oldenburg *v.* New York Cent. & H. R. R. Co., 9 N. Y. Supp. 419, judgment *affirmed* in 11 N. Y. Supp. 689, and 124 N. Y. 414, 26 N. E. 1021. But see Jordan *v.* Grand Rapids & I. R. Co., 162 Ind. 464, 70 N. E. 524, 102 Am. St. Rep. 217.

14. Pittsburgh, C. & St. L. R. Co. *v.* Yundt, 78 Ind. 373, 41 Am. Rep. 580.

Where the plaintiff's intestate was killed at a crossing by an engine and tender moving backwards and it appeared that no bell was rung or whistle blown, and that no flagman was at or near the place, it was held competent to show that it was the custom of the defendant to keep a flagman at the place in question as bearing upon the degree of care which the company had exercised. Casey *v.* New York Cent. & H. R. R. Co., 78 N. Y. 518; *citing* Ernst *v.*

gence.[15] And it has been held competent for the defendant to show its customary methods as evidence that it was not negligent on the occasion in question.[16]

Customary Methods at Other Places cannot, however, be shown.[17]

Hudson River R. Co., 39 N. Y. 61, 67, 100 Am. Dec. 405; Beisiegel *v.* New York Cent. & H. R. R. Co., 40 N. Y. 9; McGrath *v.* New York Cent. & H. R. R. Co., 63 N. Y. 525; *s. c.* 59 N. Y. 468, 17 Am. Rep. 359.

In an action against a railroad corporation for damages received in a collision at a street crossing, evidence that a flagman had always been kept at the crossing and that he was absent at the time of the accident was held competent as bearing upon the question whether under all the circumstances the defendant ran and managed its train with the requisite care and prudence; and the fact that the defendant was not the owner of the road over which it was running its train was held not to affect the competency of the evidence, and likewise the fact that the municipal ordinance may or may not have required the posting of such a flagman. McGrath *v.* New York Cent. & H. R. R. Co., 63 N. Y. 522, *distinguishing* and explaining Beisiegel *v.* New York Cent. R. R. Co., 40 N. Y. 9; Grippen *v.* New York Cent. R. R. Co., 40 N. Y. 34; Weber *v.* New York Cent. & H. R. R. Co., 58 N. Y. 451, on the ground that those cases merely held that the railroad company was not required to maintain a flagman at a crossing, but did not hold that evidence that no flagman was maintained at the crossing in question was incompetent.

15. Lingreen *v.* Illinois Cent. R. Co., 61 Ill. App. 174. See Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913.

In an action for injuries caused by the frightening of the plaintiff's team by the moving of defendant's cars at a street crossing of a railway where there was much travel on the street, it was held competent for the plaintiff to show that the defendant company had to his knowledge kept a switchman at the crossing to give signals of danger until within a short time before the accident, when, without plaintiff's knowledge, it withdrew him, and that as plaintiff approached the crossing he was careful to look for such signals and saw none. Such evidence is admissible both to show the negligence of the defendant under the circumstances and the absence of contributory negligence by the plaintiff. Pittsburgh, C. & St. L. R. Co. *v.* Yundt, 78 Ind. 373, 41 Am. Rep. 580, disapproving of an intimation in the case of McGrath *v.* New York Cent. & H. R. R. Co., 63 N. Y. 522, that such evidence would not be competent on the question of contributory negligence.

Although the law does not require a whistle to be sounded at the crossing where the accident occurred, the custom of defendant's trains to whistle at that point, if known to the plaintiff, may be shown as bearing upon his alleged contributory negligence; but the custom of whistling at that point after the collision cannot be shown, as it has no bearing upon the plaintiff's conduct. Southern R. Co. *v.* Simpson, 131 Fed. 705, 65 C. C. A. 563.

16. Upon the question whether a highway crossing was obstructed at a certain time by the defendants' cars, the manner in which their cars were usually managed at the same place may be shown. Hall *v.* Brown, 58 N. H. 93, in which it was held that the defendants were properly allowed to show their custom of compacting and shortening unloaded trains so that they did not extend across the highway.

17. In an action for injuries received at a crossing where there is a single track and no flagman, it is not competent for the plaintiff to show the custom of railroads to maintain a flagman at crossings similar to the one in question, or at crossings where there is but one track. "The need of a flagman depends much upon the situation and circumstances of each particular crossing, and these

B. Previous Particular Instances. — As bearing upon the question of contributory negligence the plaintiff may show previous particular instances, known to him, of precautions by the defendant at the crossing in question, which were not taken on the occasion of the injury.[18]

4. Customary Methods. — A. Customary Conduct of Defendant. — The customary methods of the defendant in the particular respect in question may be competent to explain the acts of the parties.[19] Such evidence is admissible on the issue of contributory negligence unless it appear that the injured person was unacquainted with the custom.[20] So also it is competent on the issue of the de-

must be known in order to determine intelligently whether or not there ought to be a flagman there. The practice at each crossing would therefore raise a separate collateral issue." Bailey *v.* New Haven & N. R. Co., 107 Mass. 496. See Hill *v.* Portland & Rochester R. Co., 55 Me. 438, 92 Am. Dec. 601.

18. Bell. — Evidence that a bell had been maintained at the crossing but at the time of the accident was out of repair is competent on both the question of negligence and of contributory negligence. Cleveland, C. C. & St. L. R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179.

Although there may be no legal obligation upon the defendant to maintain an electric alarm built at a railway crossing, yet the plaintiff injured at a crossing may show that such a bell had been maintained at the crossing where he was injured but that it had been out of order several days previous to the accident, such evidence being competent both on the question of the defendant's negligence and the plaintiff's freedom from contributory negligence. Henn *v.* Long Island R. Co., 51 App. Div. 292, 65 N. Y. Supp. 21.

Where the deceased was killed by a train at a railway crossing where no flagman was stationed at the time, the testimony of a witness that two or three weeks before the accident he had driven over the same crossing with the deceased at about the time the same train passed and that there was a flagman at the crossing at that time, was held properly admitted as bearing upon the question of the deceased's contributory negligence, although it was not shown that it was customary for the defendant to have a flagman at that point. The deceased was not a resident of that locality and there was nothing to show that it was not the habit of the company to have a flagman at the crossing. Wilbur *v.* Delaware, L. & W. R. Co., 85 Hun 155, 32 N. Y. Supp. 479. See Cleveland, C. C. & St. L. R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233.

19. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90.

Where the defendant's team was injured while he was unloading freight from cars on defendant's spur-track by a train run upon a side-track near by, it was held competent for the plaintiff to show that the defendant's customary way of delivering freight generally was to run cars upon the spur-track to be unloaded, and that while unloading the consignees would have to drive in between the spur-track and the side-track. Bachant *v.* Boston & M. R., 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

20. Bradley *v.* Ohio River & C. R. Co., 126 N. C. 735, 36 S. E. 181. See Chicago, M. & St. P. R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398. See *supra*, I, 3, A.

Where the plaintiff was injured while walking between the defendant's tracks on a path which had been commonly used for twenty-five years without objection, as bearing upon the question of contributory negligence and the reason for his failure to look back for the approach of a train it was held competent to show the usual custom of trains approaching that point to signal for road crossings and a station just beyond; such evidence was also competent

fendant's negligence;[21] and it has been held admissible as tending to show what was done at the time of the accident,[22] though it is generally held that on the issue whether the defendant did or omitted to do certain acts upon the occasion in question, such as giving the required signals, it is not competent to show its custom of doing

upon the question of the defendant's negligence in operating the train at the time of the accident. International & G. N. R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051.

The plaintiff injured while lawfully on a hand-car near a public crossing may testify that most of the trains passing the crossing while he was at work near by gave the statutory signal, it appearing that the train inflicting the injury had not done so. "If the company had been in the habit of obeying the law in giving signals, appellee had a right to conclude that it would continue to do so." Galveston, H. & S. A. R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939; *citing* Railway Co. *v.* Gray, 65 Tex. 32; Cahill *v.* Cincinnati N. O. & T. P. R. Co., 92 Ky. 345, 18 S. W. 2.

Customary Observance of Rule. Where it appeared that the deceased was employed to shovel ashes from an ash-pit in a railroad yard where it was difficult for him to see approaching engines because of flying ashes, and that he was killed by one of defendant's locomotives while leaving the pit, it was held competent for the plaintiff to show that it was the custom of the station yard for the bells to be continuously rung while approaching the ash-pit. "It was shown that the corporation owning the yard, by a rule established, required that the bells of locomotives moving in the yard should be rung. Presumptively, the plaintiff's intestate knew of the rule, and its customary observance, and he had a right to rely upon the continuance of the observance of the rule." This evidence bore directly upon the question of whether decedent negligently contributed to his own injury. Sullivan *v.* Tioga R. Co., 44 Hun (N. Y.) 304.

21. International & G. N. R. Co. *v.* Woodward, 26 Tex. Civ. App. 389, 63 S. W. 1051. See *supra*, I, 3, A.

Where the deceased was killed by the backing of the train from which she had just alighted, and while attempting to cross the track at a place used by the defendant and the public as a crossing, it was held competent to show the custom of the defendant never to back its trains over this crossing after passing it; the evidence being material in determining what degree of care was required when backing contrary to custom and in showing that the intestate had a right to rely upon the custom of the company not to back its train unless notice was given. Bradley *v.* Ohio River & C. R. Co., 126 N. C. 735, 36 S. E. 181.

22. Where the alleged cause of injury was the frightening of plaintiff's horses by the escape of steam from defendant's engine at the time the plaintiff was approaching a crossing near the defendant's station, and it was alleged that the view of the engine from the highway was obstructed by box cars standing upon a side-track, one of which was within the limits of the highway, it was held competent to show the defendant's practice of leaving cars on the side-track in such a position as to obstruct the view of a train at the station to a traveler on the highway, and its practice as to ringing the bell and blowing off steam, as tending to show what was done at the time of the accident to the plaintiff. Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554.

Evidence as to the habitual high speed of the same engine when run by the same engineer for some time previously at the same place where the accident occurred was held properly admitted, although of "doubtful admissibility," the authorities upon the question being conflicting. "Upon so doubtful a question we think the court did not err in admitting the evidence. There are several cases in our reports holding that

or not doing the act in question.[23] But evidence that the signals were customarily given would be admissible on the issue whether the defendant recognized the crossing as a public one.[24]

B. Custom of Railroads Generally. — As an explanation or excuse for his own conduct the plaintiff, it has been held, cannot show that the customary method of operating railroads was not followed in certain respects by the defendant at the time of the accident, at least where defendant has operated its road in that manner for a long time previous.[25] Nor can the defendant show that its

doubtful evidence is to be admitted rather than excluded." And the same holding was made as to evidence touching the engineer's habitual failure to ring the bell. Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

23. Bannon *v.* Baltimore & O. R. Co., 24 Md. 108; Eskridge *v.* Cincinnati, N. O. & T. P. R. Co., 89 Ky. 367, 12 S. W. 580; Chicago, R. I. & P. R. Co. *v.* Downey, 85 Ill. App. 175. See also Gahagan *v.* Boston & L. R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724.

On an issue as to whether the bell was rung or the whistle blown on a particular train on the occasion in question, it is not competent to show that the defendant's trains when passing that point habitually failed to ring the bell or blow the whistle; nor where it is alleged that the defendant in switching negligently "kicked" a car over the crossing where the accident occurred is it competent to show the defendant's usual custom in switching cars to "kick" them past the point in question. "We understand Gulf C. & S. F. R. Co. *v.* Evansich, 61 Tex. 6, and Gulf C. & S. F. R. Co. *v.* Rowland, 82 Tex. 171, 18 S. W. 96, as condemning the testimony offered as improper. Where the issue is whether a certain act is negligent or not, it has frequently been held proper to show what is usually done under the same circumstances; but whether or not the act itself occurred cannot, we think, be so proven." Stewart *v.* Galveston, H. & S. A. R. Co., 34 Tex. Civ. App. 370, 78 S. W. 979.

24. In an action for injuries at a crossing it was held competent to show the custom of defendant's trains to give the statutory signals for public crossings when approaching this crossing as evidence that they regarded it as a public crossing. Galveston, H. & S. A. R. Co. *v.* Eaten (Tex. Civ. App.), 44 S. W. 562; Chicago, R. I. & P. R. Co. *v.* Downey, 85 Ill. App. 175.

On Behalf of Defendant. — It has been held that the defendant can show its customary methods in-so-far as they were known to the injured person and would bear on his alleged contributory negligence, but not for the purpose of disproving its own negligence.

Where the deceased was killed by a switch engine while in the exercise of his duty as night car inspector, as bearing upon his alleged contributory negligence it was held error to exclude testimony offered by defendant that it was the habit and custom of the yard crew in switching to handle cars in the manner in which it was being done when the deceased was killed and that this fact was well known to the deceased. "Aside from the question of contributory negligence, such evidence would not be admissible as appellant could not relieve itself from responsibility for its negligence by the establishment of a custom." International & G. N. R. Co. *v.* Eason (Tex. Civ. App.), 35 S. W. 208.

25. The universal custom in the operation of double track railroads to run trains upon the right-hand track cannot be shown on the theory that it would tend to show that the deceased was not negligent in not watching for the train by which he was hurt because he might have thought it would come upon the other track, where it appears that

alleged negligent act was in accordance with the custom of other roads, at least not without showing a similarity of conditions.[26]

5. Other Similar Acts. — A. Generally. — Where it is contended that the train was negligently managed,[27] as that the proper or required signals were not given,[28] evidence of other similar acts of negligence at the same place or at other places is not admissible.

B. At Other Crossings. — Evidence that no signal was given by the same train at another crossing in the immediate vicinity and on the same trip is not admissible,[29] though the contrary has been held.[30]

C. Other Accidents At Same Crossing. — Other accidents or injuries to other persons at the same crossing are not competent ev-

the road had been operated in the same manner as upon the day of the accident for the two years preceding. "The liability of defendant in this action cannot be made to depend upon the question whether deceased did or did not know of the way in which it operated its road." Holmes *v.* South Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834.

26. Where the deceased was killed by a car with which a flying or running switch had been made, evidence as to the general custom of railroads to make such switches and that the switch in question was made in the customary manner was held properly excluded, there being nothing to show that the conditions were similar. "To render this testimony admissible, if indeed it could be so held under any circumstances, it would be necessary to show that other railroads were accustomed to make flying switches under the conditions here named." Weatherford, M. W. & N. W. R. Co. *v.* Duncan, 10 Tex. Civ. App. 479, 31 S. W. 562.

27. Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92.

Where the deceased was killed while standing near the right of way by cars which ran off the track, evidence that the cars got off the track now and then at other places was held incompetent on behalf of the plaintiff. Illinois Cent. R. Co. *v.* Watson, 117 Ky. 374, 78 S. W. 175.

28. Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253; Illinois Cent. R. Co. *v.* Borders, 61 Ill. App. 55. See Texas & Pac. R. Co. *v.* Payne (Tex. Civ. App.), 35 S. W. 297.

Other Trains. — Upon the issue of whether those in charge of a particular train gave a signal of its approach to a public crossing, it is not competent to show that other trains did not give the signal as they approached that place, or that trains did not usually do so. Eskridge *v.* Cincinnati, N. O. & T. P. R. Co., 89 Ky. 367, 12 S. W. 580.

Evidence that trains other than the one causing the injury frequently passed the whistling post for the crossing at which the injury occurred without whistling is not competent to show that the train in question did not whistle at that point. Chicago, R. I. & T. R. Co. *v.* Porterfield, 92 Tex. 442, 49 S. W. 361, *affirming* 19 Tex. Civ. App. 225, 46 S. W. 919.

29. Stewart *v.* North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

"Two failures of a locomotive engineer to sound crossing signals, though quite closely connected in point of distance and time, do not evidence a systematic inattention to duty." Chicago, R. I. & P. R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356, *overruling* Atchison, T. & S. F. R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278.

30. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913, (the failure to signal at another crossing tends "to show an utter disregard of the requirements of law as to the manner of running the train"); Bower *v.* Chicago, M. & St. P. R. Co., 61 Wis. 457, 21 N. W. 536. See also Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

idence of the defendant's negligence.[31] But such facts have been held competent as showing the nature of the crossing and as bearing upon the question of contributory negligence.[32]

6. Notice to Defendant. — The plaintiff may show that defendant had been notified of the injured person's presence on or near the track.[33]

7. Possibility of Averting the Injury. — A. GENERALLY. — It is competent to show that the injury might have been avoided if proper precautions had been taken by either the injured person[34] or the defendant.[35] A witness who saw the accident and knows

31. Lake Shore & M. S. R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32.

Where It Was Contended That No Signals Were Given by the approaching train, evidence that other accidents had occurred at the same crossing within a short time was held properly excluded. Menard *v.* Boston & M. R. Co., 150 Mass. 386, 23 N. E. 214; Hutcherson *v.* Louisville & N. R. Co., 21 Ky. L. Rep. 733, 52 S. W. 955.

In an action for the killing of plaintiff's intestate at a railroad crossing it is not competent for a witness to testify as to the occurrence of an accident to himself at the same crossing some eight years previous, since such evidence merely tends to show that the crossing was a dangerous place, but shows nothing as to the manner in which the train causing the injury was operated. Cohn *v.* New York Cent. & H. R. R. Co., 6 App. Div. 196, 39 N. Y. Supp. 986, distinguishing the ordinary case of showing the occurrence of other accidents at the same place as evidence that it was dangerous.

Evidence that other persons had been killed at the same crossing where the plaintiff's intestate was killed is not admissible in an action where the alleged negligence was the failure of the defendant's engineer to make proper signals as he approached the crossing. Burke *v.* New York Cent. & H. R. R. Co., 66 Hun 627, 20 N. Y. Supp. 808, distinguishing this case from those cases in which such testimony may be competent to show notice.

32. In an action for the killing of plaintiff's intestate at a railway crossing it was held proper to permit witnesses who had often traveled over the crossing in question and were familiar with its location and surroundings and who had described the crossing and the objects interfering with the view in both directions, to give instances in which they had themselves narrowly escaped being injured by trains while passing over the crossing in vehicles. The evidence while not admissible to show the defendant's negligence on former occasions is competent as showing the nature of the crossing and the difficulties experienced by travelers when passing over it in discovering an approaching train. "The most obvious objection to the testimony, and the one that is urged by the defendant, is that it had a tendency to introduce collateral issues into the case. No one, however, can doubt the great weight that men would ordinarily attach to such incidents as tending to show whether a crossing is safe or unsafe, especially when the incidents are narrated by persons who participated therein, who are familiar with the crossing, and who, in the same connection, describe the physical surroundings of the place. Taken in connection with the description given of such surroundings, the testimony illustrated in a practical way how the obstacles described inevitably tended to produce accidents." Chicago & N. W. R. Co. *v.* Netclicky, 67 Fed. 665, 14 C. C. A. 615; *citing* District of Columbia *v.* Armes, 107 U. S. 519, 524.

33. Spotts *v.* Wabash W. R. Co., 111 Mo. 380, 20 S. W. 190, 33 Am. St. Rep. 531 (notice that injured person was unloading freight).

34. Alabama, G. S. R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508.

35. Where there was evidence to show that the defendant's engineer was aware of the presence of the per-

all the circumstances may state whether the plaintiff could have seen the train in time to avoid the accident,[36] or had time to get off the track after discovering his peril.[37] So it is competent to show whether the train could have been stopped[38] or defendant's servants could have seen the injured person in time to avert the injury,[39] unless such a discovery could have been made only by taking precautions which the defendant is not required by law to observe.[40]

B. The Distance In Which A Train Can Be Stopped is not a matter of common knowledge to be judicially noticed, but the plaintiff has the burden of showing any negligence in this respect[41]

son injured, it was held competent to show that the conditions were such that his presence might have been discovered in time to avert the injury. Alabama G. S. R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169.

36. An eye witness who occupied a position where he could see everything that occurred may state whether the plaintiff could have seen the train in time to avoid the collision. Alabama G. S. R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508.

37. A fireman on the engine which ran over the plaintiff, an infant of nine years, after testifying to all the facts may be asked whether the boy had ample time to get off the track after the engineer blew his danger whistle. Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 18 Pac. 730.

38. Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591. See also Chicago & N. W. R. Co. *v.* Bunker, 81 Ill. App. 616.

39. Bias *v.* Chesapeake & O. R. Co., 46 W. Va. 349, 33 S. E. 240 (distance at which a child of decedent's size could have been seen); Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

In an action for killing an infant who had strayed upon defendant's tracks, where it appeared that the engineer saw the child when 600 feet distant from her, that the train was a light one and the track in good condition, evidence as to the distance in which the engineer could have stopped the train was held improperly excluded because competent on the question of the defendant's negligence. Meagher *v.* Cooperstown & C. V. R. Co., 75 Hun 455, 27 N. Y. Supp. 504.

Where it appears that a slight diminution in the speed of the train might have prevented the injury it is proper for the plaintiff to show that the train was equipped with brakes throughout. Louisville & N. R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35.

The engineer or fireman is presumed to have seen what he could have seen had he looked. Wabash R. Co. *v.* Jones, 53 Ill. App. 125; Illinois Cent. R. Co. *v.* Noble, 142 Ill. 578, 32 N. E. 684.

Experiments made for the purpose of showing how far an infant sitting on the track could be seen and distinguished by an engineer held inadmissible. Alabama G. S. R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169. See article "Experiments."

40. Where the deceased was struck and killed while walking on a trestle and it appears that there was a curve in the track just before reaching the trestle, evidence that a person on the engine at a point back of and before entering the curve could see a person on the trestle was held improperly admitted because it was not the engineer's duty to take his eyes off the track in front of him and look across the curve; nor was it his duty to keep any such lookout for trespassers at all. Central R. & Bkg. Co. *v.* Vaughan, 93 Ala. 209, 9 So. 468, 30 Am. St. Rep. 50.

41. Where the alleged negligence is the failure to stop or slacken the speed of the train after the plaintiff's peril was discovered, the burden is on the plaintiff to show that this could have been accomplished in time to avoid the injury; and the fact that the train was traveling on an up grade at the rate of only

by evidence of how the train was or should have been managed.[42]

C. Opinion Evidence. — The opinion of a properly qualified expert as to whether the train was stopped as soon as it could have been is admissible[43] but the engineer cannot testify that he used all the means he had to stop the train.[44] A qualified expert may give his opinion as to how far an object on the track could have been seen, or within what distance the train could have been stopped under the circumstances disclosed.[45]

D. Mechanical Appliances. — Evidence is admissible that proper mechanical appliances for preventing such accidents were not used by the defendant.[46]

twelve or fifteen miles an hour does not warrant the jury in inferring this fact from their own experience and common knowledge. "How soon a train can be stopped depends on the state of the track, the weight of the train, the appliances in use, the grade, and numerous other facts which can only be determined from the testimony." It is not a matter of common knowledge. Thornton *v.* Louisville & N. R. Co., 24 Ky. L. Rep. 854, 70 S. W. 53. See also Tully *v.* Fitchburg Co., 134 Mass. 499, and article "Judicial Notice," Vol. VII, p. 942, n. 63. *Contra,* Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591, and see more fully, *infra,* IV, 1.

42. Carver *v.* Chicago, P. & St. L. R. Co., 104, Ill. App. 644 (proper to show that there were means at hand other than those resorted to by the engineer which could have been used to expedite the stopping of the train).

Where the time in which a train could be stopped was material, evidence as to the time in which another train going at the same rate of speed as the one in question was stopped at the same point was held properly excluded. Vanarsdall *v.* Louisville & N. R. Co., 23 Ky. L. Rep. 1666, 65 S. W. 858.

The Opinion of an Expert who is familiar with all the material facts is competent. Olson *v.* Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148.

43. An expert engineer riding on the engine which inflicted the injury who saw everything done by the engineer in charge of the engine may state whether or not the train was stopped as soon as it could have been done after the signal was given. Alabama G. S. R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508.

A Non-Expert cannot testify that the train could have been stopped in time to prevent the injury if it had been running at a slower rate of speed. International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

44. An engineer in charge of the train at the time of the accident cannot testify that he used "all the means he had to stop the train," but should state what means he did use. Tanner *v.* Louisville & N. R. Co., 60 Ala. 621.

45. A witness experienced in railroad business who had been an engineer for a considerable time prior to the accident and knew the engine, train, headlight and surroundings and was familiar with the track and gate at the place of the accident was held properly permitted to give his opinion as to the distance an object could be seen in front of the headlight at that point and the distance within which the train could be stopped. Olson *v.* Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148.

46. In an action for running over and killing plaintiff's intestate where it was alleged that the locomotive in question was not supplied with proper brakes, evidence that it was supplied with a hand-brake while most or all of the defendant's other engines had air-brakes was held properly admitted. Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

Where the plaintiff, while passing over a railway along a public street, was injured by reason of his

8. Competency of Employes. — The defendant may show the competency of its employes through whose alleged negligence the injury occurred.[47]

9. Habits of Injured Person. — The habits of the injured person, known to the defendant's servants, may be relevant in explanation of the latter's alleged negligence.[48]

10. Failure To Report Accident. — The defendant's failure to report the accident, as required by law, cannot be shown.[49]

11. Contributory Negligence. — A. Facts Explanatory of Injured Person's Action. — Any relevant and otherwise competent facts and circumstances tending to show why the injured person was acting as he was at the time of the injury, and that it was not negligent for him to do what he did, are admissible on the issue of contributory negligence.[50]

foot becoming caught between the rails of a switch, it was held competent for the plaintiff to show that the danger from the switch to pedestrians and brakemen could have been obviated by a simple contrivance for blocking the switch, which was in use on a few roads of a distant state. Gulf, C. & S. F. R. Co. *v.* Walker, 70 Tex. 126, 7 S. W. 831, 8 Am. St. Rep. 582.

Injury to Trespasser. — Since a railway company is not bound to use the most modern apparatus and most effectual contrivances for managing and operating its train as against a mere trespasser in its tracks, in an action for killing such a trespasser evidence tending to show that the accident might have been prevented had the company used certain improved air-brakes in general use on railways, is not admissible. McKenna *v.* New York Cent. & H. R. R. Co., 8 Daly (N. Y.) 304.

47. Hasie *v.* Alabama & V. R. Co., 78 Miss. 413, 28 So. 941, 84 Am. St. Rep. 632.

Where the plaintiff claimed and attempted to prove that the engineer running the locomotive by which he was injured was employed by the corporation with the knowledge that he was unskillful, it was held competent for the president of the company, who employed the engineer, to testify that he hired him as skillful and competent. Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92.

48. Where it appeared that the plaintiff had unlawfully boarded a freight train and while attempting to jump from the train, as commanded by the conductor, had been injured, it was held competent for the defendant to show that the plaintiff and his companions had been in the habit of jumping on and off trains. Such evidence was relevant upon the question of whether the conductor exercised ordinary care under all the circumstances, in ordering the boy, thus shown to be agile and dexterous in jumping on and off moving trains, to get off. Thompson *v.* Yazoo & M. V. R. Co., 72 Miss. 715, 17 So. 229.

49. Although every railroad corporation is required by statute to give notice to the board of railway commissioners of any accident on its road attended with loss of life, the plaintiff in an action for the death of his intestate, who had been pushed from one of defendant's trains and run over, cannot show the defendant's failure to report this accident as indicating an intentional concealment of the truth and pointing to a consciousness of liability on the part of the defendant. Devoy *v.* Boston & A. R., 156 Mass. 161, 30 N. E. 557.

50. Goodrich *v.* Burlington, C. R. & N. R. Co., 103 Iowa 412, 72 N. W. 653; Andrews *v.* Mason City & Ft. D. R. Co., 77 Iowa 669, 42 N. W. 513; Pennsylvania Co. *v.* Conlan, 101 Ill. 93 (nature of his employment as switchman).

Where the decedent was killed while walking along defendant's

B. Knowledge and Understanding of Injured Person. — a. *Generally.* — Facts and circumstances tending to show the extent of the injured person's knowledge of the danger are admissible.[51] So, too, it is competent to show his knowledge of facts which would reasonably induce him to exercise less care,[52] as that he knew an ordinance prohibited a speed faster than a certain rate.[53] It has been held that the defendant cannot show the general public knowledge of the danger,[54] though the rule seems to be to the contrary when such evidence is offered to show the defendant's knowledge.[55]

b. *Understanding and Appreciation of Danger.* — Evidence as to whether the injured person understood and appreciated his danger is admissible,[56] unless it appears that he must have understood

tracks in company with his wife, evidence that she was ill at the time was held admissible as tending to explain his conduct in caring for her, thus bearing upon the question of contributory negligence. Remer *v.* Long Island R. Co., 48 Hun 352, 1 N. Y. Supp. 124.

51. Helbig *v.* Michigan Cent. R. Co., 85 Mich. 359, 48 N. W. 589 (his ignorance of an unusual method of moving cars, known as "staking," where he was injured during such an operation); Railway Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052 (declarations of third persons in his presence); Threlkeld *v.* Wabash R. Co., 68 Mo. App. 127 (that an automatic bell was ringing).

Where the deceased was killed at a railroad crossing of a city street in the night-time, when the gates and flagman in use by day were not used, it is competent to show that he had knowledge of this fact. Illinois Cent. R. Co. *v.* Bartle, 94 Ill. App. 57.

52. Where the plaintiff's team was injured while crossing the defendant's track, his testimony that he was frequently in the town where the accident happened, that he was familiar with the speed at which the defendant's trains usually ran while going through such town, which was about five or six miles per hour, was held improperly excluded, being competent in connection with evidence previously introduced that an ordinance of the town prohibited railway companies from running their trains faster than six miles per hour. Carraway *v.* Houston & T. C. R. Co., 31 Tex. Civ. App. 184, 71 S. W. 769.

Where it is material to determine how far the plaintiff had been influenced in his conduct by the fact that the crossing gates were frequently permitted to remain closed at a time when no trains were passing, or about to pass, it is competent to show occasions known to the plaintiff when the gates were so left down. But occasions which have not come to his knowledge either by personal observation or information received from others can not be shown. Chicago & E. I. R. Co. *v.* Keegan, 112 Ill. App. 338.

53. The plaintiff, injured at a railway crossing, may show that he was acquainted with the provisions of an ordinance limiting the speed at which trains could be run over crossings and requiring the ringing of a bell. "It could only be incompetent upon the theory that plaintiff was presumed to know what this ordinance required, but that presumption does not render incompetent evidence that confirms it as a fact." Moore *v.* Chicago, St. P. & K. C. R. Co., 102 Iowa 595, 71 N. W. 569.

54. Since the issue is whether the deceased knew or ought to have known of the danger and acted prudently under the circumstances. Savannah, F. & W. R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308.

55. See article "Negligence," Vol. VIII, p. 946.

56. In an action for killing a boy of twelve years, evidence that he was not of sufficient intelligence and discretion to go alone to other counties and distant towns was held improperly admitted, having no tendency to establish his incapacity to understand and appreciate the danger

it.[57] Thus it is competent to show his age,[58] his deafness,[59] or his ability to hear,[60] and circumstances explaining his failure to heed a warning given him.[61] But direct testimony on this question by other witnesses is not admissible.[62]

c. *Ability to See or Hear Approaching Train.* — Evidence tending to show whether or not the injured person could have seen[63] or

of his position. St. Louis & S. W. R. Co. *v.* Shiflet, 94 Tex. 131, 58 S. W. 945.

57. In an action for injuries received while attempting to pass between two cars blocking a street, plaintiff, a boy of sixteen years, offered to show that he was not familiar with the danger which he incurred by his action. The exclusion of the evidence was held proper because the danger of the trains moving was perfectly apparent to one of plaintiff's age, and because he himself testified that he would not have attempted to pass between the cars but for the assurance of the brakeman that the train was not going to move. Scott *v.* St. Louis, K. & N. W. R. Co., 112 Iowa 54, 83 N. W. 818.

58. See Young *v.* Clark, 16 Utah 42, 50 Pac. 832.

59. Although the Partial Deafness of the Plaintiff Not Known to the Defendant or its servants at the time of the injury would not require of them any increased degree of care, yet evidence of this fact is competent as part of the *res gestae* or circumstances of the case and as bearing upon the plaintiff's alleged contributory negligence; the issues being the alleged negligence of the defendant and the contributory negligence of the plaintiff. "The solution of these questions depends upon the peculiar facts and circumstances of *each* case, the state and condition of the parties, the manner in which, and the circumstances under which, the injury was received or inflicted; in short, all the circumstances surrounding the transaction which in any way reflect upon either the *degree of care* or the *manner,* in which, in the particular case, it should have been exercised. The circumstances are all relevant, and may be given to the jury. The effect which they should have upon the jury, is another and very different question. They form, so to speak, a part of the *res gesta* of the transaction; they are the circumstances under which it occurred, and indicate the agencies which caused it, and should not, therefore, be excluded; but the court trying the cause should, so far as practicable, see that undue weight is not attached to them by the jury." Cleveland, C. & C. R. Co. *v.* Terry, 8 Ohio St. 570.

60. Evidence that the plaintiff had previously crossed the track at the place where the injury occurred and had heard the whistle blown 400 or 500 yards before the train reached the crossing is admissible as tending to show that the plaintiff's hearing was good enough to detect the whistle if it had been blown on the occasion in question, the plaintiff claiming that no whistle had been blown as required by law. St. Louis & S. W. R. Co. *v.* Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891.

61. In an action for the killing of plaintiff's intestate at a railroad crossing where it was shown that boys about the crossing interfered with him, told him that a train was coming and endeavored to restrain him from going upon the tracks, it was held competent to show that on the five evenings preceding the accident when the plaintiff was approaching the same crossing the boys had done the same thing for the purpose of annoying the deceased, there being evidence to show that he was partially deaf and that the effort to warn him was ineffectual because it was misunderstood, the evidence in question being competent to explain the deceased's failure to act upon the warning given him. Tyler *v.* Concord & M. R., 68 N. H. 331, 44 Atl. 524.

62. Over *v.* Missouri, K. & T. R. Co. (Tex. Civ. App.), 73 S. W. 535.

63. A question as to whether one

heard[64] the approaching train is admissible. But the fact that another person on another occasion at the same crossing could not hear an approaching train is not competent unless the conditions are shown to have been similar.[65]

d. *Warning to Injured Person.* — In an action for injuries to an infant of very tender years the defendant cannot show that the infant had been warned of the danger.[66]

e. *Knowledge of Defendant's Previous Negligence.* — Defendant cannot show that his previous or habitual negligence at the point in question was known to the injured person.[67] But the latter's knowl-

can see a train from a given position may or may not call for an opinion, depending upon whether the witness has actually tested the matter. Cleveland, C. C. & St. L. R. Co. *v.* Moss, 89 Ill. App. 1.

Experiments as to how far a train could be seen coming to the crossing from the highway held competent. Elgin, J. & E. I. R. Co. *v.* Reese, 70 Ill. App. 462. See article "EXPERIMENTS," Vol. V., p. 488.

64. In Newstrom *v.* St. Paul & D. R. Co., 61 Minn. 78, 63 N. W. 253, evidence tending to prove by the experience and observation of the witness that on other occasions when the train was being backed down toward the highway crossing in the same manner as on the occasion of the accident travelers approaching the crossing in the same manner as the deceased could not or might not hear the approaching train until they were almost at the crossing, was held competent upon the question of the negligence of the deceased.

Where the plaintiff was injured while lawfully on defendant's track at a point near a crossing, it was held error to exclude his testimony that he could have heard the whistle of the engine injuring him if it had been sounded, the witness having previously testified that he had heard the whistles of other passing trains. Galveston, H. & S. A. R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939; *citing* Railroad Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486, and Railway Co. *v.* Duelm (Tex. Civ. App.), 23 S. W. 596, as exactly in point.

Where the deceased was killed while driving over a railroad track by a collision with a train, the fact that the horse heard the noise of the locomotive raises no legal inference that the deceased or the driver heard it. Cosgrove v. New York Cent. & H. R. R. Co., 87 N. Y. 88, 41 Am. Rep. 355.

65. Where the plaintiff claimed and testified that he could not and did not hear the freight-train approaching the crossing where he was injured, the testimony of a witness that on a different occasion when he was approaching the same crossing he did not hear an approaching passenger-train coming from the same direction as the freight-train which struck the plaintiff until it was within seventy-five yards of the crossing, and did not know of its presence until it sounded its whistle, was held error, the conditions not appearing to be similar. "If it were shown that the conditions surrounding the parties were the same, we could see no objection to a witness stating that on another occasion he did not hear the movement of the train until it was near the crossing. But it is obvious that the opportunity and conditions must be shown to be similar." The difference in the character of the trains, one being a freight and the other a passenger train, would alone be sufficient to exclude the evidence. Texas & Pac. R. Co. *v.* Payne (Tex. Civ. App.), 35 S. W. 297.

66. Louisville & N. R. Co. *v.* Chism, 20 Ky. L. Rep. 584, 47 S. W. 251.

67. The defendant cannot show that the persons injured at the crossing knew that trains passed there frequently at a rapid rate of speed since the law requires both parties to exercise due care, and though the in-

edge that the defendant's trains frequently ran by the point in question at a rapid rate of speed is competent where such speed does not appear to be negligence.[68]

C. Precautions Taken By Injured Person. — The injured person may testify as to what precautions he took and why.[69]

D. Injured Person's Habits and Reputation. — In some jurisdictions evidence of the injured person's previous habits and reputation is not admissible on the question of his contributory negligence.[70] In others it seems to be competent to show such person's previous careful habits, especially with reference to railway cross-

jured parties knew that the defendant had been guilty of negligence on former occasions "they had the right to assume that it would not repeat the wrong, but would discharge its duty, and exercise due care, on the occasion in question." No matter what their knowledge may have been appellant cannot charge them with contributory negligence in not anticipating its negligence. Gulf, C. & S. F. R. Co. *v.* Shieder (Tex. Civ. App.), 26 S. W. 509.

68. In Gulf, C. & S. F. R. Co. *v.* Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538, it was held no error to exclude evidence that the plaintiff injured at a crossing passed the crossing frequently and knew, or ought to have known, that trains passed such point frequently and at rapid rates of speed, the evidence being of a very indefinite and uncertain character in not showing when the plaintiff passed the crossing, nor that the trains did in fact frequently run there at rapid rates of speed during such a time that the plaintiff would probably have become acquainted with the custom. But the court recognizes that such evidence if properly presented might be admissible. "If the evidence had shown that at a time prior to the accident the trains frequently passed there rapidly and that while so passing the ladies often passed the crossing, so as to allow the jury to infer their knowledge of the fact, we are of the opinion that the evidence should have been admitted. We cannot say, as a matter of law, that it was negligent to run the cars at a rapid rate at that point; and hence the question discussed by counsel as to whether Mrs. Shieder was bound to anticipate the negligent running of the cars on the particular day from such previous custom is not before us."

69. The plaintiff may testify that on reaching a point where he could look down the track in one direction he saw no train approaching and from that time until he reached the point where he was injured his attention was directed in the opposite direction, as he understood the danger to be from a train approaching from that direction. International & G. N. R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772.

70. International & G. N. R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772; Glass *v.* Memphis & C. R. Co., 94 Ala. 581, 10 So. 215.

Evidence of the general reputation for sobriety of the plaintiff's intestate is not admissible in an action for his death in a collision at a railroad crossing. Chesapeake & O. R. Co. *v.* Riddle, 24 Ky. L. Rep. 1687, 72 S. W. 22.

Evidence as to the general character and habits of the deceased traveler killed at a crossing is not competent upon the question of the care exercised by him, although there were no eye-witnesses and there is no evidence as to how the accident happened. Chase *v.* Maine Cent. R. Co., 77 Me. 62, 52 Am. Rep. 744.

The habits of care of the deceased in crossing the railroad at the same point at other times cannot be considered by the jury upon the question of contributory negligence. The only material fact is his conduct on the occasion in question, and his previous habits or conduct have no bearing upon this question. Guggenheim *v.* Lake Shore & M. S. R. Co., 66 Mich. 150, 33 N. W. 161.

On Behalf of Defendant. — Evi-

ings.[71] In still other jurisdictions such evidence is competent when the testimony of eye-witnesses is not available,[72] or when the evidence is conflicting[73] on the question of the care exercised by the injured person, but not otherwise.

E. Injured Person's Condition at Time of Injury. — As

dence that one killed by a train at a railway crossing was given to the habit of intoxication is not admissible to prove contributory negligence on his part in an action for damages against the company for his death. Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645, 1128 (the contrary holding by Sherwood, J., in the main opinion is not concurred in by his associates).

71. In an action against a railroad company for negligently causing the death of a traveler at a highway crossing, evidence that it was the uniform habit of the deceased to slacken the speed of his horses and look and listen for approaching trains is competent as tending to show his conduct at the time of the injury. Smith *v.* Boston & M. R., 70 N. H. 53, 82, 47 Atl. 290, 85 Am. St. Rep. 596; Davis *v.* Concord & M. R., 68 N. H. 247, 44 Atl. 388.

The fact that a man killed on a railroad crossing was careful and sober and had previously exercised due care in passing over the same crossing tends to repel any inference of negligence arising from the mere fact that he went upon the track when a train was approaching. Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

72. Chicago, R. I. & P. R. Co. *v.* Downey, 85 Ill. App. 175; Chicago, R. I. & P. R. Co. *v.* Clark, 108 Ill. 113; McNulta *v.* Lockridge, 32 Ill. App. 86.

Proof that the deceased was careful, sober, industrious and in good health and so situated that it is fairly inferable that the instinct of self-preservation was as strong in him as in other men may be considered by the jury in determining whether he used due care; and in the absence of witnesses to the accident proof of such circumstances legally tends to prove that fact. Chicago, B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708.

Where the Evidence Leaves It in Doubt whether any person saw the deceased when he was struck by the train, evidence that the deceased was a man of careful habits may be admitted. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

The Fact that Several Witnesses Saw the Deceased Fall at the time he was struck by the tender of defendant's engine does not make them eye-witnesses where they had not seen him before and did not know he was there, and their testimony could shed no light whatever upon the question as to whether or not the deceased was exercising due care at the time he was struck other than may be drawn as inferences from the circumstances. Chicago, R. I. & P. R. Co. *v.* Downey, 85 Ill. App. 175.

Where There Is an Eye-Witness to the accident, evidence of the deceased's cautious habits is incompetent. Cleveland, C. C. & St. L. R. Co. *v.* Moss, 89 Ill. App. 1; Indiana, D. & W. R. Co. *v.* Koons, 72 Ill. App. 497.

Where There Is Positive Testimony as to what care and caution an injured person actually exercised, it is error to admit on his behalf testimony in relation to his habits as to sobriety or carefulness. Illinois Cent. R. R. Co. *v.* Borders, 61 Ill. App. 55.

In the Absence of Direct Evidence the jury may consider the fact that the deceased was a sober, industrious man of good habits. Illinois Cent. R. Co. *v.* Nowicki, 148 Ill. 29, 35 N. E. 358.

73. Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848.

In an action for injuries to a boy caused by defendant's train at a crossing, where the defendant claimed that the accident was caused by plaintiff's negligence in trying to jump on the moving train, the testimony of witnesses on behalf of the defendant that within a week previous

bearing upon the degree of care exercised by the injured person, it is competent to show that he was intoxicated at the time.[74]

F. Previous Specific Acts or Conduct of Injured Person. Previous[75] or subsequent[76] acts of negligence by the injured per-

to the accident plaintiff was in the habit of frequently jumping on moving trains in the immediate vicinity of the place where the accident occurred, was held improperly excluded, the evidence as to how the injury occurred being conflicting. Pittsburgh, C. C. & St. L. R. Co. *v.* McNeil (Ind. App.), 66 N. E. 777, *citing* Craven *v.* Central Pac. R. Co., 72 Cal. 345, 13 Pac. 878.

74. Illinois Cent. R. Co. *v.* Cragin, 71 Ill. 177.

In an action by a personal representative of a person killed at a railroad crossing, it is error to exclude evidence that when the deceased was picked up his breath smelled of liquor, that he had drunk beer shortly before the injury and was drunk between eleven and twelve o'clock of the day on which he was injured some six hours later. "If he began drinking in the morning and continued through the day, the testimony was proper as tending to show that his faculties of sight and hearing were, at the time of the injury, less acute than those of a sober and ordinarily prudent man." Wabash R. Co. *v.* Prast, 101 Ill. App. 167.

75. In an action for injuries at a crossing the defendant cannot show that on former occasions the plaintiff had gone to sleep in his wagon and permitted his team to go on over the crossing in question while he was asleep, evidence of habitual negligence in doing the act in question not being competent upon the issue of negligence in a particular instance. International & G. N. R. Co. *v.* Ives, 31 Tex. Civ. App. 272, 71 S. W. 772.

Where the plaintiff's intestate was killed while crossing the track in his buggy, evidence as to isolated instances of his having been found asleep in his buggy was held improperly admitted, either to show that he was asleep at the time he was struck by the train or to show his habit in this respect. Previous isolated instances are rarely if ever competent to prove a condition existing at the particular time in question, since such evidence tenders collateral issues and the circumstances may not have been the same, and even if it were competent to prove a habit it could not be shown in this way. Dalton *v.* Chicago, R. I. & P. R. Co., 114 Iowa 257, 86 N. W. 272, *distinguishing* Toledo St. L. & K. C. R. Co. *v.* Bailey, 145 Ill. 159, 33 N. E. 1089, and Railway Co. *v.* Clark, 108 Ill. 113.

Contra. — Where it was claimed that the deceased was negligent in driving upon the crossing where he was killed, it was held that the defendant was properly permitted to introduce evidence tending to show the negligence of the deceased in driving over railway crossings at other times and places in the vicinity of locomotives and moving trains. "Although it is quite generally held elsewhere in actions for negligence, that evidence of other specific instances of negligence on the part of either party is not competent, because raising a collateral issue, yet in this state a different rule prevails, and has become established in cases where the evidence is conflicting; and it is here held to be competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it." Parkinson *v.* Nashua & L. R. Co., 61 N. H. 416. To the same effect State *v.* Manchester & L. R., 52 N. H. 528.

76. Evidence as to the manner in which the plaintiff crossed the track at the same point two hours after the injury complained of is not admissible to show his negligence. Delaware, L. & W. R. Co. *v.* Converse, 139 U. S. 469.

son at the same crossing cannot be shown by the defendant, but such person's previous precautions have been held admissible to negative his contributory negligence.[77]

12. Existence of Crossing and Rights of Defendant in Street. On the question of whether there was a public crossing at the place of the accident, long continued user by the people may be shown.[78] Municipal ordinances may be admissible to show that the defendant's rights in the street where the accident happened are not exclusive,[79] and user by the public and the acts of the defendant may be competent for the same purpose.[80]

13. When Cars Block Crossing. — Where the accident occurred because of the injured person's attempt to pass between or around cars blocking a public crossing it is competent to show that defendant frequently blocked the street in this manner;[81] that people were accustomed to pass in the way plaintiff attempted to pass between[82]

77. Where the deceased was killed at a railway crossing, on the question of his exercise of due care it was held proper to show that on the preceding morning when going over the same crossing he stopped and looked up and down the track before entering upon it. Lyman *v.* Boston & M. R., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

In an action for the killing of plaintiff's intestate at a public crossing, on the question of the care exercised by the decedent it was held competent for the plaintiff to show that the deceased upon numerous other occasions when crossing at this point had remarked upon the dangerous character of the crossing and had taken precautions to avoid collision. Stone *v.* Boston & M. R., 72 N. H. 206, 55 Atl. 359.

78. Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073; Clampit *v.* Chicago, St. P. & K. C. R. Co., 84 Iowa 71, 50 N. W. 673. See article "Highways," Vol. VI.

79. Goodrich *v.* Burlington, C. R. & N. R. Co., 103 Iowa 412, 72 N. W. 653.

80. On the question of whether a certain order of the county court gave the defendant company the exclusive use of the public highway where the plaintiff was injured or only an easement therein, it is competent for the plaintiff to show how the public has used the highway, if at all, since the entry of such order, and also what claims, if any, the railway officials have made as to the company's rights. Turney *v.* Southern Pac. Co., 44 Or. 280, 75 Pac. 144, 76 Pac. 1080. See Central R. & Bkg. Co. *v.* Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634, and article "Highways," Vol. VI.

81. Gulf, C. & S. F. R. Co. *v.* Grisom (Tex. Civ. App.), 82 S. W. 671 (custom of blocking street).

In an action for injuries received by the plaintiff while passing over a walk reaching over defendant's track to its depot, which injuries were caused by the sudden pushing together of cars that stood on each side of the walk, where the petition charged that by long continued course of conduct the railroad had led plaintiff to believe that it had opened the space between the cars in order that he and the public might pass between them; it was held no error to permit a witness to testify as to the company's custom of separating cars left standing on this crossing and of giving signals when about to place cars upon that track or moving them over it, such evidence being competent both on the question of the defendant's negligence and the plaintiff's alleged contributory negligence. Gurley *v.* Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953. *Contra,* — Rumpel *v.* Oregon S. L. & U. N. R. Co., 4 Idaho 13, 35 Pac. 700, 22 L. R. A. 725.

82. Gulf, C. & S. F. R. Co. *v.* Gri-

or around[83] the cars, and that others ahead of the plaintiff were passing between the cars.[84] And as evidence of an invitation or license to pass between cars plaintiff may show the defendant's custom of leaving an opening for this purpose.[85]

14. Injuries at Crossing. — A. Character, Condition and Surroundings of Crossing. — a. *Generally.* — As bearing upon the degree of care exercised by both parties, and the necessity therefor, it is competent to show the character and surroundings of the crossing where the accident occurred.[86]

som (Tex. Civ. App.), 82 S. W. 671.

Contra. — Where the plaintiff's injuries were received while attempting to pass under defendant's train which was blocking a public street, evidence that the defendant company blockaded streets at other times and that people were accustomed to crawl under the cars on such occasions was held incompetent. Rumpel *v.* Oregon S. L. & U. N. R. Co., 4 Idaho 13, 35 Pac. 700, 22 L. R. A. 725.

83. In an action for killing plaintiff's intestate while going around the end of a freight-train which was obstructing a street, it was held competent to show the custom of people when crossing the track at that point to go around the end of any freight-train which might be obstructing the street, such evidence being admissible on the question of the negligence of the defendant, which knew of and acquiesced in the custom. Leary *v.* Fitchburg R. Co., 53 App. Div. 52, 65 N. Y. Supp. 699.

84. Chicago, B. & Q. R. Co. *v.* Russell (Neb.), 100 N. W. 156 (see note following).

Where the plaintiff was injured while passing between cars which were unlawfully blocking a street, evidence that he saw others cross before him was held properly admitted on the question of the defendant's negligence in starting the train without warning. Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 379; Schmitz *v.* St. Louis, I. M. & S. R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; San Antonio & A. P. R. Co. *v.* Green (Tex. Civ. App.), 49 S. W. 672; *s. c.*, 20 Tex. Civ. App. 5, 49 S. W. 670.

85. Where the plaintiff was injured while attempting to pass through an opening between cars which had been blocking a village street and sidewalk for a period of twenty or thirty minutes, it was held competent for him to show that he saw others crossing through the same opening ahead of him and that it was the custom of the railway company for a long time prior thereto to make openings of a similar character through freight-trains similarly situated, for the purpose of showing a license or invitation of the railroad company to pass through this opening. Chicago, B. & Q. R. Co. *v.* Russell (Neb.), 100 N. W. 156, *citing* Atchison, T. & S. F. R. Co. *v.* Cross, 58 Kan. 424, 49 Pac. 599; Thurber *v.* Harlem Bridge Etc. Co., 60 N. Y. 326.

86. It is competent to show by any witness acquainted with the situation that the track at the scene of the accident was straight and for what distance the view of the crossing was unobstructed. Baltimore & O. R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414.

The plaintiff may show as a circumstance indicating the character of the crossing and the degree of care required that the highway is crossed by the tracks of several companies upon which trains generally pass in rapid succession. New York, C. & St. L. R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897.

Evidence that the highway at the crossing was not as wide or in as good and passable condition at the time of the accident as it was prior to the construction of the railroad was held properly admitted for the purpose of determining the vigilance to which the defendant and its employes are to be held in the use of signals and the operation of trains in their approach to and passage over the crossing. Funston *v.* Chicago, R.

b. *Lights.* — Where the accident occurred at night the presence or absence of lights at the crossing may be shown,[87] but if relied upon as an act of negligence it must be alleged.[88]. As evidence of the degree of illumination existing at the time in question witnesses may testify as to how far they could see at the same crossing under substantially the same conditions on other occasions.[89]

c. *The Grade of the Track* approaching the crossing may be shown.[90]

d. *Obstructions to View.* — Evidence that the view of the track on either side of the crossing was obstructed by natural or artificial objects,[91] or that the defendant had left cars so as to obstruct the

I. & P. R. Co., 61 Iowa 452, 16 N. W. 518.

Evidence as to the Number of Residences In the Immediate Vicinity was held properly admitted as bearing upon the degree of care which should have been exercised by the defendant. "We think it was proper to show all the surroundings, and, as far as could be, to show the exact situation, so that the jury could determine whether the defendant had exercised such degree of care as it was required to do under the existing circumstances and conditions." Nosler *v.* Chicago, B. & Q. R. Co., 73 Iowa 268, 34 N. W. 850.

It Is Not Material Whether the Highway or Railway Was Built First. But evidence that the highway was an old and well established one, though not important, is competent to show that the defendant could not be ignorant of the fact that at the crossing in question there was a public highway. Delaware, L. & W. R. Co. *v.* Converse, 139 U. S. 469. *Compare* Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92.

87. Easley *v.* Missouri Pac. R. Co., 113 Mo. 236, 20 S. W. 1073 (as part of the *res gestae* and as having a direct bearing on the issue of plaintiff's alleged contributory negligence).

88. Where the negligence alleged is the failure to give the proper signals and running at too fast a rate of speed, it is not proper to show that the negligence consisted in the failure of the defendant to have a light at the crossing. "The fact that it was dark, or that there was no light near the crossing, under the allegations made might have been proved as a circumstance in the case explanatory of the acts of both the parties, but not to show that it was the duty of defendant to keep the place lighted, or that it was negligent not to have the light there." This could not be done in the absence of averment of the fact. Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. 608.

89. Where the deceased was run over and killed on a public crossing at night by the tender of a switch engine, and the sufficiency of the lights about the railroad platform near by became material on the question of defendant's negligence and plaintiff's contributory negligence, it was held that the testimony of witnesses who, over two years after the accident but near the same hour of a not dissimilar night and while an engine and tender were standing at about the point where deceased was killed, were in the same position as the deceased, as to the possibility of distinguishing the tender with the lights as then arranged, was admissible. And if the testimony as to whether there was any change in the arrangement of the lights was conflicting the evidence should be admitted under proper instructions to the jury. Houston & Texas Cent. R. Co. *v.* Waller, 56 Tex. 331.

90. San Antonio & A. P. R. Co. *v.* Bowles (Tex. Civ. App.), 30 S. W. 89 (admissible for the plaintiff as bearing upon the question whether there was negligence in the rate of speed at which the train was moving and whether or not due care was exercised to avert injury after the danger was discovered).

91. **Plaintiff May Show the Location of the Different Houses** near

view of travelers,[92] is competent on the question of the care required of the respective parties. The length of time such obstructions had existed prior to the accident is relevant only on the question of notice,[93] but, it seems, may be shown as part of the history of the case.[94]

e. Amount of Travel. — The amount and character of the travel over the crossing in question may be shown as bearing upon the degree of care required of the railroad company.[95]

the crossing and of the cars standing on a side-track near by, all of which are obstructions to the view of a person approaching a crossing and therefore increase the defendant's obligation to exercise care at such place and likewise bear upon the question of the contributory negligence of the injured person. Memphis & C. R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231.

Trees and Other Obstructions. International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 2 S. W. 58.

The Existence of a Hill Near the Crossing where the accident occurred, through which the defendant's railway was cut and which obscured the view of approaching trains, is a competent circumstance. Leitch *v.* Chicago & N. W. R. Co., 93 Wis. 79, 67 N. W. 21.

Evidence of the existence of such obstructions shortly after the accident is competent to show their presence at the time thereof, thus where it is claimed that cars standing on a track near by obstructed the plaintiff's view, a witness may testify that at six o'clock on the morning following the evening when the accident occurred the cars were standing there as claimed. Missouri, K. & T. R. Co. *v.* Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039.

92. Evidence as to other cars standing on a side-track next to the crossing where the accident occurred may be competent to show the situation and as affecting the care and caution required of the respective parties. Chicago & E. I. R. Co. *v.* Johnson, 61 Ill. App. 464; Memphis & C. R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231. See also Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554.

93. In an action for injuries received at a street crossing, it is competent to show that certain lumber piled up between the tracks near the crossing had been kept piled up between those tracks continuously during the year preceding the accident, where there is nothing to show that defendant had notice of this obstruction. "It is insisted that the only proper inquiry was as to the situation at the particular time of the accident. And this is true if the defendant had notice of the situation." But the testimony was proper "as tending to show notice to the defendant of the obstruction of the crossing." Chicago & E. I. R. Co. *v.* Thomas (Ind.), 55 N. E. 861.

94. Where it appeared that the view of the crossing at which the deceased was killed was obstructed by empty freight-cars standing on the track near by, it was held no error to permit the plaintiff to show how long they had been permitted to stand upon the track prior to the time of the accident, although the material inquiry was as to the condition of things when the accident occurred. This fact was merely a part of the history of the case. Thomas *v.* Delaware, L. & W. R. Co., 8 Fed. 729.

95. Chicago, B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708. Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551.

It is competent to show that the crossing where the accident occurred was thronged with people, as bearing upon the question of the defendant's negligence. Railway Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052.

Evidence that the crossing at which the plaintiff's intestate was killed is in a thickly settled and populous part of the city and constantly traveled over by large numbers of people is admissible in support of an allegation that the train which killed

f. *Opinion Evidence.* — An opinion as to whether the crossing was a dangerous one is not competent, this question being one for the jury to determine from the location and surroundings.[96] And opinions as to the character of the crossing in certain respects are not admissible, but the facts should be given to the jury.[97] A witness may, however, state the length of time required for a team to pass over the crossing,[98] and the first point on the highway at which a traveler could have seen the train.[99]

B. The Conditions at Other Crossings in the immediate vicinity may, under some circumstances, be shown,[1] but ordinarily such evidence is irrelevant, the only issue being the conditions at the crossing where the injury was inflicted.[2]

C. Speed of Train. — a. *Generally.* — As a part of the *res gestae* and as bearing upon the care exercised by both parties to the accident it is competent to show the rate of speed at which the train was running at the time of the accident irrespective of any statute or ordinance, or rules of the railway company, regulating the speed.[3] Hence any competent evidence tending to show this fact

the intestate was run at an unreasonable rate of speed. Overtom *v.* Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898.

Evidence that the defendant had constructed a crossing under the railroad which was equally convenient to travelers, and by reason thereof the crossing on which the plaintiff was injured was little used by the public to the knowledge of the defendant, was held competent as bearing upon the question of the defendant's negligence in running its trains over the crossing at a high rate of speed. L. S. & M. S. R. Co. *v.* Reynolds, 21 Ohio Cir. Ct. 402.

96. King *v.* Missouri Pac. R. Co., 98 Mo. 235, 11 S. W. 563.

97. A witness cannot state that the approach to a crossing was too narrow to permit of a wagon turning upon it with safety. The facts only must be given to the jury. International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 2 S. W. 58.

98. International & G. N. R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 2 S. W. 58.

99. Where the plaintiff had testified that bushes extended along the road on the approach to the railway, a question as to where was the first point at which the train could be seen on account of the bushes was held not objectionable as calling for a conclusion. Kansas City, M. & B. R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16.

1. Where the plaintiff was injured at a crossing, evidence that all the other crossings in town were so torn up and in bad condition on the day of the accident is admissible to show why the plaintiff who knew the condition of the crossing before he attempted to drive across it did not go by some other route, as well as to show negligence on the part of the defendant in leaving the other crossings in such condition. Galveston, H. & S. A. R. Co. *v.* Matula (Tex.), 19 S. W. 376.

2. Missouri, K. & T. R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589.

3. Galveston, H. & S. A. R. Co. *v.* Eaten (Tex. Civ. App.), 44 S. W. 562; Stepp *v.* Chicago, R. I. & P. R. Co., 85 Mo. 229; Olson *v.* Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148. See also Chicago & N. W. R. Co. *v.* Dunleavy, 129 Ill. 132, 22 N. E. 15.

While Unusual Speed of railroad trains does not of itself constitute negligence, yet it may be considered with other circumstances in determining the degree of care exercised. Artz *v.* Chicago, R. I. & P. R. Co., 44 Iowa 284.

Evidence that the locomotive which

is admissible.[4] Opinion evidence is admitted to prove speed.[5]

b. *Speed at Other Places.* — As tending to show the speed of the train at the place of the accident it is competent to show its speed a short distance from there.[6] And evidence of its speed at other

killed the plaintiff's intestate while the latter was leaving his work of shoveling ashes from an ash-pit in a railroad yard, was running faster than usual was held properly admitted. Sullivan *v.* Tioga R. Co., 44 Hun (N. Y.) 304.

To run a train at a rapid rate of speed across a public street in a city or town is *prima facie* wilful negligence. Eskridge *v.* Cincinnati, N. O. & T. P. R. Co., 89 Ky. 367, 12 S. W. 580.

On Question of Contributory Negligence. — In an action for killing plaintiff's horse in a collision at a railway crossing where it appears that the horse was attached to the back of plaintiff's wagon, which crossed just ahead of the train, although the action was based on the failure to give the statutory signals, evidence in regard to the speed of the train was held properly admitted on behalf of the plaintiff upon the question of the plaintiff's alleged contributory negligence. Frazier *v.* Wabash R. Co., 75 Mo. App. 253.

The Defendant May Show the Rate of Speed at which the train was running when it killed the deceased as tending to show whether or not the deceased under all the circumstances exercised due care, and whether other alleged acts or omissions on the part of defendant's servants caused the injury. Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 21 N. E. 575, 16 Am. St. Rep. 242, 6 L. R. A. 418.

4. Where there is evidence that the plaintiff's intestate was thrown as high as a trolley wire at the place of the accident by the train which killed him, it is competent to show the height of such trolley wire as bearing upon the rate of speed at which the train was going. Overtom *v.* Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898.

Evidence of the running time of defendants' trains over the whole road or over any given portion of it is relevant on the question of the rate of speed at any given point on the road. Nutter *v.* Boston & M. R., 60 N. H. 483.

Testimony Showing How Far a Train of Cars Ran After Striking the plaintiff's intestate is competent as tending to show that the train was running at a greater speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control. Pennsylvania Co. *v.* Conlan, 101 Ill. 93.

5. Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 15 S. W. 757; Chicago B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708. See article "Expert and Opinion Evidence," Vol. V, p. 506.

Evidence that the train which ran down the plaintiff's intestate "was going fast" is not incompetent although the witness is unable to state the speed in miles per hour. Overtom *v.* Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898. To the same effect Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521.

A witness who was a passenger on the train at the time of the accident and had traveled by the same train five or six times in three years was held properly permitted to testify that the speed of the train "might have been sixty miles an hour." Stone *v.* Boston & M. R., 72 N. H. 206, 55 Atl. 359.

A Plaintiff Injured at a Crossing may testify as to the speed of the train as part of the *res gestae* without being an expert. Covell *v.* Wabash R. Co., 82 Mo. App. 180.

A brakeman of long experience, in an action by him for injuries received in a wreck caused by the derailment of the train on a curve, may give his opinion that the train at the time and place in question was running at a dangerous rate of speed. Northern Ala. R. Co. *v.* Shea (Ala.), 37 So. 796.

6. Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183 (speed at a

stations and other places on the same trip has been held proper.[7]

c. *Speed on Other Occasions.* — Evidence of the speed of the same train on other occasions at the same place[8] or in the same vicinity[9] has been held admissible, though it has also been held incompetent.[10]

d. *Customary Rate of Speed.* — The customary rate of speed of the same train at the point in question both before and after the accident may be shown as evidence of its speed at the time of the injury,[11] at least where the other evidence is conflicting.[12]

point shortly before the train reached the place of the accident).

Where it appeared that the deceased was killed at a crossing by a wild engine running at a high rate of speed, the testimony of a witness as to the management and speed of the engine at a crossing three-fourths of a mile from where the accident happened, was held properly admitted as tending to show its management and speed at the place of the accident within a minute or so afterwards. Lyman *v.* Boston & M. R., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

7. At Other Stations on Same Trip. — Where the rate of speed of the train causing the injury was claimed to have been dangerous, it was held competent to show that at other stations the train had run at a dangerous rate of speed on the same journey. Galveston, H. & S. A. R. Co. *v.* Kutac, 76 Tex. 473, 13 S. W. 327. Compare *infra,* I, 13, E.

8. Whether such evidence should be excluded for remoteness of time or place is a question of fact for the trial court. State *v.* Boston & M. R., 58 N. H. 410; Nutter *v.* Boston & M. R. 60 N. H. 483.

9. In an action for killing plaintiff's intestate at a public crossing, the testimony of a witness that he had timed the speed of the same train many times before and since the accident between stations within a few miles of the crossing in question and that it frequently covered a certain number of miles in a given time was held properly admitted, as was also the testimony of another witness that a few days before the trial he had made observations as to the speed of the train in question and computed it at a certain rate per hour. Stone *v.* Boston & M. R., 72 N. H. 206, 55 Atl. 359.

10. Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103, 9 N. W. 575.

11. Nutter *v.* Boston & M. R., 60 N. H. 483. Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

12. Chicago, St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; McKerley *v.* Red River, T. & S. R. Co. (Tex. Civ. App.), 85 S. W. 499.

Where the speed of the train which injured the plaintiff is in issue and the evidence thereon conflicting, the plaintiff in support of other evidence as to its rate of speed may show what was the customary rate of speed at which the defendant's engines ran backwards over the same crossing in the same way as the engine in question and in the same direction for a considerable time prior to the accident. "There can be no doubt that proof of particular instances in which defendant's engines ran at a given speed, or that they had occasionally run at a given speed, would not have been admissible, for from such detached cases no inference whatever could be drawn as to the speed of the engine in this instance. But, where the evidence is conflicting as to the speed in a particular instance, proof of the customary or habitual speed at which the engines of defendant ran under like circumstances, may be given, to show that the evidence for plaintiff, or for defendant, is the more probable. It could be given only in support of other evidence of the speed in the particular case. It does not differ materially, in principle, from proof of a rule or regulation of the defendant, fixing the rate of speed for its engineers in such cases. Such

e. *Contract With Town.* — Where a railroad contracts with a town not to run its trains through the streets above a certain rate of speed, a breach of the contract is some evidence of negligence in an action for damages for personal injuries caused by a train exceeding such speed limit.[13]

D. SIGNALS. — a. *Generally.* — Evidence that no signal was given by the train as it approached the crossing is competent, although there was no statute or ordinance requiring signals to be given.[14]

b. *Rebuttal.* — The defendant may show in rebuttal that an ordinance prohibited the giving of such signals within the city limits.[15]

c. *Effect of Failure to Give.* — The mere fact that no signal was

a rule or regulation would not be independent evidence that, in any particular instance, an engine was running at a prescribed rate; but it would be proper, as against the defendant, at any rate, in support of other evidence that the engine was going at that rate." Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103, 9 N. W. 575.

In Red River T. & S. R. Co. *v.* McKerley (Tex.), 86 S. W. 921, the supreme court, in determining whether it had jurisdiction of an appeal from the court of civil appeals on the alleged ground that the latter in McKerley *v.* Red River, T. & S. R. Co. (Tex. Civ. App.), 85 S. W. 499, had overruled its previous decision in Houston & T. C. R. Co. *v.* Jones, 16 Tex. Civ. App. 179, 40 S. W. 745, held that the two cases were distinguishable and not conflicting, on the ground that the admissibility of the customary rate of speed of the defendant's train past the place of the accident to show its speed at the time thereof, there being no other evidence as to its rate of speed at that time, presented a different question from its admissibility when there was other conflicting evidence upon the same question. But the court expressly declined to pass upon the correctness of the ruling in either case.

Contra. — Evidence as to the usual rate of speed of the defendant's trains at the crossing where the accident occurred is not admissible upon the issue whether or not the train in question was being run at a negligent rate of speed; nor is it made competent by the testimony of a witness that he thought the train was going at about the usual rate of speed. Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, 18 Atl. 619, 17 Am. St. Rep. 775.

13. The contract is "similar to an ordinance, in purpose and legal effect at least, in civil actions." Duval *v.* Atlantic Coast Line R. Co., 134 N. C. 331, 46 S. E. 750, 101 Am. St. Rep. 830, 65 L. R. A. 722.

14. Such fact constitutes part of the *res gestae* and bears on the question of contributory negligence. Covell *v.* Wabash R. Co., 82 Mo. App. 180; Harrington *v.* Erie R. Co., 79 App. Div. 26, 79 N. Y. Supp. 930. See also Spires *v.* South Bound R. Co., 47 S. C. 28, 24 S. E. 992.

Notwithstanding the Previous Repeal of a statute requiring the sounding of a whistle or the ringing of a bell when a train is approaching a crossing, it was held competent to show that in the case in question no such signals were given. Friess *v.* New York Cent. & H. R. R. Co., 67 Hun 205, 22 N. Y. Supp. 104, judgment *affirmed* 140 N. Y. 639, 35 N. E. 892.

But such evidence is not competent where it appears that the failure had no bearing upon the accident. Ohio Val. R. Co. *v.* Young, 19 Ky. L. Rep. 158, 39 S. W. 415.

15. Where the plaintiff, injured by a collision with defendant's train at a street crossing, alleged and proved the failure of the defendant's servants to sound the whistle and ring the bell of the engine when approaching the crossing, it was held competent for the defendant to show an ordinance of the city council prohibiting the sounding of whistles and

given by the train, in the absence of statute or ordinance requiring it, does not shift to the defendant the burden of showing that such failure was not negligence.[16]

E. Precautions At Other Crossings. — Evidence that certain precautions are taken at some crossings is not competent to show negligence in failing to take similar precautions at another crossing.[17]

F. Flagman or Gatekeeper. — The plaintiff may show that no flagman was present at the time of the accident,[18] or that the defendant maintained no flagman at the crossing in question, even though no law requires a flagman to be placed at that particular crossing.[19] And an allegation of this fact is unnecessary where it does not constitute negligence *per se*.[20] And though a flagman

ringing of bells on engines while passing through the city. Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 36 Am. Rep. 188.

16. Kelsey *v.* Jewett, 28 Hun (N. Y.) 51.

17. The fact that a railroad company maintains electric signals at some highway crossings has no tendency to show that it was negligent in not maintaining such signals at a particular highway crossing, and such evidence is therefore collateral to the issue. McGovern *v.* Smith, 73 Vt. 52, 50 Atl. 549.

But Evidence That the Train on the Same Trip Gave no Signals at a near-by crossing is admissible; thus upon the issue of whether the train gave any signals as it approached the crossing where the accident occurred, evidence that no signals were given at a similar crossing three miles distant was held properly admitted. Bower *v.* Chicago, M. & St. P. R. Co., 61 Wis. 457, 21 N. W. 536. Compare *supra* I, 13, C, b.

18. Chicago, B. & Q. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708.

In an action for injuries received while attempting to pass between cars unlawfully blocking a street, evidence that no flagman was present at the time of the accident was held admissible to show negligence on the part of the defendant. Schmitz *v.* St. Louis, I. M. & S. R. Co., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250.

Where the injury was caused by backing a freight train over a crossing on a dark night, the fact that no flagman was stationed at the crossing was held a proper circumstance for the consideration of the jury. Union Pac. R. Co. *v.* Henry, 36 Kan. 565, 14 Pac. 1.

19. Reid *v.* New York, N. H. & H. R. R. Co., 63 Hun 630, 17 N. Y. Supp. 801; Friess *v.* New York Cent. & H. R. R. Co., 67 Hun 205, 22 N. Y. Supp. 104; Houghkirk *v.* Canal Co., 92 N. Y. 219, 44 Am. Rep. 370; Harrington *v.* Erie R. Co., 79 App. Div. 26, 79 N. Y. Supp. 930; Chicago R. I. & P. R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356; English *v.* Southern Pac. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155; Chicago & E. I. R. Co. *v.* Johnson, 61 Ill. App. 464.

Even in the absence of any statute or ordinance on the subject the presence or absence of a flagman at the crossing where the accident occurred may be shown in connection with other facts and circumstances on the question of the defendant's negligence. "This is nothing more than to allow proof of the actual condition of things at the time." Hoye *v.* Chicago & N. W. R. Co., 67 Wis. 1, 29 N. W. 646. To the same effect Abbot *v.* Dwinnell, 74 Wis. 514, 43 N. W. 496; Carrow *v.* Barre R. Co., 74 Vt. 176, 52 Atl. 537.

20. An allegation that no flagman was maintained at the crossing is unnecessary to render evidence of this fact competent where the maintenance of such a flagman is not required by any statute or ordinance, since in such case it would not be negligence *per se*. Lesan *v.* Maine Cent. R. Co., 77 Me. 85.

is kept at the crossing it is competent to show that he was neglecting his duty at the time.[21] But evidence of his misconduct on previous occasions is not admissible.[22] Nor is evidence of his incompetency relevant on the question of his alleged negligent operation of the gates.[23] The defendant may rebut a claim of incompetency and intemperance by showing that the flagman was careful and temperate.[24] The fact that, many years before, the defendant, at the request of the authorities had maintained a flagman at the crossing, or that the defendant's predecessor had represented that one was necessary, has no bearing on the conditions and necessities at the time of the accident;[25] nor is it competent to show an official expression of opinion by the public authorities that no flagman was necessary.[26]

G. GATES — The fact that no gates were maintained at the street crossing may be shown,[27] or that the gates were not closed when

Where the negligence alleged was in the management, direction and running of the locomotive, it was held that the plaintiff might show the absence of a flagman and safety gates at the crossing where the accident occurred. "It was not necessary to aver in the declaration all the facts and circumstances by which he expected to show the negligence charged. Without averring it, he had the right to show, if he could, that the whistle was not blown, nor the bell rung; that no lookout was kept; that the track was obstructed; that the locomotive was running very rapidly; the absence of a gateman or safety gates—or any other fact or circumstance which tended to show that the defendant was negligent in the running of its locomotive at that particular time and place, as to travelers." Atlantic & D. R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

21. The plaintiff may show that the gatekeeper at the crossing where the accident occurred was asleep two and a half hours previous to the accident, as tending to show that he was asleep at the time it occurred. Baltimore & P. R. Co. *v.* Carrington, 3 App. D. C. 101, *citing* Warner *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 299, as holding that in an analogous case evidence that the flagman had been drinking some time before the accident was admissible.

Where the plaintiff claimed that the flagman at the crossing where the accident happened was in his shanty at the time, he was held properly permitted to show that the flagman was lame. Tucker *v.* New York Cent. & H. R. R. Co., 11 N. Y. Supp. 692, judgment *reversed* 124 N. Y. 308, 26 N. E. 916.

22. In an action against a railroad company for damages caused by a collision at a crossing, evidence of the intoxication on previous occasions of the flagman stationed there was held immaterial. Warner *v.* New York Cent. R. Co., 44 N. Y. 465.

23. Evidence that the gatekeeper at the crossing where the accident happened was only sixteen years old is not material on the question of whether the gates were negligently operated; the competency of the gateman not being put in issue by the pleadings. Siracusa *v.* Atlantic City R. Co., 68 N. J. L. 446, 53 Atl. 547.

24. Gahagan *v.* Boston & L. R. Co., 1 Allen (Mass.) 187, 79 Am. Dec. 724.

25. Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227.

26. Shaw *v.* Boston & W. R. Corp., 8 Gray (Mass.) 45.

27. Atlantic & D. R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590. See also Chicago, R. I. & P. R. Co. *v.* Durand, 65 Kan. 380, 69 Pac. 356.

It is proper to show that there were no gates at the crossing, for the purpose of showing the physical condition and surroundings of the place where the accident occurred. Cleveland, C., C. & St. L. R. Co. *v.* Chinsky, 92 Ill. App. 50; Cohen *v.*

the injured person tried to cross at the time of the collision.[28]

H. Sign-Board. — The absence of a sign indicating a railroad crossing may be shown,[29] even though no ordinance or statute requires such a sign.[30]

I. State and Municipal Regulations. — a. *Generally.* — The violation of state and municipal regulations as to the speed of trains,[31] giving signals,[32] maintaining lookouts,[33] flagmen,[34] and lights[35] at crossings, may be shown upon the issue of negligence.

But a city ordinance is not admissible if the injury occurred outside the limits of the city[36] or those fixed by the ordinance itself,[37]

Chicago & N. W. R. Co., 104 Ill. App. 314.

Although Not Required by Statute. — Evidence that the defendant maintained no gates or flagman at the crossing where the accident occurred is admissible where it appears that the crossing was located in the center of a populous city where traffic was crowded, although there was no statute requiring such precautions. English *v.* Southern Pac. Co., 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L. R. A. 155.

28. In an action for the killing of plaintiff's intestate at a railroad crossing, the testimony of a witness who passed over the crossing when one train was within 150 feet and another coming from the opposite direction was within a quarter of a mile from the crossing as to whether the gates were up or down at the time was held improperly excluded, as it tended to show whether the gates were up when the plaintiff's intestate passed over the crossing immediately afterward and was killed by one of the same trains. Overtom *v.* Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898.

29. Heddles *v.* Chicago & N. W. R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106, *citing,* as deciding the same point, Winstanley *v.* Chicago, M. & St. P. R. Co., 72 Wis. 375, 380, 39 N. W. 856.

The failure of the defendant company to have a sign-board at a public crossing as required by law establishes its negligence. Dodge *v.* Burlington, C. R. & M. R. Co., 34 Iowa 276.

30. Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103, 9 N. W. 575.

31. See *infra,* I, 13, 1, b.

32. See *infra,* I, 13, 1, c.

33. See *infra,* I, 13, 1, c.

34. McGrath *v.* New York Cent. & H. R. R. Co., 63 N. Y. 522.

Contra.—In an action for killing the plaintiff's intestate at a public crossing, an ordinance of the city in which the accident occurred requiring the defendant to maintain at all times a flagman at the crossing in question was held improperly admitted. "The matter was *res inter alios,* even if any proof had been offered of the legal existence of the municipality in question, or of its legislative authority to impose the regulation prescribed." West Jersey R. Co. *v.* Paulding, 58 N. J. L. 178, 33 Atl. 381.

35. An ordinance requiring defendant to maintain lights where its road crosses city streets is competent in an action for injuries received at such crossing. Missouri, K. & T. R. Co. *v.* Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589.

36. Where a railroad is the dividing line between a city and a township, an ordinance of the city requiring the railroad company to erect a safety gate on the township's side of a grade crossing is inadmissible in evidence in an accident case, even if the purpose of the offer of the ordinance is merely to show the dangerous character of the crossing. Burns *v.* Pennsylvania R. Co., 210 Pa. St. 90, 59 Atl. 687.

37. A city ordinance limiting the speed of trains within certain specified limits which do not include the place where the accident occurred, is not admissible. Calligan *v.* New York Cent. & H. R. R. Co., 59 N. Y. 651.

or where the ordinance was one which the city authorities had no legal power to enact.[38]

b. *Speed Laws.* — **(1.) Generally.** — As bearing upon the questions of negligence[39] and contributory negligence[40] it is competent to show that the train causing the injury was running faster than the maximum rate allowed by law. And in such case it is competent to show the city ordinance claimed to have been violated.[41] Such an ordinance need not be pleaded to be admissible,[42] except where its violation is held to be negligence *per se*.[43]

(2.) Probative Effect of Violation. — The violation of such a statute or ordinance raises a presumption of negligence,[44] which may, however, be overcome.[45]

38. Where the statute provides that no ordinance shall limit the speed of passenger trains to less than ten miles per hour, there is no presumption of negligence arising from the violation of an ordinance limiting the speed to five miles an hour where it appears that the train was running only eight miles per hour. Chicago B. & Q. R. Co. *v.* Dougherty, 12 Ill. App. 181.

39. Even though the ordinance prescribes only a penalty for a violation of its provisions. Beisiegel *v.* New York Cent. R. Co., 14 Abb. Pr. N. S. 29, 40 N. Y. 9, *overruling* Brown *v.* Buffalo & State Line R. Co., 22 N. Y. 191.

40. In an action for injuries caused by collision at a street crossing, the fact that defendants were running their train at an unlawful rate of speed is competent evidence on the question of the plaintiff's care. "It may have been reasonable for the plaintiff to act upon the belief that the defendants were aware of the speed law and would obey it." Nutter *v.* Boston & M. R., 60 N. H. 483.

41. Railway Co. *v.* Herrick, 49 Ohio St. 25, 29 N. E. 1052 St. Louis & S. E. R. Co. *v.* Mathias, 50 Ind. 65; Madison & I. R. Co. *v.* Taffe, 37 Ind. 361.

Although the Violation of a Municipal Speed Ordinance Is Not in Itself Negligence, such an ordinance is admissible in evidence as bearing upon the question of negligence. Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644. The violation of the ordinance, while not negligence *per se*, is a competent circumstance bearing upon the defendant's negligence and the plaintiff's contributory negligence. Meek *v.* Pennsylvania Co., 38 Ohio St. 632.

42. Oldenburg *v.* New York Cent. & H. R. R. Co., 9 N. Y. Supp. 419, judgment *affirmed* in 11 N. Y. Supp. 689, and 124 N. Y. 414, 26 N. E. 1021.

43. In some jurisdictions the violation of such an ordinance or statute is negligence *per se*, in others it is regarded merely as evidence of negligence.

44. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Chicago & E. I. R. Co. *v.* Argo, 82 Ill. App. 667; Chicago & A. R. Co. *v.* Smith, 77 Ill. App. 492; Chicago, B. & Q. R. Co. *v.* Gunderson, 74 Ill. App. 356; Augusta & S. R. Co. *v.* McElmurry, 24 Ga. 75. See also Wabash R. Co. *v.* Kamradt, 109 Ill. App. 203; Weller *v.* Chicago, M. & St. P. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592.

In an action by an employe of one of two intersecting railroads for injuries received in a collision between trains at the point of intersection, the negligence of the defendant is presumed from its failure to stop its train within the distance from the crossing required by law. Birmingham Mineral R. Co. *v.* Jacobs, 101 Ala. 149, 13 So. 408.

But this presumption which the statute raises does not change the rule as to proof of contributory negligence. Chicago & N. W. R. Co. *v.* Carpenter, 45 Ill. App. 294.

45. Illinois Cent. R. Co. *v.* Bartle, 94 Ill. App. 57; Chicago & N. W. R. Co. *v.* Jamieson, 112 Ill. App. 69.

(3.) Non-Enforcement. — The defendant cannot show that such an ordinance had never been enforced because its enforcement would have put the defendant to an unreasonable expense.[46]

c. *Signals and Lookouts.* — **(1.) Generally.** — The violation of an ordinance or statute requiring certain signals by whistle or bell, or both, to be given or requiring other precautions to be taken by trains approaching a crossing may be shown.[47] But evidence of a general statute upon this subject is properly excluded as unnecessary, since it is a matter for judicial notice and instructions by the court.[48]

(2.) Negative Testimony. — A witness who was in a position where he might have heard such signals had any been given may testify that he heard none[49] and that he would have heard them if any had been given,[50] or that there was nothing to prevent his hearing

Where a statute provides that when a train, locomotive or car is run through the incorporated limits of any city, town or village at a greater speed than is permitted by any ordinance of such city, town or village the railway company shall be liable for all damages done, and the injury shall be presumed to have been done by the negligence of the company or its agents; this presumption is not a conclusive one but may be overcome by evidence. Chicago & W. I. R. Co. *v.* Zerbe, 110 Ill. App. 171.

46. Where the accident occurred within the limits of a city and it appeared that the train was running faster than the speed allowed by ordinance, it was held no error to exclude evidence offered by the defendant for the purpose of showing that the ordinance had never been enforced at the place of the accident and that the officers of the law who were charged with its enforcement had recognized the right of the defendant to disregard it. "The testimony offered by plaintiff in error tending to show how trains were customarily operated at such places and the cost and practicability of operating them at such places in the manner required by said ordinances, and that the ordinances were unreasonable, was not admissible on the issue here considered." Gulf, C. & S. F. R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

47. Reed *v.* St. Louis, I. M. & S. R. Co., 107 Mo. App. 238, 80 S. W. 919; St. Louis & S. E. R. Co. *v.* Mathias, 50 Ind. 65.

It is competent to show that the whistle was not sounded when within eighty rods of the crossing as required by statute. Evans *v.* Concord R. Corp., 66 N. H. 194, 21 Atl. 105.

48. Louisville & N. R. Co. *v.* Smith, 107 Ky. 178, 53 S. W. 269.

49. Chicago & A. R. Co. *v.* Pulliam, 111 Ill. App. 305.

A witness may testify that he did not hear any signals given by the approaching train although he was three-quarters of a mile from the crossing at the time, and the day was a stormy one, where it appears that he had heard the whistle every day previously for some time from that point and that the wind which was blowing might have assisted him. Sanborn *v.* Detroit, B. C. & A. R. Co. 99, Mich. 1, 57 N. W. 1047.

The Testimony of Passengers on the train which killed the plaintiff's intestate that they did not hear a whistle sounded was held admissible although the witnesses were not listening at the time. Stone *v.* Boston & M. R., 72 N. H. 206, 55 Atl. 359.

50. Cleveland, C., C. & St. L. R. Co. *v.* Beard, 106 Ill. App. 486; Illinois Cent. R. Co. *v.* Slater, 139 Ill. 190, 28 N. E. 830, *following* Chicago & A. R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559.

them.[51] But such negative testimony is not ordinarily entitled to so much weight as positive testimony to the contrary.[52]

(3.) Effect of Violation. — The failure to give the statutory signals raises a presumption of negligence and throws upon the defendant the burden of showing that such failure was not negligent or was not the cause of the injury.[53] But the contrary has been held.[54]

51. Ensley R. Co. *v.* Chewning, 93 Ala. 24, 9 So. 458.

52. The testimony of the fireman and engineer that the whistle was blown and the bell rung as the train approached the crossing is ordinarily entitled to more weight than the negative testimony of other witnesses that they did not hear the whistle or bell rung. Griffith *v.* Baltimore & O. R. Co., 44 Fed. 574.

Where the plaintiff, whose intestate had been killed at a railroad crossing, claimed damages under the statute requiring the bell of the engine to be rung continuously or alternately with the sounding of the whistle for eighty rods before reaching the crossing, the testimony of two men working near the crossing, one of whom testified that he did not hear any bell, but immediately qualified his statement by saying that he never noticed anything at all about the bell at the time, and the other of whom testified that he did not hear any bell at the time of the accident, was held insufficient to sustain the plaintiff's burden of proof when opposed by the testimony of the fireman that he rang the bell continuously, and of the engineer that he gave several whistles. Hubbard *v.* Boston & A. R. Co., 159 Mass. 320, 34 N. E. 459.

53. Galena & C. U. R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Crumpley *v.* Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820; Barr *v.* Hannibal & St. J. R. Co., 30 Mo. App. 248; Weller *v.* Chicago, M. & St. P. R. Co., 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, Bishop *v.* Southern R. Co., 63 S. C. 532, 41 S. E. 808; Wakefield *v.* Connecticut & P. R. R. Co., 37 Vt. 330, 86 Am. Dec. 711.

In an action under § 809, Rev. Stat., where the negligence charged is failure to ring the bell or to sound the whistle in the manner required by the statute, the burden is on the plaintiff to show that both of these acts were not performed. If either is performed it is sufficient. Summerville *v.* Hannibal & St. J. R. Co., 29 Mo. App. 48.

Where a person has been killed or injured by a train at a railway crossing and the plaintiff has shown the failure to give the statutory signals, under the Massachusetts statute defendant's liability seems to be fixed and absolute unless it can show that the person killed or injured was guilty of gross or wilful negligence, and it has the burden of showing these facts. McDonald *v.* New York Cent. & H. R. R. Co., 186 Mass. 474, 72 N. E. 55; *citing* Rev. L. c. 11, § 268. To the same effect, Brusseau *v.* New York, N. H. & H. R. Co., 187 Mass. 84, 72 N. E. 348; Copley *v.* New Haven & N. Co., 136 Mass. 6.

Under the South Carolina Statute where it appears that the train inflicting the injuries upon the plaintiff or his intestate at a public crossing failed to give the statutory signals the burden of showing that such person knew of the approach of the train is on the defendant railroad. Nohrden *v.* Northeastern R. Co., 59 S. C. 87, 37 S. E. 228, 82 Am. St. Rep. 826, *distinguishing* Barber *v.* Richmond & D. R. Co., 34 S. C. 444.

The Burden is First Upon the Plaintiff to show the facts constituting the violation. Livermore *v.* Fitchburg R. Co., 163 Mass. 132, 39 N. E. 789; Culhane *v.* New York Cent. & H. R. R. Co., 67 Barb. (N. Y.) 562.

54. Under the Nebraska Statute requiring railroad companies to ring a bell or sound a whistle at a public crossing and making them liable for a penalty for damages sustained by reason of their failure to do so, the omission to give the signals required is not *prima facie* evidence of negligence. Chicago, B. & Q. R. Co. *v.*

15. Injuries to Persons On or Near the Track. — A. Nature and Surroundings of Scene of Injury. — As bearing upon the acts and conduct of the parties and the cause of the injury it is competent to show the nature and surroundings of the place of the injury.[55] But a witness cannot give his mere conclusion as to the danger[56] or difficulty[57] involved in crossing the track at that point.

B. Speed, Signals and Lookouts. — a. *Generally.* — In an action for injuries received by a person lawfully on or near the defendant's track the plaintiff may show that no signals were given of the approach of the train that caused the injury,[58] or that no lookout

Metcalf, 44 Neb. 848, 63 N. W. 51, 28 L. R. A. 824; Omaha & R. V. R. Co. *v.* Krayenbuhl, 48 Neb. 553, 67 N. W. 447; Missouri P. R. Co. *v.* Geist, 49 Neb. 489, 68 N. W. 640; Chicago, St. P., M. & O. R. Co. *v.* Brady, 51 Neb. 758, 71 N. W. 721. In the latter case Norval, J., says: "The writer is convinced that the better reason and decided weight of the authorities are against the rule adopted by this court in the above cases, but yields to the judgment of his associates so often reaffirmed."

55. See Cuming *v.* Brooklyn City R. Co., 52 Hun 613, 5 N. Y. Supp. 476; Bias *v.* Chesapeake & O. R. Co., 46 W. Va. 349, 33 S. E. 240.

Where the accident occurred in the switch-yards of the defendant stock-yards company during switching operations, it was held competent to show the location of certain buildings, tracks and cars at the place of the accident as tending to throw light on the acts and conduct of the parties. St. Louis Nat. Stock Yards *v.* Godfrey, 198 Ill. 288, 65 N. E. 90.

Where the plaintiff had been permitted to show the existence of a private crossing at the scene of the accident, the exclusion of evidence tending to show that such crossing was there before the railroad was made and also at the time of the trial was held proper. Robinson *v.* Fitchburg & W. R. Co. 7 Gray (Mass.) 92.

56. In an action for running over and killing plaintiff's intestate, a witness cannot state his conclusion drawn from facts testified to by him that at the place where the deceased attempted to cross the company's track there was less danger to a pedestrian than at a near-by crossing. Savannah F. & W. R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308.

57. Where one of the questions in issue was the difficulty of getting off defendant's track it was held error to permit a witness to state that there was no difficulty in getting off the track at that place, this being a question of fact for the jury. Remer *v.* Long Island R. Co., 48 Hun 352, 1 N. Y. Supp. 124.

58. Where it is alleged that plaintiff's intestate was killed while unloading a car on defendant's track by the sudden backing of other cars on an adjacent track, evidence that no signal was given of the sudden backing of such cars was held properly admitted as part of the *res gestae* and on the issue of negligence. Spotts *v.* Wabash W. R. Co., 111 Mo. 380, 20 S. W. 190, 33 Am. St. Rep. 531.

Where the Plaintiff Had Notice of the coming of the train, such evidence is immaterial. Skipton *v.* St. Joseph & G. I. R. Co., 82 Mo. App. 134.

In an action for killing a child sixteen months old where the plaintiff alleged gross negligence in the running of the train and the defense of contributory negligence was set up and the plaintiff further alleged that the statutory signals when approaching a crossing about a mile from the scene of the accident were not given, and that it was the custom of the child's mother when she heard the signals given at such crossing to look out upon the track to see if any of the children were in danger, it was held proper under these circumstances to admit evidence of the defendant's failure to ring the bell or blow the whistle at such crossing,

was maintained[59] But if the injured person was a trespasser it seems that such evidence is not admissible,[60] unless there is a claim of gross negligence,[61] or the trespasser was an infant of tender years.[62]

b. *Statutory and Municipal Regulations.* — **(1.) Generally.** — The violation of statutes or ordinances governing the management of the defendant's trains and the conduct of its servants under the circumstances in question, may be shown because it bears upon the question of the care that should have been exercised by both parties.[63]

(2.) Regulations for Crossings. — Although the injury was not inflicted at a crossing it is nevertheless competent to show that a municipal or statutory requirement as to the speed of trains or giv-

the testimony being proper on the question of the proximate cause of the injury. Mason *v.* Southern R. Co., 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913.

59. Clampit *v.* Chicago, St. P. & K. C. R. Co., 84 Iowa 71, 50 N. W. 673. See also Thomas *v.* Chicago M. & St. P. R. Co., 114 Iowa 169, 86 N. W. 259.

Where it appeared that the deceased was killed while attempting to cross defendant's tracks in the latter's yard and was not a trespasser because forced to go around the defendant's train which was standing on the crossing, it was held competent to show the conditions under which the accident occurred, including the absence of a lookout on the flat cars by which the deceased was killed. "We are not prepared to hold, as a matter of law, that under the circumstances in evidence here appellant had no reason for apprehending that persons might be on its right of way at or near this crossing in view of the alleged blockade, and that hence precautions, otherwise unnecessary, might not have become a duty. . . . The position of the deceased was, under the evidence, different from that of a mere implied licensee whom appellant might have owed no duty to protect or provide with safeguards." Chicago & A. R. Co. *v.* Mayer, 112 Ill. App. 149.

60. Louisville & N. R. Co. *v.* Hunt, 11 Ky. L. Rep. 825, 13 S. W. 275. See *infra* I, 14, E, a.

61. Where the plaintiff, an infant of twelve years, was injured while walking across a railroad bridge and the complaint charged that the defendant ran its train recklessly, evidence of the failure to ring the bell or blow the whistle before crossing the bridge was held properly admitted, although it was not the proximate cause of the injury. Young *v.* Clark, 16 Utah 42, 50 Pac. 832.

62. Evidence tending to show that the engineer running the train which killed plaintiff's intestate gave no signal or alarm by blowing the whistle after he saw the child on the track is admissible, notwithstanding the objection that such alarm would have increased the peril of a child two years old by stupefying it with terror, this being a question for the jury. Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

63. McMarshall *v.* Chicago, R. I. & P. R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445 (violation of speed ordinance).

The failure of the defendant to run its trains at the speed prescribed by law or to give the signals required by law is always a competent circumstance bearing upon both the defendant's negligence and the question of the deceased's or injured person's contributory negligence, since the latter has the right to assume that trains will be run in conformity with law. McDonald *v.* International & G. N. R. Co. (Tex. Civ. App.), 20 S. W. 847.

A City Ordinance of the city in which the accident occurred, limiting the speed of trains in the city to six miles an hour and requiring that the

ing of signals at crossings was not observed, if the accident happened at a point so near that the unlawful act has some bearing upon the conduct of the parties at the place of injury.[64] But otherwise such evidence is not competent;[65] and it has been held inadmissible under any circumstances because the statute was intended solely for the benefit of persons using the crossing.[66]

bell of a locomotive be rung continuously while moving a train, and that in backing a train a man should be stationed on the car farthest from the locomotive to give danger signals, is properly admitted. Kelly *v.* Union R. & Transit Co., 95 Mo. 279, 8 S. W. 420, in which the injury was to one of defendant's servants while in the proper performance of his duty.

Where the injury occurred within the limits of a city upon a trestle and not at a public crossing, it was held that a city ordinance limiting the speed of trains within the city limits was nevertheless admissible. Jones *v.* Charleston & W. C. R. Co., 65 S. C. 410, 43 S. E. 884.

Where it appears that the injury to plaintiff was caused by the action of the defendant's servants in uncoupling the rear car of a switching train while moving backward and "kicking" it upon the siding without a light, a city ordinance providing that railroad trains when backing shall have a conspicuous light in the rear car or engine, is admissible. Chicago & A. R. Co. *v.* O'Neil, 172 Ill. 527, 50 N. E. 216.

64. The Failure To Give the Statutory Signals when approaching a crossing may be shown, although the plaintiff when injured was not at the crossing but was lawfully on the track at a point where he could have heard the signals if they had been given. Galveston, H. & S. A. R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939. See also Railway Co. *v.* Gray, 65 Tex. 32; Central R. & B. Co. *v.* Raiford, 82 Ga. 400, 9 S. E. 169; Western & Atl. R. Co. *v.* Jones, 65 Ga. 631; Cahill *v.* Cincinnati, N. O. & T. P. R. Co., 92 Ky. 345, 18 S. W. 2. But see Boyd *v.* Cross (Tex. Civ. App.), 47 S. W. 478, and note 66, *infra*.

Speed Ordinance. — Where the deceased was killed while walking along the defendant's track at a point several hundred feet from a street crossing, it was held competent for the plaintiff to show a city ordinance regulating the speed of trains at crossings. "Although the injury in this case occurred at a considerable distance from the . . . crossing, the rate of speed with which the train passed that crossing and the ordinances above mentioned had some bearing on the question of negligence at the place where the deceased was struck, and were, therefore, properly admitted to go to the jury for what they were worth." Western & Atlantic R. *v.* Meigs, 74 Ga. 857.

65. Where the injuries to the plaintiff occurred in the defendant's switch-yard, evidence as to an ordinance regulating the running of locomotives at street crossings is not admissible. Blankenship *v.* Chesapeake & O. R. R. Co., 94 Va. 449, 27 S. E. 20.

66. In an Action for Injuries Received At a Private Crossing some 2000 feet from a public crossing, evidence of the failure of the train to give the statutory signal on its approach to the public crossing was held incompetent to show the defendant's negligence, and inadmissible upon the question of contributory negligence for the reason that contributory negligence was clearly established as a matter of law. The evidence would not be admissible upon the first ground because the statutory regulation was made for the benefit only of persons using the public crossing; and upon the latter question the court says: "If we say that it may be conceded, as it must be, that while railroad companies are bound to give signals at public crossings, no such duty is imposed upon them at private crossings, and at the same time declare that if they fail to give the signal at the former, and an accident happens at the latter, evi-

C. Use of Track By Others. — The degree of care required to be exercised by the defendant's servants toward persons on or near its track depends to some extent upon whether such persons are trespassers or rightfully there, and also whether the defendant could reasonably be expected to anticipate their presence at the place of the injury.[67] For these reasons it is competent to show that the people of that vicinity were in the habit of crossing[68] or walking (and that defendant's servants knew this) upon[69] or

dence of such failure is admissible for the purpose of excusing or extenuating the admitted gross contributory negligence of the plaintiff, we thereby practically nullify the latter part of the rule relating to private crossings, and impose upon the railroads the same degree of care, and require the same signals to be given whether the crossing be public or private, whenever the latter is in such close proximity to the former that the signal given for the former may be heard at the latter. In a word, we must either reverse our former decisions declaring that signals need not be given at private crossings, and require *all* crossings to be put on the same footing, or we must adhere to the established rule that signals are required only at public crossings." Philadelphia & B. C. R. Co. *v.* Holden, 93 Md. 417, 49 Atl. 625.

67. Where the defendant company knows that its right of way at a certain point is constantly used as a foot-way by the public, this fact requires of it a higher degree of care, regardless of the question whether the persons using it are trespassers or licensees. Blankenship *v.* Chesapeake & O. R. R. Co., 94 Va. 449, 27 S. E. 20.

68. Bradley *v.* Ohio River & C. R. Co., 126 N. C. 735, 36 S. E. 181.

In an action by a boy for personal injuries received while trespassing upon the tracks of the railroad company, it is competent to show that great crowds of people with the company's knowledge were accustomed to cross the tracks each day at about the time and place of the accident, such evidence being competent upon the question of whether the company's servants were grossly negligent in running trains by such place without a light. O'Conner *v.* Illinois Cent. R. Co., 77 Ill. App. 22.

In an Action for Injuries Received in the Defendant's Yards by the plaintiff while crossing the tracks, it was held competent to show the existence and use of a foot-path at the point of injury and that the defendant's servants and people generally used this foot-path with the defendant's knowledge. "Known public travel, whether licensed or unlicensed, across their tracks would affect the measure of the ordinary care required by them." Mitchell *v.* Boston & M. R., 68 N. H. 96, 115, 34 Atl. 674, in which it appeared that the plaintiff was injured while passing from a cattle-car where he had been to see some cattle for which he was negotiating.

69. Hoppe *v.* Chicago, M. & St. P. R. Co., 61 Wis. 357, 21 N. W. 227 (admissible as pertaining "to the *res gestae*"); Murphy *v.* Chicago, R. I. & P. R. Co., 38 Iowa 539; Eckert *v.* St. Louis, I. M. & S. R. Co., 13 Mo. App. 352 (on question of negligence); Wabash R. Co. *v.* Jones, 53 Ill. App. 125 (on question of defendant's negligence). See also Shaw *v.* Chicago & G. T. R. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308; Reid *v.* New York, N. H. & H. R. Co., 63 Hun 630, 17 N. Y. Supp. 801.

In an action for the killing of plaintiff's intestate while walking along the track at a point which was not a crossing, it was held competent for the plaintiff to show that the public had been constantly in the habit of walking along the defendant's track at and near the place where the killing occurred, the evidence being competent on the question of the negligence of the defendant's employes. Railroad engineers should observe more caution in running at places where they know persons are likely to be on the track than else-

under[70] the track at the point in question, since it tends to show either an implied license to use the track or at least notice to the defendant and its servants that someone might be on the track at that point, and also bears upon the alleged contributory negligence of the injured person.[71] It is not necessary to show facts amounting to an implied license.[72] In some jurisdictions, however, such evidence is not admissible,[73] especially where

where, even if these persons are trespassers, and especially is this true when the company has tacitly consented to this otherwise unauthorized use of its property by the public. Western & Atl. R. *v.* Meigs, 74 Ga. 857.

Evidence that a part of the defendant's railroad yard was used as a common passageway and playground by children was held admissible upon the question whether the defendant's servants exercised proper care in backing their engine over that locality, whereby the intestate, a two year old child, was killed. Lindsay *v.* Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513.

Although a Statute Makes it Unlawful for persons not connected with or employed upon a railroad to walk along its track except where it is laid upon public roads or streets, yet upon the question of whether a person injured while walking upon a railroad track was guilty of a want of ordinary care, it is error to reject evidence that many persons, men, women and children, had for years before the accident in question been in the habit of passing daily and hourly up and down the same pathway upon which the injured person was passing. Such evidence would tend to show a license or repel the inference of a want of ordinary care on the plaintiff's part, and also tend to show a lack of such care on the defendant's part as the facts require. Townley *v.* Chicago, M. & St. P. R. Co., 53 Wis. 626, 11 N. W. 55.

The amount of pedestrian travel along the track at the point where the plaintiff was injured while walking upon the track may be shown by the plaintiff. Whalen *v.* Chicago & N. W. R. Co., 75 Wis. 654, 44 N. W. 849.

Use of Trestle. — Where the plaintiff's intestate was killed while walking on defendant's trestle within the limits of the city, evidence that other persons used the track at that point was held properly admitted. Jones *v.* Charleston & W. C. R. Co., 65 S. C. 410, 43 S. E. 884.

70. Where it appeared that the plaintiff, a child of eight years, was injured upon defendant's right of way while either playing or picking up chips under an elevated railway structure in process of construction, evidence tending to show that boys at other times went under the structure to pick up chips was held properly admitted as tending to show what notice the workmen had of the presence of the boys and the extent of the care required by the workmen to guard against wantonly inflicting injury upon them. Evidence relating to the entire situation properly regulated by instructions of law was admissible. Northwestern Elev. R. Co. *v.* O'Malley, 107 Ill. App. 599.

71. Bradley *v.* Ohio River & C. R. Co., 126 N. C. 735, 36 S. E. 181; Townley *v.* Chicago, M. & St. P. R. Co., 53 Wis. 626, 11 N. W. 55.

72. Where the plaintiff's intestate was killed while walking upon the defendant's track, it was held competent to show that the track at this point was used as a foot-way with the defendant's acquiescence. The testimony while insufficient to establish any legal right to use the track at that point "was admissible for what it was worth on the issue raised in the pleadings, whether persons were accustomed to use the track as a walkway with the consent or acquiescence of the defendant, and for the purpose of showing the circumstances which called for the exercise of care on the part of the defendant." Jones *v.* Charleston & W. C. R. Co., 61 S. C. 556, 39 S. E. 758.

73. Carrington *v.* Louisville & N. R. Co., 88 Ala. 472, 6 So. 910; Glass

the evidence is of a custom of crossing and the injured person was walking along the track at the time of the injury,[74] or unlawfully upon a freight-car.[75] Nor is such evidence material where the use of the track is conceded to have been proper.[76]

D. Use of Cars By Others. — Where the injured person was killed while unlawfully riding between two freight-cars, evidence

v. Memphis & C. R. Co., 94 Ala. 581, 10 So. 215 (custom or habit of other persons living in the vicinity to walk upon the track at the same point); Dilas *v.* Chesapeake & O. R. Co., 24 Ky. L. Rep. 1347, 71 S. W. 492.

Where it appears that the deceased was killed while walking along the defendant's track in a cut, evidence that this portion of the track had been used by the public as a public passway, and that the defendant's depot agent knew of such use and no objection was ever made thereto by posting a sign or otherwise forbidding such use, was held improperly admitted, there being nothing to show that such use was authorized by the defendant. Hoskins *v.* Louisville & N. R. Co., 17 Ky. L. Rep. 78, 30 S. W. 643.

Since railroad companies cannot in the absence of statutory provisions prevent the use of their tracks by pedestrians, evidence of a custom on the part of pedestrians to walk on the track is not admissible as evidence against the company in an action to recover damages for the death of a person who was killed while on the track. Such fact would not impose upon the defendant any greater burden of care at the place of the accident. Memphis & C. R. Co. *v.* Womack, 84 Ala. 149, 4 So. 618. But see Savannah & W. R. Co. *v.* Meadors, 95 Ala. 137, 10 So. 141, when the accident occurs in a thickly populated district.

Railroad Unlawfully in Street. Where the plaintiff was injured while walking across defendant's trestlework over a creek and a city street which had been platted but not graded or improved, it was held no error to exclude evidence offered by the plaintiff as to the custom of foot-passengers to cross over the same trestlework, although it appeared that this was the only way of crossing the stream at that point and the trestlework was wholly within the bounds of two intersecting streets, regardless of whether the public authorities had consented to the construction of the embankment and trestlework. "Counsel for plaintiff contends that, as the bridge lay wholly within two of the streets . . . which cross each other at the point where the bridge crosses the creek, and as a street belongs to the public from the center of the earth to the heavens above, persons had the right to climb up the embankment, and to use the trestlework as a public street of the city. Not so. The embankment and trestlework were the property of the railway company. They were used for the purposes of the company in operating its cars and trains, and so built and constructed as to render any travel thereon perilous, even without the operation of cars upon the track. Whether the authorities consented to the construction of such embankment and trestlework, is immaterial at this time. The railway company was in full occupation of it, and the public had no right to cross over such a dangerous structure, and knowing it to be unsafe for travel, to claim exemption from all negligence on their part, and charge the railway company with the fruits of their own imprudence." Mason *v.* Missouri Pac. R. Co., 27 Kan. 83, 41 Am. Rep. 405.

74. An implied license to cross the track would not show a license to walk along it. Carrington *v.* Louisville & N. R. Co., 88 Ala. 472, 6 So. 910.

75. Louisville & N. R. Co. *v.* Hunt, 11 Ky. L. Rep. 825, 13 S. W. 275.

76. Cole *v.* New York, N. H. & H. R. R. Co., 174 Mass. 537, 55 N. E. 1044.

of a custom for other persons to ride in the caboose is not admissible.[77]

E. Trespassers. — a. *Generally.* — As bearing upon the degree of care required of the defendant it is competent to show whether a person injured upon its track was a trespasser,[78] and for this purpose relevant facts and circumstances are admissible.[79]

b. *Authority To Eject Trespassers.* — There is no presumption that a brakeman has the authority or that it is his duty to forcibly eject trespassers from the train on which he is working.[80] Nor is this question one upon which opinion evidence is proper.[81] An engineer, however, is presumed to have authority to keep trespassers off the engine.[82]

F. Injuries From Being Struck By Mail-Bag. — Where the plaintiff's injuries were due to his being struck by a mail-bag thrown from the defendant's train it is competent to show facts

77. Feeback *v.* Missouri Pac. R. Co., 167 Mo. 206, 66 S. W. 965.

78. Murphy *v.* Chicago, R. I. & P. R. Co., 38 Iowa 539.

79. See Cederson *v.* Oregon, R. & N. Co., 38 Or. 343, 62 Pac. 637, 63 Pac. 763.

Where the principal controversy in an action to recover for the death of a boy is whether the deceased was a trespasser on the tracks or was crossing the tracks to take passage on a train then about due, it is not error to permit the boy's father to testify that he had given his son a nickel to pay his fare home a half hour before the happening of the accident, and that a nickel was all the money found in his possession after the accident. Chicago & E. I. R. Co. *v.* Huston, 196 Ill. 480, 63 N. E. 1028.

Where the plaintiff at the time he was injured was repairing one of the defendant's cars loaded with plaintiff's corn, in accordance with a local custom or rule of the company requiring shippers to repair leaks in the cars before the railway company accepted the same for shipment, it was held proper for the plaintiff to show the existence of such a rule as evidence that he was not a mere trespasser or licensee while engaged in such work. Chicago & A. R. Co. *v.* Pettit, 111 Ill. App. 172.

80. The burden rests upon the injured trespasser to show that the brakeman in ejecting him from the train inflicting the injury possessed the authority to do the act resulting in such injury. Chicago, R. I. & P. R. Co. *v* Brackman, 78 Ill. App. 141.

81. The duty of a brakeman to remove trespassers is not presumed but must be proved and cannot be shown by the opinion of witnesses. "A brakeman should not be asked whether certain acts were in the line of his duty, for that would probably call for his conclusion instead of a statement of facts. . . . But he could properly be asked what he was directed to do in respect to the matter of inquiry. . . . It could be shown how long he had been engaged in performing certain acts so as to test the question whether he was so engaged with the knowledge and approval of his employers. And it could be shown, directly, that he had performed such acts with the knowledge of his superiors. It is difficult to state in advance just what questions would be proper in cases of this nature, but the thing to avoid is that of calling for the opinion of the witness." Krueger *v.* Chicago & A. R. Co., 84 Mo. App. 358; *citing* to the first proposition Farber *v.* Missouri Pac. R. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350.

82. Placing an engineer in the management and control of an engine implies, in the absence of proof to the contrary, power to keep trespassers off from it, and in so doing the engineer must be presumed to

from which the defendant might reasonably have anticipated such an injury,[83] and that it had encouraged the presence of people where they were likely to be hit.[84]

G. Frightening Plaintiff's Horse. — a. *Generally.* — Where the plaintiff claims to have been injured by reason of his horse becoming frightened by escaping steam, by cars standing on or near the highway, or by the negligent management and operation of its engines and cars, he has the burden of showing the defendant's negligence.[85] It is competent to show how the engine in question was managed,[86] whether any signals of its approach were given,[87]

have been acting within the scope of his employment. Chicago, M. & St. P. R. Co. *v.* Doherty, 53 Ill. App. 282.

83. Where the plaintiff's injuries were alleged to have been caused by a mail-bag thrown from a passing train through a window of the defendant's depot, it was held competent for the plaintiff to show that for a considerable time previous the mail agent of the same train had in ejecting the mail-bag occasionally thrown it so that it struck upon the platform intended for passengers, at times struck the depot building and once or twice was known to go in the open door of the depot. "We think it not necessary that the plaintiff show that the mail bag had previously struck at this precise place. The test to be applied should be, were the previous acts such that, in common prudence, the defendant ought to have anticipated that such an accident was liable to happen?" But the fact that a person on the platform was hit by a mail-bag thirteen years previous was held too remote. Shaw *v.* Chicago & G. T. R. Co., 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308.

84. Where the injury was caused by the throwing of a mail-sack from a swiftly moving train and its striking the deceased, and it appeared that the mail-sacks were customarily thrown from the trains at the point in question and that the defendant through its servants and agents knew of this practice and also of the habit of people of coming to the platform along the street at this point when the trains were passing, it was held competent to show that the defendant permitted its trainboys to sell daily papers upon the platform in question, where the people came to buy them, but it was held improper to permit evidence that a person had been struck by a mail-sack some two years before while on the ground a rod and a half from where the accident occurred. Ohio & M. R. Co. *v.* Simms, 43 Ill. App. 260.

85. Richmond & D. R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946.

Where the plaintiff claims that his injuries were due to the frightening of his horse by the noises made by defendant's locomotive the burden is upon him to show that such noises were unnecessary to a skilful operation of the engine if they were incident to its operation. Louisville & N. R. Co. *v.* Lee, 136 Ala. 182, 33 So. 897, 96 Am. St. Rep. 24.

86. Briggs *v.* St. Louis & S. F. R. Co., 111 Mo. 168, 20 S. W. 32.

87. Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554.

Failure To Give Statutory Signals for Crossings. — Where the plaintiff was injured while approaching a railway crossing by reason of his horse becoming frightened at the defendant's train, which he alleged had failed to give any signals of its approach, it was held error to exclude evidence offered by him to show that there was no flagman at the crossing, that no flag was shown, no bell rung or whistle sounded to indicate the approach of the train; that there was a flag-station there and that a flagman was customarily stationed there; that on the day previous the plaintiff had been warned by a flagman of the approach of a train and had alighted and held his horse while the train passed; that if any signals had been given he could have taken proper precautions.

whether the view was obstructed,[88] and that the defendant had been notified of the danger to travelers from the cause in question.[89] A witness cannot give his opinion as to whether the noise made was unreasonable,[90] nor can the custom of other railroads be shown by the defendant.[91] The plaintiff may show that the horse was a gentle one,[92] but evidence that the sound of escaping steam could have been deadened by the use of a muffler, an appliance in general use on railroads, is not competent.[93]

b. *Effect on Other Horses.* — As evidence of the natural tendency of the cars, the steam or the noise to frighten his horse, it is competent for the plaintiff to show the effect which the same or similar cause has had upon other horses under similar circumstances.[94] Such evidence is also competent to show notice to the defendant of

The defendant's objection to this evidence was that the statute requiring signals to be given at highway crossings was for protection from actual collision only and not from the frightening of horses, and that it included signals which the defendant was not required by law to give. The court held that the statute was intended to protect travelers from any danger incident to the passage of trains, and that the mere compliance with the statutory requirements did not excuse the defendant from taking other reasonably necessary precaution when approaching crossings. Norton *v.* Eastern R. Co., 113 Mass. 366, *distinguishing* Flint *v.* Norwich & W. R. Co., 110 Mass. 222.

88. Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554; Texas & N. O. R. Co. *v.* Syfan (Tex. Civ. App.), 43 S. W. 551.

89. Gordon *v.* Boston & Maine R., 58 N. H. 396.

90. Hill *v.* Portland & Rochester R. Co., 55 Me. 438, 92 Am. Dec. 601.

91. Hill *v.* Portland & Rochester R. Co., 55 Me. 438, 92 Am. Dec. 601.

92. Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82, 28 N. E. 551.

93. The defendant is under no obligation to provide its engines with every possible contrivance of such nature. It is required only to exercise ordinary care towards persons near its track who are not passengers. Duvall *v.* Baltimore & O. R. Co., 73 Md. 516, 21 Atl. 496.

94. Hill *v.* Portland & Rochester R. Co., 56 Me. 438, 92 Am. Dec. 601 (whistle of locomotive—effect on other horses at same time and place, and also usual effect on ordinary horses); Gordon *v.* Boston & M. R., 58 N. H. 396 (escaping steam at same point in highway).

Standing Cars. — Where the plaintiff's injuries are alleged to have been caused by his horse becoming frightened at a car standing upon the side-track, evidence that another horse had become frightened at the same car on a previous occasion was held competent to show that the car was calculated to frighten horses, and negligence in permitting it to remain at that place. Harrell *v.* Albemarle & Raleigh R. Co., 110 N. C. 215, 14 S. E. 687.

In an action for injuries caused by the frightening of plaintiff's horse by defendant's train, the testimony of a witness that he met the plaintiff at about the center of the railroad track, and that as their horses' heads came together both of them shied at the same time from the caboose which was standing partly on the crossing, was held properly admitted; the act of the witness' horse, being contemporaneous with that of the plaintiff's at the same place, was a part of the transaction. The general rule is that as evidence of the natural tendency of the object to frighten horses of ordinary gentleness it is competent to show that other horses of the same character have been frightened at the same object, and the force of this rule is not destroyed by the fact that one horse was going in a different direction from the

the possible danger to travelers.[95] It must appear, however, that the cause was the same in the two cases.[96] A witness qualified by proper experience and observation may testify directly as to how horses act under the circumstances in question.[97]

H. Injuries From Defective Crossing. — a. *Generally.* There is no presumption of negligence on the part of the railway company merely because the injury occurred at a railroad crossing which the company was bound to keep in repair.[98] But a *prima facie* case is made by showing that the injury was caused by defects in the crossing.[99] The plaintiff, however, must show that it was the defendant's duty to repair the crossing.[1] It is competent in such an action to show whether the highway is a public one[2] or whether the crossing is one which the defendant is maintaining.[3]

other. No objection was made that the character of the witness' horse was not shown. International & G. N. R. Co. *v.* Mercer (Tex. Civ. App.), 78 S. W. 562.

Contra. — Cleveland, C. C. & I. R. Co. *v.* Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644, distinguishing the case of such evidence when competent to show notice.

95. Where one of the alleged causes of the injury was the blowing off of steam, thus frightening plaintiff's horses, the testimony of witnesses that other engines standing at the station frequently blew off steam and frightened horses, was held competent to show defendant's knowledge of that source of danger to travelers on the highway crossing. Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554.

96. Lewis *v.* Eastern R., 60 N. H. 187.

97. In an action for the killing of plaintiff's intestate at a street crossing, in which the liability of decedent's horse to take fright at the approaching train and become more frightened when it reached a point directly abreast of him was material on the question whether he exercised ordinary care, the testimony of a witness as to the behavior of horses when in near proximity to a moving train of cars was held properly admitted, it appearing to be a statement of a fact within his personal knowledge derived from experience, rather than an expression of opinion. "In either aspect it was competent. For the purpose of proving the probable behavior of a horse under particular circumstances, the conduct of other horses in the same or a similar situation may be shown. . . . It cannot be presumed that all men are so familiar with the conduct of horses when in the vicinity of and in different relative positions from a moving train that they can derive no information on the subject from the opinion of a witness expert in the use and management of horses in such situations." Folsom *v.* Concord & M. R. Co., 68 N. H. 454, 38 Atl. 209.

98. Terre Haute & I. R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588.

99. See *v.* Wabash R. Co., 123 Iowa 443, 99 N. W. 106.

In an action for injuries caused by a defective board walk across defendant's road at a public crossing, evidence that the injury was caused by the defective walk makes a *prima facie* case of negligence, either in failing to make proper inspection or failing to repair defects which were discoverable by such inspection. Defendant's "want of knowledge of the deterioration of the sidewalk would be *prima facie* negligence." Wabash R. Co. *v.* DeHart, 32 Ind. App. 62, 65 N. E. 192.

1. Texas & N. O. R. Co. *v.* Dessommes (Tex.), 15 S. W. 806.

2. Nickerson *v.* New York, N. H. & H. R. R. Co., 178 Mass. 195, 59 N. E. 636. See article "Highways."

3. Where the plaintiff claimed to have been injured by reason of the

And evidence as to the character and condition of the crossing is admissible.[4] The defendant may show that the injury was due to other causes.[5] Facts showing either the plaintiff's[6] or the defendant's previous knowledge of the defect are competent.[7] Where the injury was caused by the plaintiff's foot catching between the main rail and a guard-rail a witness may properly testify whether the accident could have happened had the track been constructed in a specified manner,[8] and plaintiff may show how other guard-rails are constructed.[9]

b. *Subsequent Repairs* by the defendant company are not competent evidence of negligence[10] or of defective condition at the time of the accident,[11] though there are cases to the contrary.[12] Such evidence may, however, be admissible to show ownership or

defective condition of a farm crossing which the defendant claimed it had abandoned, it was held competent for the plaintiff upon the issue of abandonment to show the custom of the defendant and its instructions to its trackmen with regard to keeping farm crossings in repair, there being evidence that certain planking was maintained at the crossing in question apparently in accordance with the custom of the defendant in this respect. Stewart *v.* Cincinnati, W. & M. R. Co., 89 Mich. 315, 50 N. W. 852, 17 L. R. A. 539.

4. Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554.

Where it appeared that the deceased was thrown from his wagon while passing over the last of three tracks of the defendant at the highway crossing, evidence as to the condition of the second track over which he drove before reaching the third was held admissible as part of the *res gestae* and descriptive of the surroundings. Tetherow *v.* St. Joseph & D. M. R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

5. Where the plaintiff claimed that he was drawn under the train because his foot was caught in a defective plank on the defendant's track, defendant may show that plaintiff was standing by the track as the train was passing and slipped under the wheels on approaching nearer. Galveston, H. & S. A. R. Co. *v.* Washington, 94 Tex. 510, 63 S. W. 534.

6. Plaintiff's previous knowledge of its defective condition may be shown by the record of proceedings of the county commissioners relating to the repairing of the highway at this point taken at the instance of the plaintiff. Seybold *v.* Terre Haute & I. R. Co., 18 Ind. App. 367, 46 N. E. 1054.

7. The testimony of a surveyor that he had called the attention of defendant's station agent to the defect previous to the injury was held competent to show notice. Presby *v.* Grand Trunk R., 66 N. H. 615, 22 Atl. 554.

8. The plaintiff may properly ask a witness whether if the road-bed beneath the rails had been filled to within two inches of the top of the rail it would have been possible for the deceased's foot to be caught. Raper *v.* Wilmington & W. R. Co., 126 N. C. 563, 36 S. E. 115.

9. McKinney *v.* Long Island R. Co., 53 Hun 633, 6 N. Y. Supp. 168.

10. Terre Haute & I. R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588.

Payne *v.* Troy & B. R. Co., 9 Hun (N. Y.) 526. See fully articles "HIGHWAYS," Vol. VI, and "NEGLIGENCE," Vol. VIII.

11. See *v.* Wabash R. Co., 123 Iowa 443, 99 N. W. 106.

12. Kelly *v.* Southern Minn. R. Co., 28 Minn. 98, 9 N. W. 558. See article "NEGLIGENCE," Vol. VIII.

control over the premises,[13] and obligation to keep the same in repair.[14]

c. *Other Accidents* at the same[15] or a different[16] crossing have been held admissible under some circumstances and for certain purposes, but the relevancy of this class of evidence is elsewhere discussed.[17]

II. INJURIES TO ANIMALS ON OR NEAR TRACK.

1. Presumptions and Burden of Proof. — A. From Fact of Killing or Injury. — a. *Generally.* — Where live stock on or near a railroad track are injured by the operation of trains or locomotives, the fact of the injury or happening of the accident does not raise a presumption of the defendant railroad company's negligence,[18] but the burden of proof in this respect is upon the plain-

13. Skottowe *v.* Oregon, St. L. & U. N. R. Co., 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593.

14. Ohio & M. R. Co. *v.* Cox, 26 Ill. App. 491.

15. Phelps *v.* Winona, St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

Competent Only To Show Notice. Toledo, St. L. & K. C. R. Co. *v.* Milligan, 2 Ind. App. 578, 28 N. E. 1019.

Incompetent. — In an action for damages for injury to a horse by reason of the negligent and defective construction of a railroad crossing, evidence of a former and similar accident which happened to another horse at the same place was held incompetent. Hudson *v.* Chicago & N. W. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692.

16. Where the plaintiff's intestate was run over and killed while his foot was caught between a T-rail and a guard-rail at a crossing, it was held competent to show that at another crossing a similar construction was in use and that people had had their feet caught in it between the two rails. Raper *v.* Wilmington & W. R. Co., 126 N. C. 563, 36 S. E. 115.

17. See fully articles "Highways," Vol. VI, p. 496, and "Negligence," Vol. VIII.

18. *United States.* — Eddy *v.* Lafayette, 49 Fed. 798, 1 C. C. A. 432.

Colorado. — Denver & R. G. R. Co. *v.* Henderson, 10 Colo. 1, 13 Pac. 910.

Florida. — Savannah, F. & W. R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697.

Indiana. — Indianapolis & C. R. Co. *v.* Means, 14 Ind. 30.

Mississippi. — M. & O. R. Co. *v.* Hudson, 50 Miss. 572.

Missouri. — Warren *v.* Chicago, M. & St. P. R. Co., 59 Mo. App. 367; McKissock *v.* St. Louis, K. C. & N. R. Co., 73 Mo. 456.

Nebraska. — Burlington & M. R. Co. *v.* Wendt, 12 Neb. 76, 10 N. W. 456.

Nevada. — Walsh *v.* Virginia & T. R. Co., 8 Nev. 110.

New York. — Terry *v.* New York Cent. R. Co., 22 Barb. 574.

North Carolina. — Scott *v.* Wilmington & Raleigh R. Co., 49 N. C. 432; *distinguishing* Ellis *v.* Portsmouth & Roanoke R. Co., 24 N. C. 138.

Ohio. — Railroad Co. *v.* McMillan, 37 Ohio St. 554.

In an action for killing stock, the mere fact of the killing does not authorize a recovery but the plaintiff must show the negligence of the company in some way, "either by proof of the facts and circumstances attending the transaction, or by showing that the injury was done on a part of the road not enclosed by a lawful fence, or not on the crossing of a public highway — facts from which the law raises the inference of

tiff.[19] In some jurisdictions, however, the reverse is true.[20] And

negligence." Brown *v.* Hannibal & St. J. R. Co., 33 Mo. 309.

19. Bethje *v.* Houston & Cent. Texas R. Co., 26 Tex. 604; Grand Rapids & I. R. Co. *v.* Judson, 34 Mich. 506; St. Louis, V. & T. H. R. Co. *v.* Hurst, 25 Ill. App. 181; Galveston, H. & S. A. R. Co. *v.* Cassinelli & Co. (Tex. Civ. App.), 78 S. W. 247; Talbott *v.* West Virginia, C. & P. R. Co., 42 W. Va. 560, 26 S. E. 311; Maynard *v.* Norfolk & W. R. Co., 40 W. Va. 331, 21 S. E. 733. See also Comstock *v.* Des Moines Val. R. Co., 32 Iowa 376; Volkman *v.* Chicago, St. P., M. & O. R. Co., 5 Dak. 69, 37 N. W. 731.

Plaintiff must show that the animal was killed through the negligence of the defendant, and neither the fact that it was killed by the train, nor that the track was such as to afford a clear view for a considerable distance, nor that the train passed the spot at its usual speed, has any tendency to prove want of care on the part of the defendant. Locke *v.* First Division St. Paul & P. R. Co., 15 Minn. 350.

Where There Is No Statute Requiring a Railroad Company To Fence Its Tracks, the burden is upon the plaintiff to show that the company was negligent in killing stock upon its track. Gulf, C. & S. F. R. Co. *v.* Ellidge (Tex. Civ. App.), 28 S. W. 912; *citing* Bethje *v.* Railroad Co., 26 Tex. 604.

Wanton, Wilful or Gross Negligence must be shown according to some decisions. Chicago & M. R. Co. *v.* Patchin, 16 Ill. 198, 61 Am. Dec. 65; Georgia R. & Bkg. Co. *v.* Anderson, 33 Ga. 110; Knight *v.* New Orleans, O. & G. W. R. Co., 15 La. Ann. 105.

The Diligence of the Defendant's Employes is presumed. Campbell *v.* Receivers, 4 Hughes 170, 4 Fed. Cas. No. 2,367.

The presumption is that trainmen in charge of a train by which animals on the track were injured did their duty and endeavored to prevent the injury after becoming aware of the danger. Jewett *v.* Kansas City, C. & S. R. Co., 50 Mo. App. 547.

20. Georgia, S. & F. R. Co. *v.* Young Inv. Co., 119 Ga. 513, 46 S. E. 644; Danner *v.* South Carolina R. Co., 4 Rich. L. (S. C.) 329, 55 Am. Dec. 678 (*approved* in Walker *v.* Columbia & G. R. Co., 25 S. C. 141, which holds that the rule there laid down is not modified by statutes governing the fencing in of stock); Smith *v.* Eastern R., 35 N. H. 356. See also White *v.* Concord R., 30 N. H. 188; Georgia R. & Bkg. Co. *v.* Willis, 28 Ga. 317; Lantz *v.* St. Louis, K. C. & N. R. Co., 54 Mo. 228; Galpin *v.* Chicago & N. W. R. Co., 19 Wis. 604.

Where the killing of the plaintiff's ox by the defendant's train is conceded this makes a *prima facie* case for the plaintiff and places the burden upon the defendant of showing a compliance with the duties imposed by statute when an animal is seen upon the track. Chattanooga S. R. Co. *v.* Daniel, 122 Ala. 362, 25 So. 197.

Extends Only to Negligence Alleged. — The presumption of negligence arising from proof of injury to stock extends only to the negligence alleged in the petition, although other acts of negligence than those pleaded may be admissible in evidence under some circumstances. They cannot form the basis of a recovery. "If there can be no recovery for acts of negligence not alleged in the petition, it follows as a logical conclusion that there is no presumption of negligence against the company other than as to acts alleged by the petition to have been negligent." Central of Georgia R. Co. *v.* Weathers, 120 Ga. 475, 47 S. E. 956; Central of Georgia R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780.

Cause of Injury Must Be Shown. Where it appears that the injured animal fell to the side of defendant's track from a high bank and was not struck by a locomotive or car, there is no presumption of the defendant's negligence. "The law does not raise any presumption that a particular injury was inflicted by the

the general rule may be changed or affected by statutory requirements as to fencing, etc., hereinafter discussed.[21]

b. *Statutes.* — Statutes in some states either directly or indirectly make the killing or injuring of stock by a train *prima facie* evidence of the defendant company's negligence.[22]

running of the locomotives or cars of a railroad. It is only when the injury is satisfactorily shown that the presumption of law arises that such injury occurred by the fault or negligence of the agents of the company;" although the fact that the injury was inflicted by the defendant's cars or locomotive need not be shown by positive proof, yet the circumstances must be such as will afford a reasonable inference that the injury was so inflicted. Southern R. Co. *v.* McMillan, 101 Ga. 116, 28 S. E. 599.

21. See Comstock *v.* Des Moines Val. R. Co., 32 Iowa 376, and the sections of this article immediately following.

22. *Dakota.* — Volkman *v.* Chicago, St. P., M. & O. R. Co., 5 Dak. 69, 37 N. W. 731.

Florida. — Jacksonville, T. & K. W. R. Co. *v.* Garrison, 30 Fla. 567, 11 So. 926; Jacksonville, T. & K. W. R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

Kentucky. — Cincinnati, N. O. & T. P. R. Co. *v.* Burgess, 27 Ky. L. Rep. 252, 84 S. W. 760; Grundy *v.* Louisville & N. R. Co., 8 Ky. L. Rep. 689, 2 S. W. 899; Kentucky Union R. Co. *v.* Conner, 17 Ky. L. Rep. 426, 31 S. W. 467.

Maryland. — Northern Cent. R. Co. *v.* Ward, 63 Md. 362; Western Md. R. Co. *v.* Carter, 59 Md. 306 (§ 1, art. 77 of the Code).

Mississippi. — Mobile & O. R. Co. *v.* Dale, 61 Miss. 206.

South Dakota. — Sheldon *v.* Chicago, M. & St. P. R. Co., 6 S. D. 606, 62 N. W. 955.

An act making the killing of stock *prima facie* evidence of negligence creates no new liability but merely changes the order of proof, and uncontradicted evidence tending to show that the company was not negligent prevents a recovery. Huber *v.* Chicago, M. & St. P. R. Co., 6 Dak. 392, 43 N. W. 819.

Before the Statutory Presumption of Negligence Arises the plaintiff must show that the animal's death was caused by the defendant, its agents or servants (Mattoon *v.* Fremont, E. & M. V. R. Co., 6 S. D. 301, 60 N. W. 69); or that the killing was done by a train (Southern R. Co. *v.* Forsythe, 23 Ky. L. Rep. 942, 64 S. W. 506).

Marks of the animal on the track and the position of its remains may, without an eye-witness of the killing, make the "satisfactory proof" contemplated by a statute providing that where satisfactory proof has been made of injury to person or property by the running of the locomotives of a railway company it shall be *prima facie* evidence of negligence on the part of the railway company. Chicago, St. L. & N. O. R. Co. *v.* Packwood, 59 Miss. 280.

Alabama Statute. — Place of Injury. — Under the statutes of Alabama prior to the Code of 1896 the burden was placed upon the defendant to acquit itself of negligence in actions for injuries to stock by locomotives or cars without regard to the place where the injury occurred; but under that Code, § 3443, the burden of disproving negligence is upon the defendant only where the injury was inflicted within a quarter of a mile of a public road crossing, a crossing of two roads, a regular station or stopping-place, or in a village, town or city. Alabama, Gt. So. R. Co. *v.* Boyd, 124 Ala. 525, 27 So. 408. See Louisville & N. R. Co. *v.* Kelsey, 89 Ala. 287, 7 So. 648.

Under the Arkansas Statute, where stock are shown to have been killed by the operation of the railroad the burden is upon the defendant to show the exercise of due care. St. Louis, I. M. & S. R. Co. *v.* Vincent, 36 Ark. 451; Little Rock & Ft. S. R. Co. *v.* Finley, 37 Ark. 562; Little Rock & Ft. S. R. Co. *v.* Jones, 41 Ark. 157; St. Louis, I. M. & S. R.

Animals Under Control of a Person. — The fact that the injured animal is in charge of or under the control of the owner or some other person at the time of the injury does not change the statutory rule.[23]

c. *Rebuttal of Presumption.* — It has been held that the introduction of any uncontradicted evidence in rebuttal does not as a

Co. *v.* Hagan, 42 Ark. 122; Railway Co. *v.* Dick, 52 Ark. 402, 12 S. W. 785, 20 Am. St. Rep. 190; St. Louis & S. F. R. Co. *v.* Basham, 47 Ark. 321, 1 S. W. 555; Little Rock & Ft. S. R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55; Railway Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083; St. Louis, I. M. & S. R. Co. *v.* Bragg, 66 Ark. 248, 50 S. W. 273 (where the injured animal was run into a trestle by the defendant's train); St. Louis, I. M. & S. R. Co. *v.* Norton, 71 Ark. 314, 73 S. W. 1095. See Little Rock & Ft. S. R. Co. *v.* Wilson, 66 Ark. 414, 50 S. W. 995.

The fact that the engineer in charge of the train which killed the plaintiff's stock was exercising due care does not overcome the *prima facie* case of negligence where it appears that the injury may have been due to the negligence of the fireman. Railroad Co. *v.* Chriscoe, 57 Ark. 192, 27 S. W. 431.

Colorado Statute Held Unconstitutional, and the provisions respecting the burden of proof as to negligence therefore held to be of no force. Denver & R. G. R. Co. *v.* Thompson, 12 Colo. App. 1, 54 Pac. 402.

North Carolina Statute. — The killing of live stock by the engine or cars of a railroad company is *prima facie* evidence of such company's negligence. Clark *v.* Western N. C. R., 60 N. C. 109, 86 Am. Dec. 456; Wilson *v.* Norfolk & So. R. Co., 90 N. C. 69. The defendant must show that it used all proper precautions to guard against damage. Battle *v.* W. & W. R., 66 N. C. 343; Pippen *v.* Wilmington, C. & A. R. Co., 75 N. C. 54. But this presumption does not apply if the action is not brought within six months after the time of the injury; the burden in such case being upon the plaintiff to show negligence. Jones *v.* North Carolina R. Co., 67 N. C. 122. This presumption applies only where the facts attending the killing are unknown or uncertain, and when the facts are fully disclosed in evidence and it is shown that the defendant company adopted every precaution in its power to avert the injury the presumption is fully rebutted as a matter of law. Durham *v.* Wilmington & W. R. Co., 82 N. C. 352; Randall *v.* Richmond & D. R. Co., 104 N. C. 410, 10 S. E. 691.

§ 1169 of the Tennessee Code provides that in an action against a railroad company for injuring or killing stock the burden of proof is upon the company to show that the accident was unavoidable, and that the engineer, agent or employe of the company shall in no case be a witness for it. It is held that this statute imposes no new or additional duties on railroad companies over and above what the common law demands, and that on proof of the injury the burden is on the defendant to show that it was in the exercise of due care; and only the engineer, agent or employe engaged in the tortious act is excluded. Horne *v.* Memphis & O. R. Co., 1 Coldw. (Tenn.) 72. See also Memphis & C. R. Co. *v.* Smith, 9 Heisk. (Tenn.) 860.

23. The statutory presumption arising from proof of the killing of an animal by the defendant's train arises as well where the animal is in the control of a person or is hitched to a wagon or car as where it is straying at large when killed. Randall *v.* Richmond & D. R. Co., 104 N. C. 410, 10 S. E. 691.

In an action for killing plaintiff's mule while plaintiff was attempting to get him off the track, the statutory presumption of negligence from the fact of killing obtains. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913.

matter of law overcome the legal presumption of negligence arising from proof of the killing or injury in such cases,[24] especially where the evidence is improbable or inconsistent.[25] But uncontradicted evidence showing the absence of negligence on the part of the defendant overcomes the presumption as a matter of law.[26]

B. Speed of Train. — The fact that the train was running at an unlawful rate of speed at the time of the injury makes a *prima facie* case of the defendant's negligence,[27] and it has the burden of showing that the running of the train at such speed was not the

24. The presumption of negligence arising from proof of the killing of stock by the defendant's train is not overcome by any evidence to the contrary, but the defendant must offer evidence sufficient to show either due care on its part or unavoidable accident. Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52, in which the court gives a lengthy discussion of the reasons why the mere introduction of contrary evidence by the defendant should not overcome the presumption of negligence and throw the burden back upon the plaintiff. But see article "Presumptions," Vol. IX, p. 885 *et seq.*

25. Where the plaintiff relies solely upon the statutory presumption of negligence arising from proof of the killing on the defendant's track, the jury may find for the plaintiff on such presumption, although the defendant's engineer testifies that the killing was unavoidable, if his testimony is improbable or inconsistent. Railway Co. *v.* Chambliss, 54 Ark. 214, 15 S. W. 469.

26. Seaboard Air-Line R. *v.* Walthour, 117 Ga. 427, 43 S. E. 720; Western & A. R. Co. *v.* Robinson, 114 Ga. 159, 39 S. E. 950; Kentucky Cent. R. Co. *v.* Talbot, 78 Ky. 621; Volkman *v.* Chicago, St. P. M. & O. R. Co., 5 Dak. 69, 37 N. W. 731; Keilbach *v.* Chicago, M. & St. P. R. Co., 11 S. D. 468, 78 N. W. 951.

The presumption of negligence was held to be rebutted by the uncontradicted evidence of a witness for the plaintiff showing that the animal ran suddenly upon the track about fifteen feet in front of the locomotive, which was running down grade, and that in his opinion nothing which the engineer could have done would have prevented the accident. Georgia R. & Bkg. Co. *v.* Middlebrooks, 91 Ga. 76, 16 S. E. 989.

The statutory presumption of negligence arising from proof of the killing of the animal is entirely overcome by undisputed evidence that the train in question was at the time of the accident in good repair, and condition and was equipped with the best modern appliances and improvements in use, and was operated skilfully and with due care at the time. Hodgins *v.* Minneapolis & St. P. & S. Ste. M. R. Co., 3 N. D. 382, 56 N. W. 139.

The uncontradicted testimony of defendant's witnesses that the killing was unavoidable is sufficient to rebut the statutory presumption. Railway Co. *v.* Shoecraft, 53 Ark. 96, 13 S. W. 422. But proof that defendant could not have avoided the killing after it discovered that the animal was in danger does not of necessity overcome the presumption where it appears that the bell was not rung or the whistle blown as required by law (St. Louis, I. M. & S. R. Co. *v.* Hendricks, 53 Ark. 201, 13 S. W. 699); nor does evidence that all possible efforts were used to avoid a collision with stock upon the track, without specifying the usual appliances resorted to in such cases (K. C. S. & M. R. *v.* Summers, 45 Ark. 295).

27. Chicago & N. W. R. Co. *v.* Smedley, 65 Ill. App. 644; Cleveland, C. C. & St. L. R. Co. *v.* Ahrens & Son, 42 Ill. App. 434; Toledo, P. & W. R. Co. *v.* Deacon, 63 Ill. 91.

Burden on Plaintiff To Show Excessive Speed. — Where the plaintiff claims that the injury was inflicted while the train was exceeding the speed limit fixed by a municipal ordinance, the burden is upon

cause of the injury.[28] The mere fact, however, that the train causing the injury was running at a high rate of speed raises no presumption of negligence.[29]

C. Statutory Signals. — The failure to give the statutory signals on approaching the crossing where the accident occurred is held to be *prima facie* evidence of negligence[30] and the plaintiff need not show that the accident resulted from such failure.[31] This is the rule by statute in some states.[32]

D. Failure to Fence Track. — a. *Generally.* — Where a statute requires railroad companies to fence their track the failure to

him to show the excessive speed; and mere proof that the animal was killed on the defendant's track within the limits of such city does not raise the presumption that the train was running at the prohibited rate of speed. Chicago & A. R. Co. *v.* Engle, 58 Ill. 381.

28. Jones *v.* Illinois Cent. R. Co., 75 Miss. 970, 23 So. 358.

29. Wasson *v.* McCook, 70 Mo. App. 393 (although the accident occurred within the limits of a town and the train was running thirty-five or forty miles an hour).

Evidence of Speed Inadmissible. In an action for killing the plaintiff's mules which were upon the track in the defendant's depot grounds, it was held no error to exclude evidence as to the speed of the train and the omission to sound the whistle and ring the bell, since there was no statute restricting the rate of speed at such point and because signals are required for the protection of persons at public crossings, and because further the animals were trespassers and there was no evidence to show a want of reasonable care after their perilous situation became known. Mills & Le Clair Lumb. Co. *v.* Chicago, St. P. M. & O. R. Co., 94 Wis. 336, 68 N. W. 996.

30. Where the defendant's engineer failed to give the statutory signal on approaching a crossing, evidence as to whether from his place on the engine he could see the animals near the track as the engine approached and before they came upon the track when the engine was but forty feet away, was held immaterial, since the failure to give the statutory signal was presumptive evidence of negligence. Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661.

Where the Evidence as to Whether the Statutory Signals Were Given is Conflicting, the burden still remains upon the plaintiff to show the defendant's negligence. Texas & Pac. R. Co. *v.* Scrivener (Tex. Civ. App.), 49 S. W. 649.

Contra. — The court judicially knows that cattle on a highway approaching a railway crossing will sometimes be arrested or frightened back by the sight and sound of a coming train, and sometimes will not be by the whistling and ringing in addition. "The law raises no presumption as to the effect of the omission of these signals." St. Louis, V. & T. H. R. Co. *v.* Hurst, 25 Ill. App. 181. To the same effect Terre Haute & I. R. Co. *v.* Tuterwiler, 16 Ill. App. 197.

31. Orcutt *v.* Pacific Coast R. Co. 85 Cal. 291, 24 Pac. 661. But see Alexander *v.* Hannibal & St. J. R. Co., 76 Mo. 494.

32. Southern R. Co. *v.* Reaves, 129 Ala. 457, 29 So. 594 (Code §§ 3440 and 3443); Atterberry *v.* Wabash R. Co., 110 Mo. App. 608, 85 S. W. 114; Wasson *v.* McCook, 70 Mo. App. 393.

Proof that stock was killed at a crossing by a railroad train and that the bell was not rung or the whistle sounded for an interval of eighty rods from the crossing as required by statute makes out a *prima facie* case against the company without further evidence that its employes and servants were guilty of negligence. Howenstein *v.* Pacific R. Co., 55 Mo. 33.

comply with such a statute raises a presumption of negligence in an action for killing or injuring live stock at a point where the required fence was not maintained.[33] The plaintiff need not show that the injury was due to the absence of the fence,[34] or that he himself was not at fault.[35] But he must show that no fence or a defective one was maintained at that point,[36] unless the statute relieves him of this burden.[37] If the injury occurred where a fence

33. McCoy *v.* California Pac. R. Co., 40 Cal. 532, 6 Am. Rep. 623. See Quimby *v.* Vermont Cent. R. Co., 23 Vt. 387; Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965 (Code § 2055); Missouri Pac. R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. 49, *following* Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917; Illinois Cent. R. Co. *v.* Trowbridge, 31 Ill. App. 190.

Where it appears that the injured animal strayed onto the track through a defect in the fence which the defendant was required to maintain, this amounts to a *prima facie* case of negligence, throwing the burden upon the defendant to show its freedom from negligence. Daily *v.* Chicago, M. & St. P. R. Co., 121 Iowa 254, 96 N. W. 778.

By Statute In Washington the failure to maintain a proper fence is made *prima facie* evidence of negligence in actions for stock killed by collision with trains at such point, and such statute is constitutional. Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

34. Walther *v.* Pacific R. Co., 55 Mo. 271; Wood *v.* Kansas City, Ft. S. & M. R. Co., 43 Mo. App. 294.

If cattle are killed on a railroad track where the track passes through an enclosed field, at a point which is not a public crossing and where there was no fence, the presumption is, unless the circumstances in the case rebut it, that the cattle strayed onto the track on account of the absence of the fence. Fickle *v.* St. Louis, K. C. & N. R. Co., 54 Mo. 219; *citing* Aubuchon *v.* St. Louis & I. M. R. Co., 52 Mo. 522, *disapproving* Cecil *v.* Pacific R. Co., 47 Mo. 246.

Contra. — Where the statute makes railroad companies responsible for damages *occasioned* by their failure to fence their tracks as required, in an action under such statute the plaintiff must affirmatively show that the injury was caused by the lack of a proper fence. Lawrence *v.* Milwaukee, L. S. & N. R. Co., 42 Wis. 322.

35. Rogers *v.* Newburyport R. Co., 1 Allen (Mass.) 16; Stewart *v.* Burlington & M. R. Co., 32 Iowa 561.

36. Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917; Indianapolis, P. & C. R. Co. *v.* Lindley, 75 Ind. 426; Lake Erie & W. R. Co. *v.* Kneadle, 94 Ind. 454; Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197; Indianapolis & C. R. Co. *v.* Means, 14 Ind. 30.

If the place at which the animals entered was one which the company was required to keep fenced and was a place capable of being fenced, the inference would be that the company had done its duty in regard to fencing the road. Louisville, N. A. & C. R. Co. *v.* Quade, 91 Ind. 295.

To make a case under §§ 2612 and 2613 Rev. Stats. 1889, the plaintiff must show that the animal went upon the railroad's right of way where the same was not enclosed by a lawful fence. Yeager *v.* Chicago, B. & Q. R. Co., 61 Mo. App. 594.

In an action for injury to stock alleged to have entered upon the defendant's right of way through a defective fence, the burden is upon the plaintiff to show that the fence did not conform to the requirements of the law. Seidel *v.* Quincy, O. & K. C. R. Co., 109 Mo. App. 160, 83 S W. 77.

By Statute In New York "When the sufficiency of a fence shall come in question in any suit, it shall be presumed to have been sufficient until the contrary be established." Leyden *v.* New York Cent. & H. R. R. Co., 55 Hun 114, 8 N. Y. Supp. 187.

37. In an action for the value of

either could not be maintained[38] or is not required to be erected,[39] the plaintiff must show the defendant's negligence.

b. *Necessity of Fence or Excuse for Failure To Erect.* — Who has the burden of proof as to the necessity for a fence at the place of the accident depends somewhat upon the nature and form of the statute. Under a general statute, however, requiring railway tracks to be fenced the defendant must show that the law did not require the track at that point to be fenced;[40] or establish some other legal excuse for his failure to erect a fence or properly maintain it;[41] as that the defect was due to the act of the plaintiff or some

stock alleged to have been killed on a railroad track because of the lack of a fence, the burden is on the defendant company to prove that it had a sufficient fence, since the statute makes the fact of injury in such cases *prima facie* evidence of the company's negligence. Brentner *v.* Chicago, M. & St. P. R. Co., 68 Iowa 530, 23 N. W. 245. But see Comstock *v.* Des Moines Val. R. Co., 32 Iowa 376.

Under a statute making railway companies liable for all stock killed on their tracks unless they have fenced their roads, in which event they shall be liable only for the failure to exercise ordinary care, the burden is on the defendant railway company to show that its road was fenced. Texas Cent. R. Co. *v.* Childress, 64 Tex. 346, (*distinguishing* the case of Bethje *v.* Railroad Co., 26 Tex. 604, on the ground that the statute was not in force at the time that decision was rendered); Texas & Pac. R. Co. *v.* Miller, 1 White & W. Civ. Cas. (Tex.) § 262.

38. Texas & Pac. R. Co. *v.* Scrivener (Tex. Civ. App.), 49 S. W. 649; Louisiana W. Exten. R. Co. *v.* Deon (Tex. Civ. App.), 56 S. W. 104.

39. Houston, E. & W. T. R. Co. *v.* McMillan (Tex. Civ. App.), 84 S. W. 296; Schneir *v.* Chicago, R. I. & P. R. Co., 40 Iowa 337.

Where the injured animals came upon the track at a point where the defendant was not required by law to fence, although it might have done so without materially interfering with the handling of its trains, there is no presumption of negligence, but the plaintiff must prove this fact. Redmond *v.* Missouri, K. & T. R. Co., 104 Mo. App. 651, 77 S. W. 768.

Where the stock was killed within the corporate limits of an incorporated city the statute relating to fencing does not apply because the railway company could not lawfully fence in such a city. Therefore, the burden is upon the plaintiff in such case to prove the negligence of the defendant, and is not upon the defendant to show even ordinary care independent of such proof. International & G. N. R. Co. *v.* Smith, 1 White & W. Civ. Cas. (Tex.) § 844.

40. Indianapolis, Peru & C. R. Co. *v.* Lindley, 75 Ind. 426; Cincinnati, I. St. L. & C. R. Co. *v.* Parker, 109 Ind. 235, 9 N. E. 787; Indianapolis, B. & W. R. Co. *v.* Penry, 48 Ind. 128; Union Pac. R. Co. *v.* Dyche, 28 Kan. 200; Missouri, K. & T. R. Co. *v.* Willis (Tex. Civ. App.), 52 S. W. 625; Jeffersonville, M. & I. R. Co. *v.* O'Connor, 37 Ind. 95.

Exemption From General Law. The burden is upon the defendant railway company to show that it is exempt from the duty of fencing imposed by a general law. Railroad Co. *v.* Hoffhines, 46 Ohio St. 643, 22 N. E. 871.

Injury at Crossing. — In an action for killing stock at a crossing, where the character of the crossing, whether public or private, does not appear, the burden is upon the defendant to show that the crossing was fenced, or that it was one not required to be fenced. Louisiana W. Exten. R. Co. *v.* Deon (Tex. Civ. App.), 56 S. W. 104.

41. Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965; Kingsbury

third person;[42] that the fence would have interfered with the operation of trains and endangered the lives of defendant's employes,[43] or that the accident occurred on its depot grounds.[44]

v. Chicago, M. & St. P. R. Co., 104 Iowa 63, 73 N. W. 477; Hamilton *v.* Missouri Pac. R. Co., 87 Mo. 85; Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197; Lake Erie & W. R. Co. *v.* Kneadle, 94 Ind. 454; Cincinnati, H. & I. R. Co. *v.* Ford, 89 Ind. 92.

In a suit to fix the liability of a railroad company for killing stock on the ground of a neglect to fence its track, the burden is upon the defendant company to show that the landowner had received a specific sum for fencing along the line or had agreed to build and maintain a lawful fence, or had received compensation for so doing by way of damages in the condemnation of the land, if it urges such matters as a defense. Toledo, P. & W. R. Co. *v.* Pence, 68 Ill. 524. See also *s. c.*, 71 Ill. 174.

The burden of proving that the animal was such that a good and lawful fence would have been no precaution against it rests upon the defendant. Missouri Pac. R. Co. *v.* Bradshaw, 33 Kan. 533, 6 Pac. 917.

But where the injured horses entered upon the defendant's track in the night-time through a gateway in the defendant's fence which was closed the evening previous, it was held that the fact that the gate was defectively constructed and out of repair would not raise a presumption that the injury occurred by reason of such defects so as to cast upon the defendant the burden of disproving this fact. Johnson *v.* Chicago, R. I. & P. R. Co., 55 Iowa 707, 8 N. W. 664.

42. The burden is upon the defendant to show that the gate of a private crossing which defendant had agreed to maintain was left open by the plaintiff or an independent third person, where such a defense is made. Chicago & A. R. Co. *v.* Barnes, 116 Ind. 126, 18 N. E. 459.

Contra. — Where the stock entered through a gate and the evidence was conflicting as to whether it was open because of its defective construction or because left open by a third person, it was held that the burden was on the plaintiff to show the defendant's negligence. St. Louis & S. W. R. Co. *v.* Adams, 24 Tex. Civ. App. 231, 58 S. W. 1035.

Notice to Defendant of Negligent Act of Third Person. — The burden of showing that bars opening on defendant's track, let down by a third person, had continued down for such a length of time or under such circumstances as to justify the inference of negligence on the part of the company in not seeing and putting them up is upon the plaintiff. Perry *v.* Dubuque, S. W. R. Co., 36 Iowa 102.

43. Ft. Wayne, C. & St. L. R. Co. *v.* Herbold, 99 Ind. 91. See also Louisville, N. A. & C. R. Co. *v.* Clark, 94 Ind. 111.

Danger to Employes. — Where the plaintiff has made a *prima facie* case by showing that the cattle were killed on defendant's track where it was not fenced, the burden is on the defendant of showing that a fence at that point would have endangered the lives and limbs of its employes engaged in switching. Cox *v.* Atchison, T. & S. F. R. Co., 128 Mo. 362, 31 S. W. 3; Spooner *v.* St. Louis S. W. R. Co., 66 Mo. App. 32; Chicago & E. I. R. Co. *v.* Modesitt, 124 Ind. 212, 24 N. E. 986; Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; Toledo, St. L. & K. C. R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793.

44. Smith *v.* Chicago, M. & St. P. R. Co., 60 Iowa 512, 15 N. W. 303.

The Fact That the Injury Occurred Where There Was a Switch raises no presumption that this part of the road was a portion of a station ground, thus exempting the defendant from the duty of fencing; the burden is on the defendant to show what grounds are used for station purposes. Comstock *v.* Des Moines Val. R. Co., 32 Iowa 376. But under a statute requiring a fence only at particular points to be subsequently designated, the plain-

c. *Injury Within Corporate Limits.* — Nor does the fact that the injury was inflicted at a point within the limits of a city or village relieve the defendant of this burden.[45] It has, however, been held to the contrary.[46]

d. *Place of Entry on Right of Way or Track.* — The plaintiff need not prove by direct or positive evidence where the injured animal entered upon the right of way or track,[47] and it is generally held that in the absence of contrary evidence the animal is presumed to have entered at the point where it was injured or is found dead or disabled.[48] But there is no presumption as to the

tiff must show that a fence was required at the place of the accident.

Where a railroad company is not required by law to fence its track except in such places as are required by the county commissioners, the burden is on the plaintiff claiming injuries to stock by reason of the failure to fence to show that the injury occurred at a place where the defendant was required to maintain a fence. Baxter *v.* Boston & W. R. Corp., 102 Mass. 383.

45. International & G. N. R. Co. *v.* Cocke, 64 Tex. 151; Gulf, C. & S. F. R. Co. *v.* Adams (Tex. Civ. App.), 24 S. W. 834 (where the place of the accident was between two streets within the incorporated limits of a city).

The road may pass through portions of the city where there is nothing to prevent the erection of a fence. Texas & Pac. R. Co. *v.* Mitchell, 2 Willson Civ. Cas. (Tex.) § 373, in which it appeared that the animal was killed within the limits of an incorporated city but at a place where there was no street, alley or public square.

Where a general statute requires railroad companies to fence their right of way and put in cattle-guards at crossings, in an action for the killing of a cow in a small hamlet the burden is on the defendant to show that its failure to fence at that point was justified by the necessities of the case. Flint & P. M. R. Co. *v.* Lull, 28 Mich. 510.

46. Although the statute provides that the happening of the injury at a point where no fence is maintained is *prima facie* evidence of negligence, it is held not to apply to injuries occurring within the corporate limits of a city or town. Wier *v.* St. Louis & I. M. R. Co., 48 Mo. 558; Wallace *v.* St. Louis I. M. & S. R. Co., 74 Mo. 594; Wasson *v.* McCook, 70 Mo. App. 393.

47. Evansville & T. H. R. Co. *v.* Mosier, 101 Ind. 597, 1 N. E. 197.

Where the evidence is that the road was not fenced at the place where the stock was killed it is but a fair inference that the stock got upon the road at that place. St. Louis & S. E. R. Co. *v.* Casner, 72 Ill. 384. See also Lepp *v.* St. Louis, I. M. & S. R. Co., 87 Mo. 139.

In an action for injuries to a cow which had strayed upon the track through some point in the defendant's fence, it was held that the jury might properly presume that the cow had gone through the fence at the point where it was partially broken down. Leyden *v.* New York Cent. & H. R. R. Co., 55 Hun 114, 8 N. Y. Supp. 187.

48. Ellis *v.* Mississippi River & B. T. R. Co., 89 Mo. App. 241; Pearson *v.* Chicago, B. & K. C. R. Co., 33 Mo. App. 543; Duke *v.* Kansas City, Ft. S. & M. R. Co., 39 Mo. App. 105; McGuire *v.* Missouri Pac. R. Co., 23 Mo. App. 325.

Where it appears that the blood and carcass of the animal for the killing of which damages are claimed, were found upon the track at a point which was not but should have been fenced, it will be presumed in the absence of evidence to the contrary that the animal entered upon the track at that point. Jantzen *v.* Wabash, St. L. & Pac. R. Co., 83 Mo. 171.

But this presumption is overcome where it appears that the track at that point was securely fenced and

place where the engine or train collided with the animal.[49]

e. *Effect of Existence of Lawful Fence.* — If it appears that the accident occurred at a place where the required fence was maintained the plaintiff has the burden of proving negligence.[50]

E. Finding Dead or Injured Animal Near Track. — The mere fact that a dead or injured animal was found near a railway track raises no presumption that it was killed or injured by a passing train;[51] there must be other evidence of the cause of its death.[52]

F. Ownership of Injured Animal. — The plaintiff must show his ownership of the injured live stock.[53]

G. Omission To Post Notice of Injury. — Where extra damages are claimed for the failure to post a notice of the injury to the animal as required by law, the plaintiff has the burden of proving this fact.[54]

2. Signals. — A. Generally. — It is competent to show that no signals were given by the approaching train.[55]

B. Statutory Signals. — a. *Generally.* — Where the animal in question was killed or injured at a highway crossing, as bearing upon the defendant's negligence it is competent to show that the statutory signals were not given by the train as it approached the crossing.[56] And evidence as to whether the animal would probably

there is evidence tending to show that the cattle entered through an open gate. (Bumpas *v.* Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115); or where the animal is found at a street crossing and the evidence tends to show that it came upon the track through a defect in the fence near by. Kimball *v.* St. Louis & S. F. R. Co., 99 Mo. App. 335, 73 S. W. 224.

49. Croddy *v.* Chicago, R. I. & P. R. Co., 91 Iowa 598, 60 N. W. 214.

50. International & G. N. R. Co. *v.* Cocke, 64 Tex. 151; International & G. N. R. Co. *v.* Samora, 1 White & W. Civ. Cas. (Tex.) § 155. See also Jewett *v.* Kansas City, C. & S. R. Co., 50 Mo. App. 547.

51. St. Louis, I. M. & S. R. Co. *v.* Hagan, 42 Ark. 122; Railway Co. *v.* Sageley, 56 Ark. 549, 20 S. W. 413.

The fact that the injured animal was found on the right of way but not on the track of the defendant and was afterwards shot by an employe of the defendant as being no longer of value raises no legal presumption that the animal was injured by the defendant's train, since the fact that the animal was found on the right of way injured raises no presumption that its injuries were occasioned by the running of trains. Railway Co. *v.* Parks, 60 Ark. 187, 29 S. W. 464.

52. St. Louis, I. M. & S. R. Co. *v.* Hagan, 42 Ark. 122.

The mere fact that the animal was found at or near a railroad track does not sufficiently show that it was killed by a train. Union Pac. R. Co. *v.* Bullis, 6 Colo. App. 64, 39 Pac. 897.

53. Welsh *v.* C. B. & Q. R. Co., 53 Iowa 632, 6 N. W. 13.

Proof of Possession of the stock killed is *prima facie* evidence of ownership. Toledo, W. & W. R. Co. *v.* Stevens, 63 Ind. 337.

Joint Ownership. — Where parties suing for damages for the killing of cattle claim the cattle as joint owners they should be held to reasonably strict proof of ownership. Illinois Cent. R. Co. *v.* Finnigan, 21 Ill. 646.

54. K. C. S. & M. R. *v.* Summers, 45 Ark. 295.

55. Edson *v.* Central R. Co., 40 Iowa 47.

56. Hohl *v.* Chicago, M. & St. P.

have heeded the signal had one been given is incompetent and immaterial.[57]

b. *Signals at Near-by Crossing.* — The fact that the statutory signals for a near-by crossing were not given is a competent circumstance although the injury was not inflicted at the crossing.[58] Such evidence, however, is irrelevant where the action is based on the failure to fence the track as required by statute.[59]

3. Rate of Speed. — A. GENERALLY. — As a part of the *res gestae* and as bearing upon the question of negligence it is competent to show the speed of the train at the time of the accident.[60]

B. ORDINANCES AND STATUTES. — Ordinances or statutes limiting the speed of trains at the place of the accident, and their violation, may be shown on the question of negligence.[61] But the ordinance must apply to the defendant's trains.[62]

C. CUSTOMARY SPEED. — Where the high and unusual speed of the train causing the damage is relied upon, evidence of its cus-

R. Co., 61 Minn. 321, 63 N. W. 742, 52 Am. St. Rep. 598. *Contra*, Mills & Le Clair Lumb. Co. *v.* Chicago, St. P., M. & O. R. Co., 94 Wis. 336, 68 N. W. 996.

57. Kendrick *v.* Chicago & A. R. Co., 81 Mo. 521.

58. Although the plaintiff's horse was not killed at a crossing but at a point near by, the jury may properly consider the fact that the signals required by statute to be given at a certain distance from crossings were not given, as well as the engineer's neglect to have his train under proper control as he approached the crossing, and it is not error to refuse to instruct that such statutory regulation is intended only for the benefit of persons or things on the crossing. Western & Atl. R. Co. *v.* Jones, 65 Ga. 631. See Georgia R. *v.* Williams, 74 Ga. 723. But see Mills & Le Clair Lumb. Co. *v.* Chicago, St. P., M. & O. R. Co., 94 Wis. 336, 68 N. W. 996.

In an action for killing plaintiff's mule while plaintiff was endeavoring to get him off the track, evidence that the train causing the injury failed to give the statutory signals upon approaching a crossing near the place of injury and at other road crossings was held properly admitted on the ground that it "tended to show an utter disregard of the requirements of law as to the manner of running the train, and was responsive to the allegation of reckless negligence." Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 68 Am. St. Rep. 913.

59. Collins *v.* Atlantic & Pac. R. Co., 65 Mo. 230.

60. Edson *v.* Central R. Co., 40 Iowa 47; Taylor *v.* St. Louis, I. M. & S. R. Co., 83 Mo. 386.

In an action for killing stock at a point where the statute requires the whistle to be blown and the speed to be reduced, an inquiry as to whether the engineer after having run one or more trips could afterwards remember at what points, including depots, road crossings and towns through which he passed, he blew the whistle, rung the bell and reduced the speed, is irrelevant. Memphis & C. R. Co. *v.* Lyon, 62 Ala. 71.

61. Cleveland, C. C. & St. L. R. Co. *v.* Ahrens & Son, 42 Ill. App. 434.

Where the alleged negligence was the running of defendant's train at a high rate of speed and killing plaintiff's cow on a crossing within the limits of a city, an ordinance limiting the speed of trains within the city limits to six miles an hour is competent evidence. Union Pac. R. Co. *v.* Rassmussen, 25 Neb. 810, 41 N. W. 778, 13 Am. St. Rep. 527; Chicago, B. & Q. R. Co. *v.* Richardson, 28 Neb. 118, 44 N. W. 103.

62. Fell *v.* Burlington, C. R. & M. R. Co., 43 Iowa 177 (ordinance limiting speed of the trains of another railway incompetent).

tomary rate of speed is admissible,[63] but such evidence is not competent to show what was the speed of the train at the time in question.[64]

4. Headlight. — The character and condition of the headlight carried by the engine causing the damage may be shown,[65] as may also the distance at which objects on the track were made visible by its light.[66] A non-expert witness may testify as to his observations of the light cast by similar headlight under similar circumstances at the same place.[67]

5. Fences and Cattle-Guards. — A. Generally. — The plaintiff may show the absence of fences or cattle-guards at the point where the accident occurred.[68] And the defendant in rebuttal may show any legal excuse for their absence,[69] as that their presence at a particular point would endanger the lives of its employes;[70] but

63. Chicago & N. W. R. Co. *v.* Bunker, 81 Ill. App. 616; Gulf, C. & S. F. R. Co. *v.* Anson (Tex. Civ. App.), 82 S. W. 785. See also Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

64. Houston & T. C. R. Co. *v.* Jones, 16 Tex. Civ. App. 179, 40 S. W. 745. See also *supra,* I, 4, A. But see Gulf, C. & S. F. R. Co. *v.* Anson (Tex. Civ. App.), 82 S. W. 785.

65. Central of Georgia R. Co. *v.* Hardin, 114 Ga. 548, 40 S. E. 738, 58 L. R. A. 181.

66. Where the defendant's engineer and fireman testified that the headlight of the engine did not enable them to see an animal on the track more than sixty feet in advance, it was held competent for plaintiff in rebuttal to prove facts showing that on other occasions in the same neighborhood, and under circumstances no more favorable, objects on the track were visible at a distance of two or three hundred yards by the aid of the headlight. Alabama, G. S. R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238.

67. Arrowood *v.* South Carolina & G. E. R. Co., 126 N. C. 629, 36 S. E. 151.

68. Although the negligence alleged is in the operation of the train, the plaintiff may show the absence of cattle-guards at the point where the horses were injured as part of the conditions existing at that point, and hence as bearing upon the degree of care which should have been exercised. Rafferty *v.* Portland, V. & Y. R. Co., 32 Wash. 259, 73 Pac. 382.

But, in Dickey *v.* Northern Pac. R. Co., 19 Wash. 350, 53 Pac. 347, where the complaint alleged that horses were killed by reason of the negligent operation of the defendant's train, evidence that the track at the point of the injury was not fenced was held not admissible, although the statute provided that in actions for injury to stock caused by collision with moving trains the failure to maintain a proper fence was *prima facie* evidence of negligence on the part of the defendant. The negligence complained of was in the operation of the train and not in failing to maintain a fence.

69. In an action for killing stock which was upon the defendant's track at a point where it ran through plaintiff's land, it was held competent for the defendant to introduce the proceedings and award of the commissioners who adjusted the damages for the running of defendant's track over the plaintiff's land showing the plaintiff had been allowed additional compensation for building and keeping up a fence on the line of the railroad. Georgia R. & Bkg. Co. *v.* Anderson, 33 Ga. 110. See Railroad Co. *v.* Hoffhines, 46 Ohio St. 643, 22 N. E. 871.

70. See *supra,* III, 1, D, b.

In an action for the killing of a

opinion evidence on the latter question is held not to be competent.[71]

B. Condition of Fences and Cattle-Guards. — a. *Generally.* The plaintiff may show that the fence or cattle-guard through which the animal is alleged to have entered upon the track was in a defective condition at the time of the injury.[72] And no evidence of its insufficiency to hold stock is necessary where this is clearly apparent from the condition shown.[73] The fact that the kind of cattle-guard in question is in general use on the defendant's road has no tendency to show its sufficiency.[74]

b. *Condition at Other Times.* — As evidence of the condition of the fence or cattle-guard at the time of the injury it is competent to show its condition a short time previous or subsequent thereto,[75] unless it appears to have materially changed in the interim.[76] And evidence of its condition at some more remote period is likewise

horse at a point seventy or eighty yards east of the east end of the defendant's switch, where the defendant contended and produced evidence tending to show that to have fenced its track at a point so near the switch would interfere with its employes in switching its trains, it was held proper to permit the plaintiff to show in rebuttal that the defendant had in fact fenced the track to within thirty or forty feet west of the west end of the switch. Texas & Pac. R. Co. *v.* Seay (Tex. Civ. App.), 69 S. W. 177.

71. An opinion as to whether the placing of cattle-guards at a particular point on the defendant's track would endanger trainmen in the management of trains at that point is not competent, although the witness was shown to be a properly qualified expert. Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106; *citing* Pennsylvania Co. *v.* Mitchell, 124 Ind. 473, 24 N. E. 1065. To the same effect Toledo, St. L. & K. C. R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793.

72. Where the plaintiff claims that the animal in question was killed because of defendant's negligence in not keeping its cattle-guards free of snow and ice, he may show that the cattle-guard over which the animal passed was full of ice and snow (Robinson *v.* Chicago, R. I. & P. R. Co., 79 Iowa 495, 44 N. W. 718); and had been in this condition for two weeks previous. Schuyler *v.* Fitchburgh R. Co., 20 N. Y. Supp. 287.

73. Where it appeared that the defendant's fence, originally four feet and upwards in height, had been broken down at one point to a height of two feet and eight inches, to the knowledge of defendant's agents, it was held that no evidence was necessary to show that the fence at such point was insufficient, but that the jury might properly act on their own knowledge that such fence was not sufficient to hold cattle. Leyden *v.* New York Cent. & H. R. R. Co., 55 Hun 114, 8 N. Y. Supp. 187.

74. Schuyler *v.* Fitchburgh R. Co., 20 N. Y. Supp. 287.

75. Haskings *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 302 (short time previous); Grahlman *v.* Chicago, St. P. & K. C. R. Co., 78 Iowa 564, 43 N. W. 529, 5 L. R. A. 813 (cattle-guard filled with snow and ice previous and subsequent to the accident); Mackie *v.* Central R. of Iowa, 54 Iowa 540, 6 N. W. 723 (condition of gate three days subsequent).

Evidence as to the defective condition of the cattle-guard on the day following the injury is competent proof of its condition on the day previous, the defect being of a somewhat permanent nature. Miller *v.* Northern Pac. R. Co., 36 Minn. 296, 30 N. W. 892.

76. In an action for killing stock by defendant's train, the testimony of a witness who arrived at the

competent if it further appears or is shown that no material change has taken place.[77]

c. *Condition at Other Places.* — It is competent to show the defective condition of the fence in the vicinity of the place where the animal was injured if it is not claimed or shown that the animal entered at any specific place.[78] And as evidence of notice of a particular defect or break in the fence its bad condition on either side may be shown.[79]

d. *Notice to Owner of Animal's Previous Breaches.* — Where the injured animal came upon the track through a defect in the defendant's fence the defendant cannot show that the owner had notice that the animal had gotten upon the track through the same defect on other occasions.[80]

C. Opinion Evidence. — a. *Generally.* — It is not competent for a witness to express his opinion that a particular fence[81] or cattle-guard[82] was sufficient or insufficient to keep out stock.

b. *Necessity for Fence.* — A witness cannot properly give his opinion that a fence is a better protection than a bank or natural obstacle,[83] nor can he state that a particular locality is dangerous

scene of the accident several hours after defendant's servants had commenced to make repairs on the fence, as to the condition of the fence when he saw it, is inadmissible without a preliminary showing that there had been no change in its condition. Colyer *v.* Missouri Pac. R. Co., 93 Mo. App. 147.

77. Morrison *v.* Chicago & N. W. R. Co., 117 Iowa 587, 91 N. W. 793; Brentner *v.* Chicago, M. & St. P. R. Co., 58 Iowa 625, 12 N. W. 615.

In an action against a railway company for killing horses, evidence showing what the condition of the guards and fences at the place was a year before, followed by proof of their continuous bad condition from then to the time of the injury, was held properly admitted. Chicago & E. I. R. Co. *v.* Chipman, 87 Ill. App. 292.

78. In an action for killing stock which had strayed upon the defendant's track, evidence to the effect that the fence was defective for half a mile up and down the road from the place of the killing on one side of the track and for two or three hundred yards from the place of the killing on the other side was held properly admitted. Maberry *v.* Missouri Pac. R. Co., 83 Mo. 664.

79. McGuire *v.* Ogdensburg & L. C. R. Co., 63 Hun 632, 18 N. Y. Supp. 313, *distinguishing* Reed *v.* Railway Co., 45 N. Y. 574, in which it was held that the condition of the railroad a half mile from the place of the accident could not be shown.

80. Rogers *v.* Newburyport R. Co., 1 Allen (Mass.) 16 (since the defendant can not shift its duty of maintaining its fences upon the plaintiff).

81. Chicago & A. R. Co. *v.* O'Brien, 34 Ill. App. 155.

Where the Condition of a Certain Gate was in question, evidence that "anything that would touch it would throw it down" and that "most any animal would throw it down," was held not objectionable as an opinion or as invading the province of the jury. Chicago & A. R. Co. *v.* O'Brien, 34 Ill. App. 155.

82. Smead *v.* Lake Shore & M. S. R. Co., 58 Mich. 200, 24 N. W. 761.

83. Where the statute provides that no fence shall be required in places where there are embankments or other natural obstacles sufficient to make a fence unnecessary, the opinion of a witness as to whether a certain bank of earth was as good a protection against cattle as a fence four and a half feet high is inadmissible. Veerhusen *v.* Chicago &

and might have been remedied by erecting a particular kind of fence.[84]

6. Other Acts and Instances. — A. To Show Negligence. Evidence that other animals had been killed or injured at the same place is not admissible to show the defendant's negligence;[85] nor is evidence of a failure on other occasions to give the statutory signals[86] or to keep closed the gates opening on the right of way.[87]

B. To Show Character of Fence or Cattle-Guard. — But as evidence that a fence or a cattle-guard was not properly constructed it is competent to show that stock had on other occasions passed through such fence[88] or over such cattle-guard[89] or one of substantially similar construction,[90] or that on previous occasions stock had been seen on the track at the place of the injury.[91] And

N. W. R. Co., 53 Wis. 689, 11 N. W. 433.

84. Southern Kansas R. Co. *v.* Cooper, 32 Tex. Civ. App. 592, 75 S. W. 328.

85. Gulf, C. & S. F. R. Co. *v.* Ogg, 8 Tex. Civ. App. 285, 28 S. W. 347; Croddy *v.* Chicago, R. I. & P. R. Co., 91 Iowa 598, 60 N. W. 214.

In an action for the negligent killing of a cow, evidence that the company had at different times paid other persons for cattle killed by its train at the same place, is irrelevant and inadmissible. Georgia R. & Bkg. Co. *v.* Walker, 87 Ga. 204, 13 S. E. 511.

86. Evidence that the defendant's trains had frequently on other occasions passed the point of the accident without whistling or ringing a bell was held incompetent. Proof of negligence at other times and places does not establish negligence upon the occasion in question. Mississippi Cent. R. Co. *v.* Miller, 40 Miss. 45. See also Southern R. Co. *v.* Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

87. Chicago & A. R. Co. *v.* Hodge, 55 Ill. App. 166.

88. In an action for killing the plaintiff's colts, evidence that on several occasions within about a month previous cattle were found upon the track and driven through the fence along the right of way at the point where the plaintiff claims his colts subsequently went through is admissible upon the issue of whether the colts escaped at such point, in view of the defendant's testimony that the fence was in good condition. Bowen *v.* Flint & P. M. R. Co., 110 Mich. 445, 68 N. W. 230; *distinguishing* Jebb *v.* Chicago & G. T. R. Co., 67 Mich. 160, 34 N. W. 538. See Payne *v.* Kansas City, St. J. & C. B. R. Co., 72 Iowa 214, 33 N. W. 633 (*holding* competent evidence that gate fastenings like the one in question had proved insufficient under like circumstances).

89. Where the injury to plaintiff's stock was alleged to be due to a defect in the wing fence on one side of a cattle-guard, the testimony of a witness that he had repeatedly seen cattle and horses pass over the fence at this point and had seen a boy ride a horse across it, was held properly admitted. Chicago & N. W. R. Co. *v.* Hart, 22 Ill. App. 207.

90. Lake Erie & W. R. Co. *v.* Murray, 69 Ill. App. 274; Lake Erie & W. R. Co. *v.* Helmericks, 38 Ill. App. 141.

Where it was claimed that plaintiff's stock entered upon the right of way over insufficient cattle-guards, it is competent for witnesses to testify that they had seen stock walk over a guard some three or four miles distant from the one in controversy, there being evidence to show that this guard was similar in material and construction to the one in question and there being nothing to show that it was not in good condition. New York, C. & St. L. R. Co. *v.* Zumbaugh, 11 Ind. App. 107, 38 N. E. 531.

91. Jebb *v.* Chicago & G. T. R. Co., 67 Mich. 160, 34 N. W. 538 (that on several occasions months be-

it has been held that the defendant may show that the same make of cattle-guard is in general use among first-class railroads and is regarded as the best known device for the purpose.[92] But it cannot show that the cattle-guard is the same as those in general use on its road.[93]

7. Traces. — Evidence of traces such as blood and hair subsequently found on a train which might have killed the animal is competent evidence that it did kill it.[94] Where there is a dispute as to where the animal was killed, evidence that tracks and other signs were found at the place claimed to have been the scene of the accident is admissible though such tracks and signs are not shown to have been left by the animal killed.[95]

8. Opinion. — A properly qualified witness may give his opinion, founded on examination of the appearances, as to where the animal came upon the track, in what direction and at what speed it was traveling,[96] and in which direction it was thrown by the force of the collision.[97] The engineer may give his opinion as to what action on his part was likely to be the most effective method under the circumstances of preventing the impending collision.[98]

9. Animals at Large Contrary to Law. — Statutes requiring stock to be kept within enclosures do not affect the presumption of negligence arising from proof of injury,[99] even though the injured animal was at large in violation of such a statute.[1] But the latter

fore other stock of the plaintiff had been seen on the defendant's right of way).

92. Lake Erie & W. R. Co. *v.* Murray, 69 Ill. App. 274. But see Downing *v.* C. R. I. & P. R. Co., 43 Iowa 96; Payne *v.* Kansas City, St. & C. B. R. Co., 72 Iowa 214, 33 N. W. 633 (general use of gate fastener).

93. Schuyler *v.* Fitchburgh R. Co., 20 N. Y. Supp. 287.

94. International & G. N. R. Co. *v.* Hughes, 81 Tex. 184, 16 S. W. 875.

95. Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427.

96. Chicago & A. R. Co. *v.* Legg, 32 Ill. App. 218.

97. In Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427, it was held no error to permit a witness who had testified as to the presence of tracks and other evidence of the presence of cattle along the track, to give his opinion as to which direction the animals were thrown by the force of the collision, as bearing upon the direction the train was running which collided with the cattle. "The witness did not see the animals upon the track, but testified to indications and appearances along the track shortly after the injury. There was an opportunity to cross-examine the witness and obtain the basis of his knowledge upon the question. In the judgment of the trial court the appearances could not be described to the jury with sufficient vividness to enable them to form as accurate conclusions thereon as the witness could, and under such circumstances opinions are admissible."

98. It was error to refuse to allow the defendant to ask the engineer in charge of the engine causing the injury if sounding the cattle alarm and applying the air-brakes was a more effective means of saving the injured animals than reversing the engine, since the engineer was an expert. Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377.

99. Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52. But see Houston & T. C. R. Co. *v.* Hollingsworth, 29 Tex. Civ. App. 306, 68 S. W. 724; Galpin *v.* Chicago & N. W. R. Co., 19 Wis. 604.

1. The statutory presumption of

fact may be shown, as it has some bearing upon the question of negligence;[2] and in states where the plaintiff has the burden of showing negligence it has been held that the violation of such a statute relieves the defendant from liability for anything but gross or wilful negligence.[3]

Contributory Negligence. — The fact that the injured animal was at large contrary to law has no effect upon the rule as to the burden of proving contributory negligence.[4]

10. Possibility of Averting Injury. — It is competent to show the distance at which the engineer could have seen the animal at the time and place in question.[5] The conductor and engineer, being experts, may state that they did everything in their power to stop the train and avert the injury when they saw the animal.[6]

negligence arising from proof of the killing of live stock by the defendant's trains, being a rule of evidence, is not modified by the stock law requiring owners of stock to restrain them by fences in certain localities; but the fact that the stock law is in force where the killing occurred is a circumstance to be considered by the jury on the question of negligence. Davis *v.* Florida Cent. & P. R. Co., 47 S. C. 390, 25 S. E. 224. See also Roberts *v.* Richmond & Danville R. Co., 88 N. C 560.

2. Davis *v.* Florida Cent. & P. R. Co., 47 S. C. 390, 25 S. E. 224; Van-Horn *v.* Burlington, C. R. & N. R. Co., 59 Iowa 33, 12 N. W. 752 (city ordinance).

In an action for killing the plaintiff's cow on a crossing within the limits of a city, an ordinance of such city prohibiting owners of cattle from allowing them to run at large is admissible on the question of contributory negligence. Chicago, B. & Q. R. Co. *v.* Richardson, 28 Neb. 118, 44 N. W. 103.

Plaintiff May Show That He Was Not at Fault in the Matter. — Louisville & W. R. Co. *v.* Hall, 106 Ga. 786, 32 S. E. 860.

3. In an action against a railway company for injuries inflicted by its engine on animals running at large, it is competent for the defendant to show that under a local law stock were not permitted to run at large at the place where the injury was inflicted, since under such law the defendant would only be liable when guilty of gross negligence, the animals being trespassers. International & G. N. R. Co. *v.* Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484.

4. Burden of Proving Contributory Negligence on Defendant. Cairo & St. L. R. Co. *v.* Woosley, 85 Ill. 370.

The fact that the injured animals were running at large, contrary to law, is not sufficient to prove contributory negligence on the part of their owner, but the defendant must show that this was the proximate cause of the injury. Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. 661.

Since the Burden Is On the Plaintiff to disprove contributory negligence he must show that the injured stock were lawfully at large, where under the general law cattle cannot be permitted to run at large without permission from the town. Perkins *v.* Eastern R. Co., 29 Me. 307, 50 Am. Dec. 589.

5. Sheldon *v.* Chicago, M. & St. P. R. Co., 6 S. D. 606, 62 N. W. 955.

6. Choate *v.* Southern R. Co., 119 Ala. 611, 24 So. 373.

But where the defendant's engineer had been permitted to testify that he did everything in his power to stop the train, it was held no error to refuse to permit him to answer a question as to whether it was possible for him to do anything else besides what he did to prevent the injury (Central of Georgia R. Co. *v.* Bagley, 121 Ga. 781, 49 S. E. 780), or to exclude the testimony of other witnesses as to whether the engineer could have done anything else to

11. Notice of Injury. — Under a statute providing for the giving of a notice by the plaintiff to the defendant, of the injury and claim, a copy of such notice is admissible without accounting for the original.[7] A slight misnomer of the defendant does not justify the exclusion of the notice.[8]

12. Damages. — The damages for killing an animal are measured by its value at the time, and any competent evidence of this fact is admissible.[9]

III. INJURIES FROM FIRE.

1. Presumptions and Burden of Proof. — A. GENERALLY. — In an action for damages from fire alleged to have been set by the defendant in the operation of its road, the plaintiff has the burden in the first instance of showing the defendant's negligence,[10] unless

avoid the accident. Johnson *v.* Rio Grande W. R. Co., 7 Utah 346, 26 Pac. 926.

7. A copy of the notice and affidavit of injury served by the plaintiff on the defendant when accompanied with the oath or affidavit of the person who served the same is admissible to prove the fact of such service under Code § 3698, without accounting for the original or giving notice to produce the same. McLenon *v.* Kansas City, St. J. & C. B. R. Co., 69 Iowa 320, 28 N. W. 619; Brentner *v.* Chicago, M. & St. P. R. Co., 58 Iowa 625, 12 N. W. 615. But an affidavit and notice shown to be merely similar to the one served on the agent of the defendant is not admissible under Code § 1289. Kyser *v.* Kansas City, St. J. & C. B. R. Co., 56 Iowa 207, 9 N. W. 133.

8. In an action against the Central Iowa Railway Company for injury to plaintiff's horses, a notice of the injury required by statute as the foundation of the claim for double damages was held properly admitted although addressed to the "Iowa Central Railway Company," the transposition of the words in the name not being sufficient to exclude the notice. "The omission, alteration or transposition of any of the words, if the words in the name used are synonymous with the true name of the corporation, is not a misnomer that will defeat the notice." Martin *v.* Central I. R. Co., 59 Iowa 411, 13 N. W. 424.

9. Southern Kansas R. Co. *v.* Cooper, 32 Tex. Civ. App. 592, 75 S. W. 328; Gulf, C. & S. F. R. Co. *v.* Anson (Tex. Civ. App.), 82 S. W. 785 (what it cost). See articles "DAMAGES" and "VALUE."

On the question of the animal's value as a brood mare it is not competent to show her general reputation among horsemen and turfmen with reference to her being rattle headed or disposed to break when racing. "These were questions of fact to be proved by persons acquainted with the performances of the animal upon the track." Cincinnati, Hamilton & I. R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

The Appraisement made by appraisers procured by the plaintiff to appraise the value of the animal, and to certify to the correctness of his claim, is an admission on his part and competent as such, but it may be explained or rebutted by proof of any fact connected with the appraisement which is admissible as part of the *res gestae*, as that he told the appraisers to put the lowest cash value on the animal not exceeding the sum fixed by them, because the defendant's agent had promised that the claim should be paid at once without abatement. East Tennessee, V. & G. R. Co. *v.* Bayliss, 74 Ala. 150.

10. Musselwhite *v.* Receivers, 4 Hughes 166, 17 Fed. Cas. No. 9,972; Pennsylvania Co. *v.* Watson, *81 Pa. St. 293; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316.

Where the complaint charges that

the statute of the state where the fire occurs provides otherwise.[11]

B. Presumption From Setting of Fire. — a. *Generally.* — As to whether proof of the setting of a fire in the operation of a railroad raises a presumption of negligence on the part of the company operating it, the courts are not in harmony. The weight of authority is to the effect that such evidence raises a presumption of negligence either in the equipment or management of the locomotive which caused the fire, the reason being that it would ordinarily be impossible for the injured party to secure evidence as to such facts except from the defendant itself.[12] In other juris-

the fire causing the damage resulted from the defendant's negligence in using insufficient spark-arresters, the burden is upon the plaintiff to prove the negligence charged; but, like the escape of fire, negligence may be established by circumstantial as well as by direct evidence or by both. Toledo, St. L. & W. R. Co. *v.* Fenstermaker, 163 Ind. 534, 72 N. E. 561.

But there is no legal presumption that a railway company while in the exercise of its lawful right to run its locomotives and trains over its roads and to use fire in so doing will not permit fire to escape from them. Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217; Crews *v.* Kansas City, St. J. & C. B. R. Co., 19 Mo. App. 302.

11. A statute making a railroad liable without proof of negligence for property injured or destroyed by fire set by their locomotives is constitutional, and the fact that negligence is unnecessarily alleged does not prevent a recovery under the statute without proof of negligence. Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175.

12. *England.* — Piggott *v.* Eastern Counties R. Co., 3 Man. G. & S. 229, 54 E. C. L. 228.

United States. — McCullen *v.* Chicago & N. W. R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; Great Northern R. Co. *v.* Coats, 115 Fed. 452; Lesser Cotton Co. *v.* St. Louis, I. M. & S. R. Co., 114 Fed. 133, 52 C. C. A. 95. See Missouri Pac. R. Co. *v.* Texas & Pac. R. Co., 31 Fed. 526.

Alabama. — Alabama G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771.

Georgia. — Gainesville J. & S. R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213.

Indian Territory. — St. Louis, I. M. & S. R. Co. *v.* Lawrence, 4 Ind. Ter. 611, 76 S. W. 254. (But see *contra* Missouri, K. & T. R. Co. *v.* Wilder, 3 Ind. Ter. 85, 53 S. W. 490).

Mississippi. — Alabama & V. R. Co. *v.* Barrett, 78 Miss. 432, 28 So. 820.

Missouri. — Logan *v.* Wabash W. R. Co., 43 Mo. App. 71; Huff *v.* Missouri Pac. R. Co., 17 Mo. App. 356; Reed *v.* Missouri Pac. R. Co., 50 Mo. App. 504; Polhans *v.* Atchison, T. & S. F. R. Co., 45 Mo. App. 153; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; Coates *v.* Missouri, K. & T. R. Co., 61 Mo. 38; Bedford *v.* Hannibal & St. J. R. Co., 46 Mo. 456; Wise *v.* Joplin R. Co., 85 Mo. 178.

Nebraska. — Rogers *v.* Kansas City & O. R. Co., 52 Neb. 86, 71 N. W. 977; Creighton *v.* Chicago, R. I. & P. R. Co. (Neb.), 94 N. W. 527.

Nevada. — Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

North Carolina. — Ellis *v.* Portsmouth & Roanoke R. Co., 24 N. C. 138; Aycock *v.* Raleigh & A. Air-Line R., 89 N. C. 321; Raleigh Hosiery Co. *v.* Raleigh & G. R. Co., 131 N. C. 238, 42 S. E. 602; *citing* Manufacturing Co. *v.* Raleigh & G. R. Co., 122 N. C. 881, 29 S. E. 575.

North Dakota. — Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227.

Oregon. — Richmond *v.* McNeill, 31 Or. 342, 49 Pac. 879; Anderson *v.* Oregon R. Co. (Or.), 77 Pac. 119.

South Dakota. — White *v.* Chica-

go, M. & St. P. R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

Tennessee. — Simpson *v.* East Tennessee, Va. & Ga. R. Co., 5 Lea 456.

Texas. — Texas Southern R. Co. *v.* Hart, 32 Tex. Civ. App. 212, 73 S. W. 833; Scott *v.* Texas & Pac. R. Co., 93 Tex. 625, 57 S. W. 801; Galveston, H. & S. A. R. Co. *v.* Horne, 69 Tex. 643; International & G. N. R. Co. *v.* Timmermann, 61 Tex. 660; Houston & T. C. R. Co. *v.* McDonough, 1 White & W. Civ. Cas. § 651.

Vermont. — Cleavelands *v.* Grand Trunk R. Co., 42 Vt. 449.

Virginia. — Patteson *v.* Chesapeake & O. R. Co., 94 Va. 16, 26 S. E. 393; White *v.* New York, P. & N. R. Co., 99 Va. 357, 38 S. C. 180, *disapproving* Bernard *v.* Richmond, F. & P. R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. Rep. 103; Norfolk & W. R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864.

Wisconsin. — Spaulding *v.* Chicago & N. W. R. Co., 30 Wis. 110, 11 Am. Rep. 550.

In Woodson *v.* Milwaukee & St. P. R. Co., 21 Minn. 60, the court while recognizing the conflict on the question and holding it unnecessary to decide it in this case says that it is certainly good sense to require the defendant to prove the proper construction and management of the engine after proof that it set the fire as alleged.

Reason of Rule. — The fact that fire is communicated to property along the line of a railroad by sparks from a locomotive engine raises an inference of negligence in its construction, equipment or management sufficient to make out a *prima facie* case in the absence of all other evidence as to the manner in which the engine is constructed, equipped or operated. "On the question whether that fact alone is sufficient to make out a *prima facie* case of such negligence there appears to be an irreconcilable conflict of authority. The most respectable courts after careful consideration have arrived at directly contrary conclusions. On the one hand it has been held that no such presumption arises, because first, the defendant is carrying on a lawful business in a lawful manner, and second, that sparks and coals may escape notwithstanding all the safeguards have been adopted which modern science can suggest, and the greatest skill and care are employed in the operation of the engine. On the other hand we may well presume that the defendant is not running locomotives over its road the natural and probable effect of which would be to communicate fire to the property along its route if the locomotives were properly equipped and carefully managed, and when fire is so communicated the natural presumption is that it is due to negligence. More than that, such a presumption has its foundation in the necessities of the case. The locomotives of railroad companies by night and day rush with great velocity through the land. They are here to-day and to-morrow may be hundreds of miles away. They are within the control of the defendant. The method of their equipment and manner of their operation are known to its employees who are always present with the engine, and evidence touching this subject is easy of production on its part. The owner of the property destroyed has no such opportunities of knowledge. It may be often exceedingly difficult if not impossible for him to even identify the engine which has caused the injury, or to obtain the names of those who know about its equipment or its use. He is frequently absent, and if present at the time and place of the fire he can obtain but a momentary view of the locomotive. He has no opportunity for inspection and knows nothing of its equipment and management. He can judge only by the result, and can often obtain no other proof as to whether the injury which he suffers has been caused by negligence. It is similar to those cases in which the burden of proof is cast upon him who best knows the facts. In this state the question is a new one. We are at liberty to adopt that rule which seems to us most consonant with reason and justice, and we think that negligence in the construction, equipment or management of the defendant's locomotive engine may fairly

dictions, however, proof of the setting of the fire creates no presumption but leaves the plaintiff under the burden of showing negligence.[13] The cause of the conflict in opinion seems to be the difference in the view taken of the operation of a railway, some courts

be inferred from the fact that the fire was communicated by sparks from it, and that there being no evidence or circumstances to rebut that inference, it is sufficient to enable the plaintiff to make out a *prima facie* case of negligence and maintain this action." Dyer *v.* Maine Cent. R. Co., 99 Me. 195, 58 Atl. 994, 67 L. R. A. 416, *distinguishing* Lowney *v.* New Brunswick R. Co., 78 Me. 479, 7 Atl. 381. To the same effect Louisville & N. R. Co. *v.* Marbury Lumb. Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Galveston, H. & S. A. R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Koontz *v.* Oregon, R. & N. Co., 20 Or. 3, 23 Pac. 820; McCullen *v.* Chicago & N. W. R. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642.

In New York. — There is some uncertainty as to the rule in New York. The general rule, that a presumption of negligence arises from proof of the setting of the fire, seems to be laid down in Case *v.* Northern Cent. R. Co., 59 Barb. (N. Y.) 644, *citing* Field *v.* New York Cent. R., 32 N. Y. 339, which, however, only holds that such fact justifies an inference of negligence; and this is the rule stated in Genung *v.* New York & N. E. R. Co., 66 Hun 632, 21 N. Y. Supp. 97. But in other more recent cases in the Supreme Court it has been held that the plaintiff has the burden of showing that the fire was caused either by the absence of a spark-arrester or by its defective condition known to the defendant, or existing long enough to charge defendant with notice. Peck *v.* New York Cent. & H. R. R. Co., 37 App. Div. 110, 55 N. Y. Supp. 1121. See also White *v.* New York Cent. & H. R. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497.

13. *Delaware.* — Jeffries *v.* Philadelphia, W. & B. R. Co., 3 Houst. 447.

Indiana. — Indianapolis & C. R. Co. *v.* Paramore, 31 Ind. 143. (The use of engines "in operating railways is authorized by law, and why should the presumption of negligence arise from the fact of fire being communicated by them?"); Chicago & E. R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Chicago & E. I. R. Co. *v.* Ostrander, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110 (*following* Indianapolis & C. R. Co. *v.* Paramore, 31 Ind. 143. The court says: "The doctrine of that case was inadvertently disapproved in the more recent case of Pittsburgh etc., R. Co. *v.* Hixon, 79 Ind. 111, but was reaffirmed when this latter case was again before this court [see *s. c.*, 110 Ind. 225, 11 N. E. 285] and is now, as formerly, the recognized law of this state in all cases in which it is applicable").

Iowa. — McCummons *v.* Chicago & N. W. R. Co., 33 Iowa 187; Gandy *v.* Chicago & N. W. R. Co., 30 Iowa 420, 6 Am. Rep. 682 (changed by statute).

Maine. — Lowney *v.* New Brunswick R. Co., 78 Me. 479, 7 Atl. 381 (practically *overruled* in Dyer *v.* Maine Cent. R. Co., 99 Me. 195, 58 Atl. 994, 67 L. R. A. 416).

Ohio. — Ruffner *v.* Cincinnati, H. & D. R. Co., 34 Ohio St. 96.

Pennsylvania. — Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Jennings *v.* Pennsylvania R. Co., 93 Pa. St. 337.

Proof that the fire was caused by sparks from a passing locomotive is not *prima facie* evidence of negligence, but the plaintiff must further show that the emission of the sparks was due to the defendant's negligence. "There is great contrariety of opinion in the cases upon the question whether the mere communication of fire by sparks of an engine is prima facie evidence of engligence in a railway company. The question is further complicated by the fact that in many states statutes have been passed which make such evidence prima facie evidence of negligence. Without examining the cases, we think we may say that nearly all the earlier cases hold that the burden is

regarding it in the same light as the exercise of any other legal right, others looking upon it as a business inherently dangerous.[14]

b. *In Action Against Receiver.* — The same presumption of negligence arises in an action against a receiver of a railroad.[15]

c. *Source of Fire Must Appear.* — Before any presumption of the defendant's negligence arises the fire must be shown to have originated from the operation of its trains.[16]

d. *Statutes.* — In many states there are statutes which either di-

upon the plaintiffs not only to show that the fire was caused by the sparks, but that the sparks were emitted through the negligence of the defendant. In later cases the effect of the state statutes, and the difficulty attending the proof of negligence, arising from the fact that the condition of the engine is a matter wholly within the knowledge and control of the defendant company, have led courts into making this an exception to the ordinary rule in cases of negligence." Garrett *v.* Southern R. Co., 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645, holding that the federal courts are not bound by the decisions of the state in which they sit upon questions of this kind since "the rules of evidence in the federal court are questions of general law, not controlled by state decisions."

Emission of Sparks of Unusual Size. — Negligence is not presumed merely from proof that the fire was caused by sparks from the defendant's locomotive; but when the emission is of such character as is inconsistent with the common experience or the known efficiency of approved spark-arresters in general use, and properly used, it is evidence of negligence. The emission of sparks of unusual size, or both of unusual size and in unusual quantities, is evidence sufficient to raise the presumption of negligence and throw upon the company the burden of removing such presumption. Jacksonville, T. & K. W. R. Co. *v.* Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1,157, 9 So. 661, 17 L. R. A. 33.

In Louisiana. — In Edrington *v.* Louisville, N. O. & T. R. Co., 41 La. Ann. 96, 6 So. 19, the court refuses to pass upon the question whether proof of the communication of the fire by sparks from an engine makes a *prima facie* case, but apparently indicates that it would hold negatively on that proposition.

14. See Ruffner *v.* Cincinnati, H. & D. R. Co., 34 Ohio St. 96.

15. Eddy *v.* Lafayette, 49 Fed. 807, 1 C. C. A. 441; Missouri Pac. R. Co. *v.* Texas & Pac. R. Co., 33 Fed. 361. *Contra,* Robinson *v.* Huidekoper, 98 Ga. 306, 25 S. E. 440.

16. Chesapeake & O. R. Co. *v.* Heath, 103 Va. 64, 48 S. E. 508; Union Pac. R. Co. *v.* Keller, 36 Neb. 189, 54 N. W. 420 (but this may be sufficiently shown by circumstantial evidence).

Before the presumption of negligence is raised the plaintiff must satisfactorily show that the fire was the result of some affirmative act or omission on the part of the defendant, but this result does not follow as a conclusion of law from evidence which merely "'tends' to show that the fire originated from sparks escaping from defendants' engine in unusual and dangerous quantities." Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

When it appears from the evidence that within a very few minutes after a train passed the fire originated in two or three places close to the track this is sufficient to cast upon the defendant the burden of disproving negligence. Atchison, T. & S. F. R. Co. *v.* Gibson, 42 Kan. 34, 21 Pac. 788.

If it is shown that sparks and burning cinders were emitted by one of defendant's engines just before, or soon after, the property on the line of its track was destroyed by fire without any known cause or circumstance of suspicion besides the engines, it is incumbent upon the defendant to show that its engines were not the cause. Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

rectly or by implication provide that proof of the setting of the fire by sparks from one of the defendant's locomotives makes a *prima facie* case or raises a presumption of negligence.[17]

e. *Fire Communicated From Combustibles on Right of Way.* — Although the fire originated on the defendant's right of way and was communicated thence to the plaintiff's property, if it was caused

17. *Arkansas.* — Tilley *v.* St. Louis & S. F. R. Co., 49 Ark. 535, 6 S. W. 8; Railway Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

Georgia. — East Tennessee, Va. & Ga. R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

Illinois. — Cleveland, C. C. & St. L. R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052; Pittsburgh, C. & St. L. R. Co. *v.* Campbell, 86 Ill. 443; Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; Franey *v.* Illinois Cent. R. Co., 104 Ill. App. 499; Louisville, E. & St. L. Consol. R. Co. *v.* Black, 54 Ill. App. 82; Toledo, St. L. & W. R. Co. *v.* Valodin, 109 Ill. App. 132; Toledo, St. L. & W. R. Co. *v.* Needham, 105 Ill. App. 25; Callaway *v.* Sturgeon, 58 Ill. App. 159; Lake Erie & W. R. Co. *v.* Holderman, 56 Ill. App. 144.

Kansas. — Ft. Scott, W. & W. R. Co. *v.* Karracker, 46 Kan. 511, 26 Pac. 1027.

Maryland. — Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115 (Code, Art. 77, § 1).

New Jersey. — Wiley *v.* West Jersey R. Co., 44 N. J. L. 247.

Utah. — Anderson *v.* Wasatch & J. V. R. Co., 2 Utah 518.

An injury caused by fire set by a locomotive is one inflicted by the running of locomotives or cars, within the meaning of the Mississippi statute. Louisville, N. O. & T. R. Co. *v.* Natchez, J. & C. R. Co., 67 Miss. 399, 7 So. 350.

Under the Code provision, § 2,056, providing that any corporation operating a railway "shall be liable for all damages sustained by any person on account of loss or of injury to his property caused by fire set out or caused by the operation of such railway," the fact of fire so caused being shown, a presumption of negligence on the part of the railway company follows without further proof. Kennedy Bros. *v.* Iowa State Ins. Co., 119 Iowa 29, 91 N. W. 831; Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909; Small *v.* Chicago, R. I. & P. R. Co., 50 Iowa 338. Such a provision, however, does not create an absolute liability. Small *v.* Chicago, R. I. & P. R. Co., 50 Iowa 338.

In an action for damages caused by fire from defendant's locomotives after the plaintiff has shown that the fire was caused by sparks from defendant's locomotive, the burden is on the defendant to show that the plaintiff was guilty of gross negligence, since the statute makes the company liable in such case unless the party injured was guilty of gross negligence. Bowen *v.* Boston & A. R. Co., 179 Mass. 524, 61 N. E. 141.

Effect of Allegation of Negligence. — Notwithstanding the fact that the petition contained specific allegations of the defendant's negligence respecting the condition and operation of the engine shown to have caused the fire, the burden is upon the defendant to disprove negligence in respect to the engine and its operation. Walker *v.* Kendall, 7 Kan. App. 801, 54 Pac. 113.

Michigan Statute. — Ann Arbor R. Co. *v.* Fox, 92 Fed. 492, 34 C. C. A. 497.

Minnesota Statute. — Niskern *v.* Chicago, M. & St. P. R. Co., 22 Fed. 811.

Under the Ohio Statute where the fire originates on land adjacent to the land of the railway company, the latter is liable only when the fire was caused wholly or in part by sparks from a passing engine; but the fact that the fire was so caused is *prima facie* evidence of the negligence of the company operating the road. Baltimore & O. R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203.

by sparks from a locomotive the same general presumption of the defendant's negligence obtains;[18] although it has been held that in such case the question of negligence in allowing combustible material to accumulate on the right of way is one for the jury.[19] If, however, the fire was set for a lawful purpose and not by sparks from an engine negligence must be proved.[20]

f. *Rebuttal of Presumption.* — To rebut this presumption of negligence the defendant must show that the engine causing the fire, or, where no particular engine is identified, the engine which might have caused the fire was fitted with the most approved spark-arresters in known practical use; that such apparatus was in good working order and properly managed and operated at the time of the fire.[21] The same rule applies in those states where the

18. Gulf, C. & S. F. R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74. *Contra*, Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207.

If sparks escaping from a railroad locomotive kindle a fire upon the company's right of way and the fire extends to and destroys adjoining property, the loss is *prima facie* the result of the company's negligence. Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 252.

Under Statutes. — Statutes raising a presumption of negligence from proof of the setting of fire by sparks from a locomotive apply not only where the fire is directly communicated but where it is indirectly communicated through combustible matter on the right of way. Atchison, T. & S. F. R. Co. *v.* Hays, 8 Kan. App. 545, 54 Pac. 322; Clark *v.* Ellithorp, 9 Kan. App. 503, 59 Pac. 286; Sibilrud *v.* Minneapolis & St. L. R. Co., 29 Minn. 58, 11 N. W. 146. See also Jones *v.* Michigan Cent. R. Co., 59 Mich. 437, 26 N. W. 662.

Under the statute making a railway company absolutely liable for any loss or damage by fire originating on its land and caused by operating its road, the fact that the fire originated on the land of the company is *prima facie* evidence that it was caused by the operation of its road, and in an action for such loss or damage negligence need not be alleged or proved. Baltimore & O. R. Co. *v.* Kreager, 61 Ohio St. 312, 56 N. E. 203.

19. The presumption arising from proof of the origin of the fire is overcome by proof of the use of proper spark-arresters which were in good repair and operated in a skillful manner. The plaintiff would be required to show the defendant's negligence in permitting the accumulation of combustible matter on its right of way. Gulf, C. & S. F. R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; Indiana, I. & I. R. Co. *v.* Hawkins, 84 Ill. App. 39.

20. Mattoon *v.* Fremont, E. & M. V. R. Co., 6 S. D. 301, 60 N. W. 69.

Where a statute provides that in an action for damages from a fire set out or caused by the operating of any railway it shall only be necessary for the plaintiff to prove injury to or destruction of his property. A fire set out by section men for the purpose of burning grass along the right of way does not come within the meaning of the phrase operating a railway; hence in such case the burden is not upon the defendant to show its freedom from negligence. Connors *v.* Chicago & N. W. R. Co., 111 Iowa 384, 82 N. W. 953.

21. *England.* — See Piggott *v.* Eastern Counties R. Co., 3 Man. G. & S. 229, 54 E. C. L. 228.

United States. — Great Northern R. Co. *v.* Coats, 115 Fed. 452; Lesser Cotton Co. *v.* St. Louis, I. M. & S. R. Co., 114 Fed. 133, 52 C. C. A. 95; Missouri Pac. R. Co. *v.* Texas & Pac. R. Co., 41 Fed. 917.

Georgia. — East Tennessee, Va. & Ga. R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828; American Strawboard Co. *v.* Chicago & A. R. Co., 177 Ill. 513, 53 N. E. 97; Chicago & A. R. Co. *v.* American Strawboard Co., 91 Ill. App. 635, judgment *affirmed* in 190

Ill. 268, 60 N. E. 518; Cleveland, C. C. & St. L. R. Co. *v.* Hornsby, 105 Ill. App. 67; Chicago & A. R. Co. *v.* Quintance, 58 Ill. 389; Chicago & E. I. R. Co. *v.* Goyette, 133 Ill. 21, 24 N. E. 549; Bass *v.* Chicago, B. & Q. R. Co., 28 Ill. 9, 81 Am. Dec. 254; St. Louis, A. & T. H. R. Co. *v.* Montgomery, 39 Ill. 335; Cleveland, C. C. & St. L. R. Co. *v.* Hornsby, 202 Ill. 138, 66 N. E. 1052.

Iowa. — Hamilton *v.* Des Moines & K. C. R. Co., 84 Iowa 131, 50 N. W. 567.

Mississippi. — Drake *v.* Yazoo & M. V. R. Co., 79 Miss. 84, 29 So. 788.

Missouri. — Coates *v.* Missouri, K. & T. R. Co., 61 Mo. 38.

Nebraska. — Rogers *v.* Kansas City & O. R. Co., 52 Neb. 86, 71 N. W. 977; Burlington & M. R. Co. *v.* Westover, 4 Neb. 268; Creighton *v.* Chicago, R. I. & P. R. Co. (Neb.), 94 N. W. 527; Chicago, B. & Q. R. Co. *v.* Beal (Neb.), 94 N. W. 956.

New York. — Case *v.* Northern Cent. R. Co., 59 Barb. 644; *citing* Field *v.* New York Cent. R., 32 N. Y. 339.

Oregon. — Richmond *v.* McNeill, 31 Or. 342, 49 Pac. 879.

South Dakota. — Kelsey *v.* Chicago & N. W. R. Co., 1 S. D. 80, 45 N. W. 204; White *v.* Chicago, M. & St. P. R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

Tennessee. — Burke *v.* Louisville & N. R. Co., 7 Heisk. 451, 19 Am. Rep. 618; *citing* Horne *v.* M. & O. R. Co., 1 Coldw. 72; Simpson *v.* East Tennessee, Va. & Ga. R. Co., 5 Lea 456.

Texas. — Texas Southern R. Co. *v.* Hart, 32 Tex. Civ. App. 212, 73 S. W. 833; Galveston, H. & S. A. R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Texas Midland R. Co. *v.* Moore (Tex. Civ. App.), 74 S. W. 942; St. Louis S. W. R. Co. *v.* Goodnight, 32 Tex. Civ. App. 256, 74 S. W. 583; Tyler S. E. R. Co. *v.* Hutchins, 26 Tex. Civ. App. 400, 63 S. W. 1069; Texas & Pac. R. Co. *v.* Levine, 87 Tex. 437, 29 S. W. 466; Texas Midland R. Co. *v.* Hooten, 21 Tex. Civ. App. 139, 50 S. W. 499.

Virginia. — Norfolk & W. R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864; Patteson *v.* Chesapeake & O. R. Co., 94 Va. 16, 26 S. E. 393; White *v.* New York, P. & N. R. Co., 99 Va. 357, 38 S. E. 180, *disapproving* Bernard *v.* Richmond, F. & P. R. Co., 85 Va. 792, 8 S. E. 785, 17 Am. St. Rep. 103.

The Evidence In Rebuttal of the presumption must be as broad as the presumption itself. Drake *v.* Yazoo & M. V. R. Co., 79 Miss. 84, 29 So. 788; Karsen *v.* Milwaukee & St. Paul R. Co., 29 Minn. 12, 11 N. W. 122; Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22.

Proper Handling. — It must appear that the engine and spark-arresting apparatus were properly handled at the time of the fire; it is not enough to show that the machinery and appliances were of a proper character and were at the time in good condition (Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227; St. Louis, V. & T. H. R. Co. *v.* Funk, 85 Ill. 460); that the engine was operated in the customary manner (Woodson *v.* Milwaukee & St. P. R. Co., 21 Minn. 60); or that it was in the hands of a competent engineer (St. Louis, I. M. & S. R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159; Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243); or that the most approved spark-arresters were used and that careful and competent men were in charge thereof (Crews *v.* Kansas City, St. J. & C. B. R. Co., 19 Mo. App. 302).

Proper Equipment. — Evidence that the locomotive was handled carefully is not alone sufficient to overcome the presumption from the setting of a fire. It must further appear that the engine was properly equipped with spark-arresters. Texas & Pac. R. Co. *v.* Gains (Tex. Civ. App.), 26 S. W. 873. The evidence in this respect need not show proper construction down to the very moment when the fire occurred. Spaulding *v.* Chicago & N. W. R. Co., 30 Wis. 110, 11 Am. Rep. 550. But the statutory presumption of negligence is not rebutted by the testimony of a witness that he knew the defendant had adopted the latest and best improvements in spark-arresters, it not appearing that the engines were thus equipped at the time the injury oc-

statute raises from the fire itself a presumption of negligence.[22]

g. Sufficiency of Rebutting Evidence. — When the defendant has shown the foregoing facts as to the equipment, condition and operation of the locomotive the presumption of negligence is overcome as a matter of law, and the plaintiff must make some further showing of negligence.[23] This, however, is not the rule in some states, but it is a question for the jury whether there was negligence or not.[24] And where there is other evidence tending to show that the engine was defective or improperly managed negligence becomes a

curred. Southern R. Co. *v.* Puckett, 121 Ga. 322, 48 S. E. 968.

In Louisiana where a railroad company equips its engines with the most effective modern and practical spark-arresters the burden is upon the plaintiff claiming damages by fire from the escape of sparks to prove negligence by positive, strong and convincing evidence. Meyer *v.* Vicksburg, S. & P. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408. See also Gumbel *v.* Illinois Cent. R. Co., 48 La. Ann. 1180, 20 So. 703.

22. Railway Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Ft. Scott, W. & W. R. Co. *v.* Karracker, 46 Kan. 511, 26 Pac. 1027; Ann Arbor R. Co. *v.* Fox, 92 Fed. 494, 34 C. C. A. 497; Niskern *v.* Chicago, M. & St. P. R. Co., 22 Fed. 811.

23. *United States.* — Savannah, F. & M. Ins. Co. *v.* Pelzer Mfg. Co., 60 Fed. 39; Rosen *v.* Chicago, G. W. R. Co., 83 Fed. 300, 27 C. C. A. 534.

Alabama. — Alabama G. S. R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673; Louisville & N. R. Co. *v.* Marbury Lumb. Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917.

Georgia. — See Gainesville, J. & S. R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213.

Missouri. — Palmer *v.* Missouri Pac. R. Co., 76 Mo. 217; Wise *v.* Joplin, R. Co., 85 Mo. 178.

Oregon. — Koontz *v.* Oregon, R. & N. Co., 20 Or. 3, 23 Pac. 820.

Texas. — Missouri, K. & T. R. Co. *v.* Stafford (Tex. Civ. App.), 31 S. W. 319.

Utah. — Olmstead *v.* Oregon Short Line R. Co., 27 Utah 515, 76 Pac. 557.

Wisconsin. — Menominee River Sash & Door Co. *v.* Milwaukee & Northern R. Co., 91 Wis. 447, 65 N. W. 176; Spaulding *v.* Chicago & N. W. R. Co., 33 Wis. 582.

The presumption of negligence arising from proof of the mere communication of fire by a railroad engine "is not a rule of liability but of evidence," and when the defendant has shown the proper construction of the engine, the use of proper appliances and careful management, the plaintiff must give other evidence of negligence. Louisville & N. R. Co. *v.* Marbury Lumb. Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620.

The burden is upon the plaintiff to show that the fire originated in dry grass or other combustible material negligently left on the right of way by the defendant. Indiana, I. & I. R. Co. *v.* Hawkins, 84 Ill. App. 39; Gulf, C. & St. F. R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74.

24. First Nat. Bank *v.* Lake Erie & W. R. Co., 174 Ill. 36, 50 N. E. 1023; Greenfield *v.* Chicago & N. W. R. Co., 83 Iowa 270, 49 N. W. 95; Seska *v.* Chicago, M. & St. P. R. Co., 77 Iowa 137, 41 N. W. 596; Engle *v.* Chicago, M. & St. P. R. Co., 77 Iowa 661, 37 N. W. 6; St. Louis & S. F. R. Co. *v.* Richardson, 47 Kan. 517, 28 Pac. 183; Solum *v.* Great Northern R. Co., 63 Minn. 233, 65 N. W. 443. But see Indiana, B. & W. R. Co. *v.* Craig, 14 Ill. App. 407; Daly *v.* Chicago, M. & St. P. R. Co., 43 Minn. 319, 45 N. W. 611.

Where it appears that the fire was caused by the defendant's engine, "the mere happening of the fire not only shifts the burden of proof to defendant to show freedom from negligence, but stands as substantive evidence of neglect on the part of the

question for the jury in spite of direct evidence as to proper equipment and management.[25]

h. *Effect on Burden of Proof.* — This presumption does not shift the burden of proof on the question of negligence, but merely requires the defendant to show the absence of negligence in certain particulars, and when this has been done the plaintiff must give other evidence of negligence.[26]

C. Contributory Negligence. — The general conflict in the authorities as to the burden of proof on the question of contributory negligence is found also in actions for damages from fire set by the operation of a railway.[27]

company operating the train." West Side Mut. Fire Ins. Co. *v.* Chicago & N. W. R. Co. (Iowa), 95 N. W. 193.

Where a statute makes the causing of fire by the operation of a railroad *prima facie* evidence of negligence on the part of the company, this fact being shown, it becomes a question of fact for the jury, not of law for the court, to determine whether such *prima facie* case is overcome by the evidence of the company that the engine which set the fire was equipped with the latest devices in good repair and was being carefully managed by competent employes. "Here was a case of evidence against evidence. It is hardly fair to say that it was presumption against evidence, or evidence against presumption. The statute makes the setting out of a fire *prima facie* evidence of negligence. We think it is competent for the legislature to give this much of evidentiary weight to the fact of the causing of the fire." Atchison, T. & S. F. R. Co. *v.* Geiser, 68 Kan. 281, 75 Pac. 68.

25. Evidence tending to show that the engine causing the fire also set two other fires about the same time is not necessarily overcome by evidence that the engine was properly equipped with the best known spark-arrester, was in good condition and managed by a competent engineer. Smith *v.* Chicago, M. & St. P. R. Co., 4 S. D. 71, 55 N. W. 717.

The statutory presumption of negligence is not overcome by the testimony of the defendant's engineer that he handled his engine very carefully, where it appears that a large volume of sparks was being emitted by the engine at the time. Johnson *v.* Chicago, M. & St. P. R. Co., 31 Minn. 57, 16 N. W. 488.

The fact that the engine threw out an unusual quantity of fire was held sufficient to overcome any direct evidence that it was in good order, or if in good order that it was skillfully managed by the engineer. Chicago & N. W. R. Co. *v.* McCahill, 56 Ill. 28.

26. Louisville & N. R. Co. *v.* Reese, 85 Ala. 497, 5 So. 283, 7 Am. St. Rep. 66; Galveston, H. & S. A. R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294; Gulf, C. & S. F. R. Co. *v.* Johnson, 28 Tex. Civ. App. 395, 67 S. W. 182; Texas & Pac. R. Co. *v.* Ervay, 3 Willson Civ. Cas. (Tex.) § 46; St. Louis & S. W. R. Co. *v.* Moss (Tex. Civ. App.), 84 S. W. 281; *citing* Gulf C. & S. F. R. Co. *v.* Johnson, 92 Tex. 591, 50 S. W. 563.

Although proof that the fire was set by defendant's locomotive makes a *prima facie* case for the plaintiff requiring the defendant to show that its engines were properly equipped, in good repair and properly handled, the burden of proof on the whole case does not shift and on the issue of proper equipment, proper repair and careful handling the burden is still upon the plaintiff, so that if proof upon these issues should be evenly balanced the verdict should be for the defendant. Highland *v.* Houston, E. & W. T. R. Co. (Tex. Civ. App.), 65 S. W. 649; *citing* Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103.

27. Burden on Defendant.

D. Ownership of Injured Property. — The plaintiff need not produce written evidence of his ownership of the property injured or destroyed by the fire, but this fact is sufficiently proved against the defendant by showing the plaintiff's quiet and peaceable possession of the property.[28] But the defendant may show that the plaintiff was not the owner of the property,[29] or was not the sole owner.[30]

2. Origin of Fire. — A. Generally. — The plaintiff must of course show that the defendant railway company was responsible for the fire[31] but circumstantial evidence is sufficient,[32] and owing

Smith *v.* Chicago, M. & St. P. R. Co., 4 S. D. 71, 55 N. W. 717.

The fact that the plaintiff failed to clear the brush and combustible material from his premises adjoining the railroad does not shift the burden of proving contributory negligence from the defendant in an action for damages caused by the fire. Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C C. A. 446. The burden is on the plaintiff to negative contributory negligence. Louisville N. A. & C. R. Co. *v.* Carmon (Ind. App.), 48 N. E. 1047.

Where the plaintiff's intestate was killed by explosion of a powder mill alleged to have been caused by a spark from one of defendant's locomotives, it was held that the plaintiff was bound to show that the explosion was not caused by the carelessness of the decedent and that it was caused solely by the fault of the defendant. "It cannot be presumed that he was free from carelessness, and the burden was upon the plaintiff in some way to prove it." Babcock *v.* Fitchburg R. Co., 140 N. Y. 308, 35 N. E. 596.

28. Moore *v.* Chicago, M. & St. P. R. Co., 78 Wis. 120, 47 N. W. 273; Alabama, G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771 (possession under claim of ownership raises a presumption of ownership); Chicago, St. P. M. & O. R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264.

29. As evidence that the plaintiff was not the owner of the premises destroyed by fire the defendant may put in evidence the record of a judgment recovered by another party against an insurance company for the loss. Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316.

30. Ormond *v.* Central Iowa R. Co., 58 Iowa 742, 13 N. W. 54.

31. Baltimore & O. R. Co. *v.* Shipley, 39 Md. 251 (but he need not prove that it could not have originated from a source other than the operation of the railroad).

The plaintiff must not only show that the fire might have proceeded from the defendant's locomotive but must show by reasonable affirmative evidence that it did so originate. It is not necessary, however, to prove this beyond a reasonable doubt. White *v.* Chicago, M. & St. P. R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824.

32. *Georgia.* — Gainesville, J. & S. R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213.

Indiana. — Louisville, N. A. & C. R. Co. *v.* McCorckle, 12 Ind. App. 691, 40 N. E. 26.

Iowa. — Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

Kansas. — Kansas City, Ft. S. & M. R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81.

Minnesota. — Wolff *v.* Chicago, M. & St. P. R. Co., 34 Minn. 215, 25 N. W. 63.

Mississippi. — Alabama & V. R. Co. *v.* Barrett, 78 Miss. 432, 28 So. 820; Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899.

Nebraska. — Rogers *v.* Kansas City & O. R. Co., 52 Neb. 86, 71 N. W. 977; Chicago, B. & Q. R. Co. *v.* Beal (Neb.), 94 N. W. 956.

Rhode Island. — MacDonald *v.* New York, N. H. & H. R. Co., 25 R. I. 40, 54 Atl. 795.

Evidence tending to show that the defendant company negligently left along its track combustible material

to the difficulty of establishing this fact in the case of fires set by a locomotive the courts are very liberal as to the showing which they require.[33] Circumstantial evidence is sufficient although the fire is not traced to any particular locomotive.[34] But the evidence must be strong enough to raise a reasonable inference.[35] As evidence that sparks from one of defendant's engines could have caused the fire it is competent to show the quantity and size of the sparks emitted[36] and conditions of the weather as to dryness[37] and wind.[38] The fact that defendant's employes attempted to put out the fire is not a relevant circumstance in determining its origin.[39]

B. OTHER ORIGIN. — The defendant may introduce evidence tending to show some other cause of the fire for which he is not

which was discovered to be on fire soon after the passing of a train raises an inference which the company must rebut that the fire was caused by sparks from the engine. Richmond *v.* McNeill, 31 Or. 342, 49 Pac. 879.

Evidence showing that the fire originated immediately after the passing of a locomotive and tending to disprove the presence of any other cause will warrant the conclusion that sparks from the engine caused the fire. Wiley *v.* West Jersey R. Co., 44 N. J. L. 247; Karsen *v.* Milwaukee & St. Paul R. Co., 29 Minn. 12, 11 N. W. 122; Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350.

33. Union Pac. R. Co. *v.* De Busk, 12 Colo. 294, 20 Pac. 752, 13 Am. St. Rep. 221, 3 L. R. A. 350; Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

34. Donovan *v.* Chicago & N. W. R. Co., 93 Wis. 373, 67 N. W. 721.

35. "If it raises only a mere conjecture as to whether the fire was or was not so occasioned, no recovery can be had." Gainesville, J. & S. R. Co. *v.* Edmondson, 101 Ga. 747, 29 S. E. 213.

36. Louisville & N. R. Co. *v.* Marbury Lumb. Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917.

37. Louisville & N. R. Co. *v.* Marbury Lumb. Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917.

38. Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun (N. Y.) 182 (direction in which the wind was blowing at the time the fire was started).

In an action against a railroad company for the loss by fire of household goods in a house located 421 feet from defendant's right of way, where it appeared that shortly after one of defendant's engines had passed a pile of lumber on the right of way took fire and that a very strong wind was blowing at the time from the lumber pile toward the plaintiff's house, evidence that on the same day charred shingles were found a quarter of a mile beyond plaintiff's house and in the direction the wind was blowing, was held admissible as tending to show the source of the fire whereby the plaintiff's property was destroyed. Knight *v.* Chicago, R. I. & P. R. Co., 81 Iowa 310, 46 N. W. 1112.

Where the complaint alleged that the fire was caused by sparks from defendant's locomotive which set fire to combustible matter on the defendant's right of way, and was thence communicated to plaintiff's premises by intervening dry grass, it was held proper for the plaintiff to show the dryness of the season, the inflammable character of the surface of the intervening country, the connection of the various bottoms and their relation to the plaintiff's premises, and the strength and direction of the wind on the days between the origin of the fire and the day it reached the plaintiff's premises. Marvin *v.* Chicago, M. & St. P. R. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506.

39. Denver & R. G. R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345.

responsible,[40] as that it was of incendiary origin,[41] or that there were other fires in the neighborhood which could have caused it.[42]

C. Opinion. — A witness cannot give his opinion as to what caused the fire.[43] As to whether he can testify that he saw nothing which could have caused the fire but the operation of the railroad, it has been held both ways.[44]

3. Defects in and Management of Engines. — A. Generally. As evidence of negligence the plaintiff may show the absence of[45] or defects in[46] a spark-arrester in the engine causing the fire. He may further show the volume of sparks emitted by the engine and the distance to which they were thrown at about the time the fire was set,[47] and whether or not the size and quantity were unusually

40. In an action for the burning of plaintiff's mill by fire alleged to have been set by defendant's locomotive, testimony as to the cause of fires in other mills in which the witness had worked was held incompetent and irrelevant without showing that the condition of the machinery in such other mills was the same or that the methods of operation and other conditions were alike. The court refrains from passing upon the admissibility of such evidence where a proper preliminary showing as to the similarity of conditions has been made. Conner *v.* Missouri Pac. R. Co., 181 Mo. 397, 81 S. W. 145.

41. Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426.

Where the evidence was wholly circumstantial and conflicting it was held error to exclude testimony that shortly before the fire a person interested in the contents of the destroyed building was seen running away from it in a suspicious manner. Missouri, K. & T. R. Co. *v.* Jordan (Tex. Civ. App.), 82 S. W. 791.

42. The defendant may show that near the burned premises was a stationary boiler with a smoke-stack having no spark-arrester and that it was in use at the time of the fire. And for the purpose of showing that live sparks were emitted from this smoke-stack a witness may testify that some time after the fire a spark from this smoke-stack fell upon and burned his clothing. Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426.

Where the plaintiff had offered only indirect proof that the fire was caused by the defendant's engine and had shown simply that the fire was seen near the track about three hours after the engine had passed that point, evidence offered by the defendant to prove that it was the custom or usage among the farmers of that region and had been for many years to set fire to the leaves and underbrush at that season to improve the pasturage, was held improperly excluded. Green Ridge R. Co. *v.* Brinkman, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755.

43. Chicago & E. I. R. Co. *v.* Ross, 24 Ind. App. 222, 56 N. E. 451.

44. Competent. — Tyler *v.* Chicago & N. W. R. Co. 102 Iowa 632, 71 N. W. 536.

Incompetent. — Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

45. The absence of a spark-arrester is *prima facie* evidence of negligence on the part of the defendant. Henderson *v.* Philadelphia, & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

46. Where the fire in question is shown to have originated from a worn and defective spark-arrester which contained holes through which sparks and coals of fire were emitted, falling upon the grass on the premises along the right of way, a *prima facie* case of negligence is made against the company without further showing affirmatively that the defendant had knowledge of such defects. Louisville, N. A. & C. R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. 26.

47. Alabama, G. S. R. Co. *v.*

large.[48] The defendant may show the engine was of a new and approved make, that it was fitted with a good spark-arrester and had been properly inspected.[49] And in explanation of the emission of large quantities of sparks it is competent to show the steep grade at the place of the fire.[50] The condition of the engine or spark-arresting apparatus at the time of the fire may be shown by evidence of its condition within a reasonable time before or after.[51] As evidence that a particular spark-arresting device is effective a witness familiar with its use may testify as to his observation of what the results have been.[52] The defendant's habitual failure to

Clark, 136 Ala. 450, 34 So. 917 (volume of sparks and height to which they were thrown); Anderson *v.* Oregon R. Co. (Or), 77 Pac. 119; Lake Erie & W. R. Co. *v.* Helmerick, 29 Ill. App. 270 (presence of smoke after passage of engine).

Evidence that at the time the fire occurred the engine claimed to have caused the fire was emitting sparks from its smoke-stack in large showers is sufficient to authorize the jury to find that the spark-arrester was either improperly adjusted or out of proper order. Louisville & N. R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198.

48. Anderson *v.* Oregon R. Co. (Or.), 77 Pac. 119.

A witness may properly testify that the sparks emitted by the engine at the time it set the fire were unusually large in quantity and size and that she had never seen the engine "throw out fire that way before." Birmingham R. Light & Power Co. *v.* Hinton, 141 Ala. 606, 37 So. 635.

A witness who has testified to the size and quantity of sparks thrown by the engine claimed to have set the fire may also testify as to how the quantity and size of the sparks on this occasion compared with the quantity and size of sparks thrown by other engines along the defendant's road. Orient Ins. Co. *v.* Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036; *citing* Brusberg *v.* Milwaukee, L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416.

49. Patton *v.* St. L. & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446. See also Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243.

50. The defendant may show that the grade at the point where the fire occurred is steep and that its engines drawing trains up this grade are obliged to labor hard and consequently emit more sparks than usual. Frier *v.* President, etc., of Delaware & H. Canal Co., 86 Hun 464, 33 N. Y. Supp. 886.

51. Baltimore & O. R. Co. *v.* Shipley, 39 Md. 251; Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215 (condition two or three months previous held not too remote); Willitts *v.* Chicago, B. & K. C. R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Baltimore & O. S. W. R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833. See also *infra*, "Other Fires and Emissions of Sparks."

A witness who was on the engine at the time the fire occurred and who shortly afterward saw the grate attached to the smoke-stack of the engine as a spark-arrester but did not see it before or on the day of the fire may testify as to its defective condition at the time he saw it. Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

Evidence as to an examination of the engine made by the witness a week or two after the fire was held properly admitted. The time of the examination was not too remote. Crissey & Fowler Lumb. Co. *v.* Denver & R. G. R. Co., 17 Colo. App. 275, 68 Pac. 670.

52. Evansville & T. H. R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296 (the foreman of the boiler shops of another railway was called as an expert for the plaintiff and testified that a certain device to prevent the emission of sparks had been in use on his road for many years and that with proper use and handling he had never known of a fire resulting from an engine so equipped. *Held*, no error.

adopt new safety devices and improvements cannot be shown,[53] but its custom of inspecting engines may be relevant under some circumstances.[54] The record of inspection is not competent for the defendant except to refresh the memory of the person who made it.[55] The defendant may show that a certain spark-arrester would interfere with the working of the engine.[56]

B. Locomotive Unidentified. — Where the particular locomotive causing the fire is not identified the plaintiff may show defects in the spark-arresting apparatus of any one or all of the defendant's engines which may have set the fire.[57] The defendant may show that all its engines passing on the day of the fire were properly equipped and operated.[58]

C. Opinion. — A properly qualified expert with a personal knowledge of the facts may testify that the engine was being prop-

An engineer who is familiar with two different kinds of spark-arresters and who knows by observation how they act may state which of the two emits the more and larger sparks and which sets the more fires. Collins *v.* New York Cent. & H. R. R. Co., 109 N. Y. 243, 16 N. E. 50.

53. Evidence that the defendant was in the habit of refusing to adopt appliances which would modify very materially the amount of smoke emitted from its locomotives until the patents therefor have expired has no tendency to show that the spark-arresters used by the defendant were not up to the standard, and is therefore inadmissible. Pennsylvania R. Co. *v.* Page (Pa.), 12 Atl. 662.

54. The defendant may show by the master mechanic of one of its shops at a point beyond where the fire occurred, which was the destination of the engine, the general custom of inspecting engines on their arrival at that place, as evidence that in accordance with that custom had the engine been defective the inspector would have reported to the witness that such was its condition, and since there was no such report, that the engine was in good repair. Chicago & A. R. Co. *v.* Quaintance, 58 Ill. 389.

55. Illinois Cent. R. Co. *v.* Barrett, 23 Ky. L. Rep. 1755, 66 S. W. 9.

56. In Carter *v.* Kansas City, St. J. & C. B. R. Co., 65 Iowa 287, 21 N. W. 607, it was held error to exclude the testimony of the defendant's engineer as to what effect upon the working capacity of the engine the use of a spark-arrester with smaller meshes than the one actually used would have.

57. Where at the time the plaintiff is making his case the particular engine causing the fire has not been identified he has the right to show that any locomotive belonging to the defendant was defective in its spark-arresting apparatus, or that all of defendant's engines were in bad condition in this respect, the testimony being competent on the issue of ordinary care in selection of machinery, "for it could not be expected that the exercise of ordinary care would fail in every instance to secure reasonably safe equipments." The witness in this case testified that the engines used by the defendant on this road were old, some of them in ordinary condition and some in bad condition, and that he knew their condition from having seen them daily and from having worked frequently on them. Missouri, K. & T. R. Co. *v.* Carter, 95 Tex. 461, 68 S. W. 159.

58. Biering *v.* Gulf, C. & S. F. R. Co., 79 Tex. 584, 15 S. W. 576.

Such evidence is not open to the objection that it should be limited to the particular engine which did the damage, or that it is a matter of opinion on which expert testimony alone is competent, since it is a matter of fact and observation. Haley *v.* St. Louis, K. C. & N. R. Co., 69 Mo. 614.

erly managed at the time the fire occurred.[59] So an expert may give his opinion in response to a hypothetical question as to whether an engine acting in a certain way was in good order and properly managed.[60] He may testify how an engine properly equipped and operated would act with respect to throwing sparks or fire,[61] and whether such an engine would throw sparks as large and as far as the one in question.[62] Such an expert cannot properly give his opinion as to whether a spark thrown a given distance would set a fire, though he may give his opinion as to what its condition would be under such circumstances,[63] and he may state how large a spark would have to be to be visible under given conditions.[64] Testimony that the spark-arrester would only permit small sparks to escape is incompetent because a mere conclusion.[65]

D. SUFFICIENCY. — The defendant's negligence in the equipment and operation of the engine causing the fire may be shown by circumstantial evidence.[66]

4. Kind of Fuel. — Plaintiff may show that the defendant was burning fuel which was peculiarly liable to cause dangerous sparks,[67] unless he is relying wholly upon some other grounds of negligence.[68]

5. Competency and Qualifications of Employes. — The competency and qualifications of the defendant's employes through whose al-

59. The fireman on the engine at the time it was alleged to have communicated the fire if shown to be an expert may give his opinion that the engine was being properly managed at that time. The fact that the engineer could also give the same testimony is no reason for excluding the testimony of the fireman. Texas Southern R. Co. *v.* Hart, 32 Tex. Civ. App. 212, 73 S. W. 833.

60. An expert on spark-arresters may give his opinion in response to a hypothetical question based upon the evidence as to whether an engine setting fires and dropping sparks as the engine in question did was in good working order or properly operated. Texas & Pac. R. Co. *v.* Watson, 190 U. S. 287.

61. A person who has been employed as a locomotive engineer for a long time and who is qualified by experience and observation to understand the operation and effect of spark-arresters in locomotives may give testimony as to whether a spark-arrester in first-class condition would prevent the escape of sparks or fire from a locomotive sufficient to ignite or burn property on or near the right of way. Kansas City, Ft. S. & M. R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81.

62. Peck *v.* New York Cent. & H. R. R. Co., 165 N. Y. 347, 59 N. E. 206.

63. Peck *v.* New York Cent. & Hudson R. R. Co., 165 N. Y. 347, 59 N. E. 206, *reversing* 55 N. Y. Supp. 1121.

64. Where it is material an expert may testify as to how large a live spark would have to be to be seen in the daytime at a distance of ten or twenty rods passing from the mouth of the smoke-stack of a locomotive hauling a train. Chicago & E. R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033.

65. Swanson *v.* Keokuk & W. R. Co., 116 Iowa 304, 89 N. W. 1088.

66. Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

67. St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47 (*holding* competent evidence that all of defendant's engines, which were coal burners, were burning wood).

68. Galveston, H. & S. A. R. Co. *v.* Rheiner (Tex. Civ. App.), 25 S. W. 971 (where the negligence al-

leged negligence the fire occurred, may be shown,[69] but not by opinion evidence.[70]

6. Rate of Speed. — The rate of speed at which the train setting the fire was running at the time may be shown,[71] and it has been held competent to prove the custom of defendant's trains to run by the point in question at an unlawful rate of speed.[72] But the speed of the train at a considerable distance from the scene of the fire cannot be shown.[73] The violation of a municipal speed ordinance at the time of setting the fire is evidence of negligence,[74] though the contrary has been held.[75]

7. Customary Methods and Acts. — The defendant cannot show its own[76] or the general custom[77] with respect to the act in ques-

leged was the failure to provide proper spark-arresters).

69. Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446 (that the engineer and fireman were competent and careful); Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243; Flynn *v.* Manhattan R. Co., 1 Misc. 188, 20 N. Y. Supp. 652 (careful and skilful engineer).

70. The opinion of defendant's road-master, as an expert, is not admissible to prove that its section man who had charge of the section where the fire originated was a careful, prudent and attentive man in the discharge of his duties. Bryan *v.* Central Vermont R. Co., 56 Vt. 710.

71. Norfolk & W. R. Co. *v.* Fritts, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864.

72. Bennett *v.* Missouri, K. & T. R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

73. The rate of speed of the train causing the fire, at a point a mile and a half or two miles distant from the scene thereof, cannot be shown. Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

74. An ordinance limiting the speed of passenger trains within the city to ten miles an hour is properly admissible for the plaintiff where one count of the declaration sets out such ordinance and alleges that by reason of the excessive speed the sparks were thrown from the engine which set fire to the plaintiff's property, especially where other evidence tends to show that a high rate of speed is more likely to result in the emission of sparks or coals from the engine. Lake Erie & W. R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660.

75. In an action for injuries caused by fire within the limits of a city, although it appears that the train causing the fire was running at a rapid rate of speed, a city ordinance limiting the speed of trains to six miles an hour is not admissible. "Negligence cannot be fastened on the carrier by some local police regulation. Punishment may be imposed for violation of such ordinances, but in civil suits there are well defined methods of establishing the facts which authorize a recovery, and we cannot depart from these methods without doing violence to well settled principles." Louisville & N. R. Co. *v.* Dalton, 102 Ky. 290, 43 S. W. 431.

76. The defendant cannot show the mere usage on its part as to the construction and operation of its engines but must show the actual construction and condition. Baltimore & Ohio R. Co. *v.* Shipley, 39 Md. 251.

77. The testimony of a civil engineer as to the usual practice adopted in guarding fires kindled in clearing and grubbing on railroad locations is not competent because such practice is not a safe criterion as to what constitutes ordinary care. "Not even a general custom can be deemed a relevant fact in an action for negligence respecting any non-contractual duty which is not performed under fixed conditions." Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986.

Where the fire was communicated to defendant's bridge by sparks and thence to plaintiff's buildings, it was held no error to exclude evidence offered by the defendant to show that

tion as evidence of the absence of negligence; and the same rule applies to the plaintiff on the question of his contributory negligence.[78] It has been held, however, that the defendant may show the common use of a smoke-stack by many other railroads, as evidence of its safety.[79]

8. Combustibles on Right of Way. — Where the fire originated on defendant's right of way, evidence that combustible matter had been permitted to accumulate at that point is competent to show negligence.[80] Statutes sometimes make the failure to keep the right of way clear of such combustibles *prima facie* evidence of negligence in actions for damages from fires caused by the operation of the railroad.[81] But where the fire originated elsewhere such evidence is not admissible.[82]

9. Other Fires and Emission of Sparks and Cinders. — A. By Same Engine. — a. *At About the Same Time.* — As evidence that a particular locomotive caused the fire in question and was defectively constructed or negligently managed it is competent to show that other fires were set by it at about the same time or on the same trip,[83] or that fires sprang up along the right of way about

the usual practice of railroad companies in that section of the country was not to employ a watchman for bridges like the one destroyed, since the defendant's vigilance is not to be measured by such a standard. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 469.

78. In an action for the value of certain stacks of oats destroyed by fire set out by the defendant's engine, evidence of the custom of the neighborhood not to plow around stacks is not competent for the purpose of showing a want of contributory negligence. Ormond *v.* Central Iowa R. Co., 58 Iowa 742, 13 N. W. 54.

79. Frankford & Tpk. Co. *v.* Philadelphia & T. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708.

80. Cantlon *v.* Eastern R. Co., 45 Minn. 481, 48 N. W. 22; Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989; Crissey & F. Lumb. Co. *v.* Denver & R. G. R. Co., 17 Colo. App. 275, 68 Pac. 670.

Evidence is admissible to show that dry grass, weeds and other combustible material had been permitted to accumulate in the street in the space between the main track and the side track and also on the side-track, even admitting that it was not the defendant's duty to keep the space in the street between the main track and side track clean, since in such case the city and the defendant would be joint *tort feasors* if the fire originated from such combustible material. Lake Erie & W. R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660.

Where the Complaint Charges No Negligence in the improper and careless maintenance of the right of way, evidence of the inflammable condition of the right of way is not admissible. Noland *v.* Great Northern R. Co., 31 Wash. 430, 71 Pac. 1098.

81. Montana Statute. — Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

Under such a statute it is competent to show in such an action that the right of way at other points than the place where the fire was set but in the immediate neighborhood, was encumbered by combustible material. Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

82. Missouri, K. & T. R. Co. *v.* Stafford (Tex. Civ. App.), 31 S. W. 319.

83. Hazeltine *v.* Concord R., 64 N. H. 545, 15 Atl. 143; Lake Erie & W. R. Co. *v.* Gould, 18 Ind. App. 275, 47 N. E. 941; Slossen *v.* Burlington, C. R. & N. R. Co., 60 Iowa 214, 10 N. W. 860, 14 N. W. 244; Patton *v.* St. Louis & S. F. R. Co., 87 Mo.

the time of its passage.[84] Such fires, however, must be located with some definiteness along the right of way.[85]

b. *At Other Times.* — (1.) **Generally.** — As evidence that a particular engine claimed to have been the cause of the fire was in fact the cause and was defectively constructed or negligently managed at the time, it is competent to show that the same engine caused other fires on other occasions both before[86] the fire in question and

117, 56 Am. Rep. 446 (*holding* that Kenney *v.* Hannibal & St. J. R. Co., 70 Mo. 243, is not opposed to this conclusion); Texas & Pac. R. Co. *v.* Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088; Lanning *v.* Chicago, B. & Q. R. Co., 68 Iowa 502, 27 N. W. 478 (*distinguishing* Bell *v.* Chicago, B. & Q. R. Co., 64 Iowa 321, 20 N. W. 456, and Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909, on the ground that they hold that the occurrence of other fires about the same time is not to be regarded as evidence that the fire in question was set out by engine of the defendant); Webb *v.* Rome, W. & O. R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

84. Tyler *v.* Chicago & N. W. R. Co., 102 Iowa 632, 71 N. W. 536; Brusberg *v.* Milwaukee, L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416.

Where it appeared that the fire in question sprang up soon after the passing of a particular locomotive, it was held competent to show that other fires at different places along the railway sprang up on the same day after the passing of the same locomotive. such evidence tended to prove that the fire in controversy was caused by a locomotive and also negligence of the defendant with respect to the locomotive from which the fire came. Chicago & E. R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033.

Evidence that at about the time of the fire complained of and about the time of the passing of the locomotive which it was charged caused the fire, witnesses observed other fires at various points not far removed from the place where the fire in question occurred was held properly admitted as tending to show that the fire was caused by the locomotive in question. and also negligence in its construction or operation. Texas & Pac. R. Co. *v.* Watson, 190 U. S. 287, *following* Grand Trunk R. *v.* Richardson, 91 U. S. 454.

85. Patton *v.* St. Louis & S. F. R. Co., 87 Mo. 117, 56 Am. Rep. 446.

86. Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & Mfg. Co., 27 Fla. 1,157, 9 So. 661, 17 L. R. A. 33; Brighthope R. Co. *v.* Rogers, 76 Va. 443; Patteson *v.* Chesapeake & O. R. Co. 94 Va. 16, 26 S. E. 393. See New York, P. & N. R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264; Ireland *v.* Cincinnati W. & M. R. Co., 79 Mich. 163 44 N. W. 426.

Where a fire was claimed to have been set by the engine attached to a particular train and evidence as to the setting of other fires by the same train during the preceding two weeks had been admitted, a motion to strike out such evidence on the ground that it was not competent because there was no proof that the fires were set by the same engine was held properly overruled, conceding the rule of law to be as contended, because the ground of objection was not sufficiently stated and because there was some evidence that the engines were identical, a witness having testified that "they generally run the same engine on the same train." Nelson *v.* Chicago, M. & St. P. R. Co., 35 Minn. 170, 28 N. W. 215.

But evidence as to fires caused by the same engine shortly prior to the fire in question was held properly excluded where there was nothing to show that they were caused in a manner indicating a want of repair or improper management of the engine, or that they were other than the result of the unavoidable escape of small sparks or cinders. Such evidence is too uncertain to be of any value. Menominee R. S. & D. Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176.

after.[87] And under such circumstances it is competent also to show that sparks dangerous in quantity and size were emitted by the same engine at other times, if not too remote.[88] The evidence is sometimes apparently confined, however, to fires in the same vicinity.[89] And if it appears that the engine had in the interval been repaired and put in good order, previous fires cannot be shown.[90] In rebuttal of evidence that the engine in question was properly constructed and managed plaintiff may show that it set other fires shortly afterwards at the same place.[91]

(2.) Remoteness. — Such evidence of other fires must not be too remote but must be confined to a time near the fire for which damages are claimed,[92] unless they are shown to have continued to oc-

87. Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

88. Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Brighthope R. Co. *v.* Rogers, 76 Va. 443; Patterson *v.* Chesapeake & O. R. Co., 94 Va. 16, 26 S. E. 393; Missouri, K. & T. R. Co. *v.* Wilder, 3 Ind. Ter. 85, 53 S. W. 490.

In an action for damages from fire alleged to have been set out by a passing engine evidence that the same engine less than ten days after the fire in question was seen going up the same grade near the location of the fire "throwing cinders from its smoke-stack" is admissible to show that the fire was caused by the engine. The condition of the engine soon after would, considering its substantial and permanent character, have some tendency to show its condition at the time of the fire. Baltimore & O. S. W. R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833.

89. Henry *v.* Southern Pac. R. Co., 50 Cal. 176. See also Webb *v.* Rome, W. & O. R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

Testimony is admissible that about two weeks before the fire in question the witness saw another fire in a field near the defendant's road within a half mile of the place of the fire in question immediately after the same engine claimed to have caused the fire had passed. Butcher *v.* Vaca Valley & C. L. R. Co., 67 Cal. 518, 8 Pac. 174, 5 Pac. 359.

90. Menominee R. S. & D. Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176.

91. Alabama, G. S. R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917; Loring *v.* Worcester & N. R. Co., 131 Mass. 469; Texas & Pac. R. Co. *v.* Scottish Union Nat. Ins. Co., 32 Tex. Civ. App. 82, 73 S. W. 1088.

Where the defendant has introduced evidence tending to show that the engine alleged to have caused the fire was in good repair and furnished with a suitable spark-arrester, that it had been recently examined and found in good order, was under the control of a competent engineer and was being carefully operated, it was held that on rebuttal plaintiff could show that on the same day the plaintiff's property was burned several other fires were set from sparks emitted by the same engine within a few miles of where the first fire was set. Lake Erie & W. R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. 660.

92. Galveston, H. & S. A. R. Co. *v.* Rheiner (Tex. Civ. App.), 25 S. W. 971 (fires two or three years previous are too remote). See Collins *v.* New York Cent. & H. R. R. Co., 109 N. Y. 243, 16 N. E. 50.

"Of course, the inquiry in all such cases is as to the existence or condition of the spark-arrester at the precise time of the injury; but, in order to make this practicable by proof that it was defective, or threw out sparks of unusual size, a reasonable latitude must be allowed to show its management and operation both before and after. The evidence, however, must be confined to its operation at or about the time of the occurrence." Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

cur from time to time with some frequency during the interim.[93]

B. By Other Engines. — a. *Generally.* — There is some confusion and conflict on the question as to when evidence of the setting of other fires or the emission of sparks by other engines of the defendant is admissible. Some cases seem to hold that upon the issues both of negligence and the cause of the fire it is competent to show that fires were set or sparks emitted by the defendant's engines along the right of way within a reasonable time both before and after the fire in question, regardless of whether the engine claimed to have set the fire is identified.[94] And it has been ex-

Evidence that the same engine a year later set fire to timber at another place is not admissible because involving too many collateral issues. Cheek *v.* Oak Grove Lumb. Co., 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

Proof of other fires if limited to fires within a day or two of the one in question would be manifestly competent. Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851.

Fires occurring two or three months previous were held not too remote in Brown *v.* Benson, 101 Ga. 753, 29 S. E. 215.

Evidence as to fires set by the same engine in November and December following the fire in question, which occurred on September 30th, was held clearly incompetent in Menominee R. S. & D. Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176.

93. The testimony of a witness that she had frequently seen the same engine throwing sparks in the night-time a specified distance from the track, and that such observation had extended down to the day of the fire in question, was held properly admitted. Taylor *v.* Louisville & N. R. Co., 19 Ky. L. Rep. 717, 41 S. W. 551.

94. Piggott *v.* Eastern Counties R. Co., 3 Man. G. & S. 229, 54 E. C. L. 228; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367; Lake Erie & W. R. Co. *v.* Cruzen, 29 Ill. App. 212; MacDonald *v.* New York, N. H. & H. R. Co., 25 R. I. 40, 54 Atl. 795; Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165; Hoover *v.* Missouri P. R. Co. (Mo.), 16 S. W. 480, *overruling* Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; Lester *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 265.

In an action for the burning of cord-wood piled near the defendant's track where it was not shown by what engine the fire was caused nor that any engine had dropped coals on a particular occasion, but the fire was traced from the wood to the defendant's track on which coals were found, and but one engine, identified by name, had been in the wood-yard on the day of the fire, it was held competent to permit witnesses to testify that previous to the date of the fire they had frequently seen fires in the same wood-yard caused by coals dropped from defendant's engines, and also at various times seen sparks from such engines at the same place of sufficient size to set fire to cord-wood. So also it was held competent to show that about four weeks after the fire in question another fire had been caused by another engine along the defendant's track, there being no pretense that the two engines were differently constructed. Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

In Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 135, where the engine which passed immediately preceding the fire and was claimed to have been the cause of it was identified by name, evidence that within a week previous the defendant's engines had been seen scattering large sparks as they passed, which sparks had caused a fire, was held properly admitted for the purpose of showing that the fire in question was occasioned by one of the defendant's locomotives and that there was negligence in the construction and management of the engines.

pressly held that where the question in issue is whether the fire was caused by any locomotive it is competent to show that other fires were caused by the defendant's locomotive at about the same time and in the same vicinity, without regard to the question of the identification of the engine causing the fire.[95]

Where the plaintiff claimed that the fire was caused by defendant's engines, evidence that such engines shortly before and about the time of the fire in question emitted large quantities of sparks and cinders and started many fires along the track on and in the vicinity of the plaintiff's farm, and that large-sized cinders covered the ground along the track and outside of the right of way on the plaintiff's farm, was held properly admitted although there was uncontradicted evidence that the engines which the defendant claimed caused the fire were fitted with screens which would effectually prevent the escape of sparks or fire and of the most approved type. Illinois Cent. R. Co. *v.* Scheible, 24 Ky. L. Rep. 1708, 72 S. W. 325; *citing* Louisville & N. R. Co. *v.* Dalton, 102 Ky. 290, 43 S. W. 431; Louisville & N. R. Co. *v.* Samuels (Ky.), 57 S. W. 235; Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165.

Habit. — It is competent to show that the defendant's locomotives were in the habit of throwing off sparks and cinders previous to the day of the fire in question, as evidence that this was the cause of the fire. MacDonald *v.* New York, N. H. & H. R. R. Co., 25 R. I. 40, 54 Atl. 795.

95. "But without regard to the question of identity, upon a careful reexamination of the decided cases, we are satisfied that the rule stated in Thatcher *v.* Railroad Co. is supported by reason, and by the great weight of authority. We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives, at about the same time, and in the same vicinity, may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by emission of sparks or the escape of coals. It is admissible as 'tending to prove the possibility, and a consequent probability, that some locomotive caused the fire.'—language from Grand Trunk R. Co. *v.* Richardson, 91 U. S. 464, which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive as such, with the respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof." Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208, *holding* that Thatcher *v.* Maine Cent. R. Co., 85 Me. 502, 27 Atl. 519, was not intended to lay down a rule inconsistent with the one established in this case.

In Campbell *v.* Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. Rep. 530, 25 L. R. A. 175, which was an action for damages for the burning of plaintiff's building, fences and shrubbery by fire alleged to have been communicated from one of defendant's locomotives, evidence that other fires both before and subsequent to the one in question at different places on the line of defendant's road had been started by sparks from some of defendant's engines, was held properly admitted to show the possibility and probability that the fire in question was communicated from an engine. The court *distinguishes* Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227, on the ground that the statute makes the defendant absolutely liable without respect to the character of the machinery or the

b. *When No Particular Engine Is Identified As the Cause.* Where the fire is claimed to have been caused by sparks from a passing engine but no particular locomotive is identified as the cause, evidence that other fires have been set, or dangerous sparks emitted by the defendant's locomotives along the same road within a reasonable time before and after the fire in question, is admissible to show both that a locomotive may have been the cause of the fire and that, if so, it was defectively constructed or negligently operated.[96] In some cases an additional limitation seems to be placed

competency of the employes. "The only issue, involving the liability of defendant, was whether the fire was communicated to plaintiff's property directly, or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial, whether the fire causing the damage did, in fact, originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility, that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The facts that live sparks were thrown from engines, and did ignite grass, and other combustible materials, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine, from which alone the fire could have been communicated, was constructed or manned with more care than all others in use on the road." And after citing authorities the court further says: "We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only and the engine which could only have caused the damage, had been clearly identified, evidence that other engines emitted sparks and set fires, would have been inadmissible under the decisions of this court. Coale *v.* Railroad, supra; Patton *v.* Railroad, 87 Mo. 117. But, in case the fact, whether the fire originated from the engine, was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue." See also Gibbs *v.* St. L. & S. F. R. Co., 104 Mo. App. 276, 78 S. W. 835.

96. *United States.* — Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446.

Indiana. — Evansville & T. H. R. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296; Louisville, N. A. & C. R. Co. *v.* Lange, 13 Ind. App. 337, 41 N. E. 609.

Kansas. — St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47; Sprague *v.* Atchison, T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828.

Mississippi. — Alabama & V. R. Co. *v.* Aetna Ins. Co., 82 Miss. 770, 35 So. 304.

New York. — Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182. See also Westfall *v.* Erie R. Co., 5 Hun 75.

Oregon. — Koontz *v.* Oregon R. & N. Co., 20 Or. 3, 23 Pac. 820; Manchester Assur. Co. *v.* Oregon R. & N. Co. (Or.) 79 Pac. 60.

Rhode Island. — See Smith *v.* Old Colony & N. R. Co., 10 R. I. 22.

Tennessee. — Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

Texas. — San Antonio & A. P. R. Co. *v.* Home Ins. Co. (Tex. Civ. App.), 70 S. W. 999; Galveston, H. & S. A. R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294.

Virginia. — Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207.

Washington. — Noland *v.* Great

upon this kind of evidence, namely, that the other fires or emissions of sparks must have occurred near the place of the fire for which damages are claimed.[97] But it has been held competent to show other fires along the right of way at other points on the same day.[98]

c. *When Particular Engine Is Identified.* — **(1.) Generally.** Where the engine which caused or is claimed to have caused the fire is identified, evidence as to the setting of other fires or the

Northern R. Co., 31 Wash. 430, 71 Pac. 1098 (habit of emitting sparks upon the the right of way and that other fires had been caused thereby).

The testimony of a witness, living nineteen miles from the property destroyed, that it was a common occurrence for engines passing the place where he lived to set fire four rods from the track, was held properly admitted. Pennsylvania R. Co. *v.* Stranahan, 79 Pa. St. 405.

Subsequent Fires bear only on the question of whether the fire could have been communicated in the manner alleged, and where this is not in issue such evidence is not admissible. Smith *v.* Old Colony & N. R. Co., 10 R. I. 22.

Contra. — Akins *v.* Georgia R. & Bkg. Co., 111 Ga. 815, 35 S. E. 671.

97. *United States.* — Gulf, C. & S. F. R. Co. *v.* Johnson, 54 Fed. 474, 4 C. C. A. 447; Chicago, St. P., M. & O. R. Co. *v.* Gilbert, 52 Fed. 711, 3 C. C. A. 264 (other fires in the same vicinity some weeks previous).

Alabama. — Alabama, G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771 (that the defendant's engines going up the grade where the fire occurred habitually threw out a large amount of sparks about the time of the fire).

Indian Territory. — St. Louis, I. M. & S. R. Co. *v.* Lawrence, 4 Ind. Ter. 611, 76 S. W. 254.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 279.

Kentucky. — Mills *v.* Louisville & N. R. Co., 116 Ky. 309, 76 S. W. 29.

Maine. — Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208.

New York. — White *v.* New York Cent. & H. R. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497; Field *v.* New York Cent. R., 32 N. Y. 339; Sheldon *v.* Hudson R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

Ohio. — Pennsylvania Co. *v.* Rossman, 13 Ohio Cir. Ct. 111; Lake Side & M. R. Co. *v.* Kelly, 10 Ohio Cir. Ct. 322.

Vermont. — Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24.

Where there was evidence to show that the fire was caused by sparks from two passing engines but they were not identified, it was held proper to permit the plaintiff to show that at various times during the same summer before the fire occurred some of the defendant's locomotives scattered fire at the same place "without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. . . . The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 469.

"The true rule upon this subject is that, in an action against a railway company for setting a fire by means of defects in the condition or operation of an engine, it is competent, where the engine that might have set the fire is unknown or unidentified, to introduce testimony that some of the defendant's engines set fires or threw igniting sparks at other times, within a few weeks, and at other places in the vicinity." Lesser Cotton Co. *v.* St. Louis, I. M. & S. R. Co., 114 Fed. 133, 52 C. C. A. 95.

98. Galveston, H. & S. A. R. Co.

emission of sparks on other occasions by other engines of the defendant is held in many jurisdictions to be inadmissible.[99]

(2.) Identification. — (A.) GENERALLY. — As to just when the engine is identified within the meaning of the rule excluding evidence of fires by other engines there is some apparent conflict in the cases. If the number of the engine was known that is clearly sufficient.[1] And it has been held that if the fire must have been caused, if by any engine, by one of two or three engines which passed about the time it occurred, evidence of fires by other engines is incompetent.[2] But this has been generally held to be insufficient identi-

v. Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013; *citing* Railway Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163; Texas & Pac. R. Co. *v.* Land, 3 Willson Civ. Cas. (Tex.) § 50.

99. *United States.* — Lesser Cotton Co. *v.* St. Louis, I. M. & S. R. Co., 114 Fed. 133, 52 C. C. A. 95.

Colorado. — Crissey & Fowler Lumb. Co. *v.* Denver & R. G. R. Co., 17 Colo. App. 275, 68 Pac. 670 (not ordinarily admissible although it might possibly be competent under some circumstances).

Florida. — Jacksonville, T. & K. W. R. Co. *v.* Peninsular L., T. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33.

Georgia. — Inman *v.* Elberton Air-Line R. Co. 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232.

Illinois. — First Nat. Bank *v.* Lake Erie & W. R. Co., 174 Ill. 36, 50 N. E. 1023.

Indiana. — Chicago, I. & L. R. Co. *v.* Gilmore, 22 Ind. App. 466, 53 N. E. 1078.

Indian Territory. — Missouri, K. & T. R. Co. *v.* Wilder, 3 Ind. Ter. 85, 53 S. W. 490.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286. But see St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47.

Michigan. — Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426.

North Carolina. — Hygienic Plate Ice Mfg. Co. *v.* Raleigh & A. Air-Line R. Co., 126 N. C. 797, 36 S. E. 279.

Ohio. — Lake Side & M. R. Co. *v.* Kelly, 10 Ohio Cir. Ct. 322.

Pennsylvania. — Erie R. Co. *v.* Decker, 78 Pa. St. 293.

Texas. — San Antonio & A. P. R. Co. *v.* Home Ins. Co. (Tex. Civ. App.), 70 S. W. 999.

Virginia. — Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

Where the injury complained of is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine which is known and identified the evidence should be confined to the condition of that engine, its management and practical operation. Evidence tending to prove defects in other engines of the defendant is irrelevant and should be excluded. Henderson *v.* Philadelphia, & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299; Erie R. Co. *v.* Decker, 78 Pa. St. 293; Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316.

1. Hygienic Plate Ice Mfg. Co. *v.* Raleigh & A. Air-Line R. Co., 126 N. C. 797, 36 S. E. 279; Ireland *v.* Cincinnati, W. & M. R. Co., 79 Mich. 163, 44 N. W. 426; Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

2. Albert *v.* Northern Cent. R. Co., 98 Pa. St. 316; Gibbons *v.* Wisconsin Val. R. Co., 58 Wis. 335, 17 N. W. 132. See also Toledo, St. L. & W. R. Co. *v.* Needham, 105 Ill. App. 25.

Where the alleged cause of the fire was sparks which escaped from one of two engines described in the declaration, the exclusion of evidence that other engines of the defendant besides these two and not shown to be of like construction had at other times emitted sparks at or near the same place was held no error. Inman *v.* Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958, 35 Am. St. Rep. 232, *distinguishing*

fication;[3] and the fact that the fire, if caused by an engine, must have been caused by the one attached to a particular passing train does not identify it within the rule,[4] since the same engine is not always attached to the same train.

(B.) Time of Identification. — The identification, to be of any service to the plaintiff in enabling him to prepare his evidence, must have preceded the trial, hence the fact that the defendant, during the course of the trial, identifies[5] or gives notice that it will

East Tennessee. Va. & Ga. R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828.

3. Northern Pac. R. Co. *v.* Lewis, 51 Fed. 658, 2 C. C. A. 446; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 469.

Where the fire was claimed to have been set by one of three engines which passed about the time it originated, it was held no error to permit the plaintiff to show the emission of sparks from other engines passing the same point shortly before and afterward. Such evidence is admissible as tending to prove the possibility, and consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railway company. "There was no identification in this case of any engine as being the one which set out the fire." Alabama & V. R. Co. *v.* Aetna Ins Co., 82 Miss. 770, 35 So. 304 (*quoting* and *following* Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 470). But see Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899.

Proof that one of four locomotives, if any, set out the fire is too uncertain and does not amount to identification. Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

The engine is not identified merely because it appears that it was probably one of two engines which passed at about the time of the fire. Railroad Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936.

4. "The mere fact that an engine was attached to a certain train on a certain occasion does not constitute a specific identification of the engine. The train is sufficiently identified, but not its constituent parts. The same engine may have been used to move many different trains over the road. It is a difficult matter to identify a passing engine moving rapidly, particularly so after dark, as it appears from the conceded facts was the case here." Evansville & T. H. R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296. See Kentucky Cent. R. Co. *v.* Barrow, 89 Ky. 638, 20 S. W. 165; Hoover *v.* Missouri Pac. R. Co. (Mo.), 16 S. W. 480.

"It would be manifestly difficult, if not imposible, for an injured party who could identify an engine only by the train it drew on a particular occasion, to obtain any information which . . . would be of any service to him, except such as the servants of the railroad company were willing to communicate." Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; *citing* as cases in which the engines were similarly identified: Thatcher *v.* Maine Cent. R. Co., 85 Me. 502, 27 Atl. 519; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454; Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 13 Pac. 367; Piggott *v.* Railway Co., 3 Man. G & S. (Eng.) 228; Koontz *v.* Oregon R. & N. Co., 20 Or. 3, 23 Pac. 820; Henderson *v.* Philadelphia & R. R. Co., 144 Pa. St. 461, 33 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

Contra. — Gibbons *v.* Wisconsin Val. R. Co., 58 Wis. 335, 17 N. W. 132; Tribette *v.* Illinois Cent. R. Co., 71 Miss. 212, 13 So. 899.

5. "As the plaintiff must proceed with his evidence in the first instance, the fact that the defendant may be able to prove the identity of the engine cannot have the effect to make the admission of such evidence error. It may be granted that the admissibility of such evidence trenches somewhat on the general doctrine regarding relevancy in actions of this character, but the authorities indicate that its allowance

identify the engine[6] does not render incompetent evidence of fires by other engines.

d. *Preliminary Proof.* — The competency of such evidence does not depend upon preliminary proof that the construction and condition of the engines and the conditions under which the fires occurred were similar.[7] In New York it seems that there must be preliminary proof tending to show that the fire could have been caused only by sparks from a passing engine.[8]

e. *Remoteness.* — Such evidence must not be too remote but should be confined to a reasonable time before or after the fire in question.[9] Where, however, the defendant has offered evidence as to the good condition of all its engines within a certain period, fires

is justified by the necessities of the case." Koontz *v.* Oregon, R. & N. Co., 20 Or. 3, 23 Pac. 820. But see Texas Midland R. Co. *v.* Moore (Tex. Civ. App.), 74 S. W. 942.

6. "Proof of identity from the defendant at that time would be of little service to the plaintiff to enable him to investigate the character, or the previous history, as to fires, of that particular engine." Dunning *v.* Maine Cent. R. Co., 91 Me. 87, 39 Atl. 352.

7. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454. See also Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; White *v.* New York Cent. & H. R. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497. But see O'Reilly *v.* Erie R. Co. 72 App. Div. 228, 76 N. Y. Supp. 171; O'Reilly *v.* King, 72 App. Div. 357, 76 N. Y. Supp. 515.

Where the plaintiff's evidence had no tendency to show what particular engine caused the fire and there was no positive or direct evidence by the defendant identifying the particular engine, it was held proper to show that shortly before the fire in question other fires had occurred in the same vicinity, and lighted coals had been thrown from the defendant's engine to a greater distance from the track than the building which was burned. It was held unnecessary to show that all the conditions of wind, weather and everything else connected with the passage of the engines in such cases were exactly like all the conditions connected with the passage of the engine shown to have caused the fire. Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 279.

8. Sheldon *v.* Hudson R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

It is not necessary, however, that the plaintiff's preliminary evidence should exclude all possibility of another origin or that it be undisputed, it is sufficient if it presents a question for the jury. Crist *v.* Erie R. Co., 58 N. Y. 638.

9. Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51, 24 N. W. 324. See Toledo, St. L. & W. R. Co. *v.* Needham, 105 Ill. App. 25; Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989.

The scattering of coals during the preceding month may be shown. White *v.* New York Cent. & H. R. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497. See also Texas & P. R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825.

Fires from three to six months previous are not too remote. Hoover *v.* Missouri P. R. Co. (Mo.), 16 S. W. 480.

Ten months' intervening time is not sufficient to make the evidence too remote. "We do not undertake to fix any definite time or to announce a hard and fast rule." Railroad Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936.

Evidence as to fires five or seven years previous is properly excluded if it is not shown that they were continuous or customary. Dillingham *v.* Whitaker (Tex. Civ. App.), 25 S. W. 723.

"This class of testimony is exceptional in character at the best, and is only admissible because the ordinary sources of proof are inaccessible, and

occurring during that period may be shown.[10] And if there is connecting evidence the time may be extended indefinitely.[11]

f. *By Other Engines of Similar Construction.* — It has been held that the fact that other engines were constructed and equipped the same as the engine in question does not render admissible evidence of fires set by them;[12] but it has likewise been held to the contrary.[13] And as evidence that an engine of a particular construc-

direct evidence impracticable. The rule should not, therefore, be carried beyond the necessity which justifies its admission. If at or about the time when fires are alleged to have been set by locomotive engines, unknown by number or other means of identification, the company is shown to have been habitually negligent in the equipment or management of its engines, or of many of them, this is a circumstance to be considered in connection with others, not only in determining the origin of the fire, but in deciding whether or not the company was, at the time, in this as in many other instances, negligent in failing to provide suitable precautions against danger. If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters. Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence. . . . But we are of the opinion that the rule should not be given greater latitude than we have given it. . . . The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable." Henderson *v.* Philadelphia, & R. R. Co., 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. Rep. 652, 16 L. R. A. 299.

10. Wilson *v.* Pecos & N. T. R. Co., 23 Tex. Civ. App. 706, 58 S. W. 183.

11. Where fires are shown to have occurred within a few weeks prior to the one in question the plaintiff may follow it up by showing that other fires have occurred at various times at the same place since the road was built. The more frequent the occurrence the stronger the inference that it was due to negligence. Longabaugh *v.* Virginia City & T. R. Co., 9 Nev. 271.

12. First Nat. Bank *v.* Lake Erie & W. R. Co., 174 Ill. 36, 50 N. E. 1023; Allard *v.* Chicago & N. W. R. Co., 73 Wis. 165, 40 N. W. 685.

The fact that fire escaped from other engines of the company, although of the same make and equipped with the same appliances as the engine causing the fire, is not competent to rebut direct and positive evidence as to the actual condition and management of the particular engine on the occasion in question. First Nat. Bank *v.* Lake Erie & W. R. Co., 65 Ill. App. 21 (*distinguishing* Grand Trunk R. Co. *v. Richardson*, 91 U. S. 454; Lake Erie & W. R. Co. *v.* Cruzen, 29 Ill. App. 212; Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355).

13. Railroad Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936. See also Black *v.* Minneapolis & St. L. R. Co., 122 Iowa 32, 96 N. W. 984. Such evidence is admissible as tending to show that the fire in question could have been, and probably was, set in the same manner, where it appears that the locomotives were of the same construction, used the same kind of fuel and had the same kind of spark-arresters. Smith *v.* Boston & M. R., 63 N. H. 25. See also Boyce *v.* Cheshire R., 43 N. H. 627; Boyce *v.* Cheshire R., 42 N. H. 97. And see Lesser Cotton Co. *v.* St. Louis, I. M. & S. R. Co., 114 Fed. 133, 52 C. C. A. 95.

Where the fire was alleged to have been caused by a passing locomotive,

tion will throw live coals and sparks under given circumstances it has been held competent to show that other engines similarly constructed have thrown such sparks under similar conditions.[14] In rebuttal of defendant's evidence as to the proper condition and construction of its engines, all of substantially the same construction, plaintiff may show that on other occasions and at different places the defendant's locomotives had emitted sparks which caused or were capable of causing fires similar to the one in question.[15]

evidence that defendant's locomotives passing along the line of its road, apparently all of similar construction and equipment, within a few weeks before and after the fire in question threw sparks and burning cinders from their smoke-stacks which set out fires as far from the track as the plaintiff's building which was burned, was held properly admitted. The court held that the engine causing the fire was not identified, but even conceding that it was the evidence would nevertheless be admissible. "To confine the proof of negligence in these particulars to the equipment and condition of locomotives identified by railroad companies in this or any other way would be to give them absolute control of all proof of their character, and an unfair advantage in all cases where the plaintiff could not produce positive evidence of the origin of the fire. Plaintiffs in these cases would be unable to controvert the evidence produced by the defendants. They have no access to the records and information necessary to establish the identity of the locomotives drawing the numerous trains of a great railroad system, and ordinarily, where identity is established, they have not the skill to determine whether the locomotive is properly equipped or in good repair, and how are they to know that it is then in the same condition as when the fire occurred." Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429.

14. Sprague *v.* Atchison, T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828.

15. East Tennessee, Va. & Ga. R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828; Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429; Ross *v.* Boston & W. R. Co., 6 Allen (Mass.) 87; Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355; Missouri Pac. R. Co. *v.* Donaldson, 73 Tex. 124, 11 S. W. 163.

Where the plaintiff introduced evidence tending to show that engines properly equipped did not scatter fire, and the defendant gave evidence to the effect that none of its engines were permitted to go on a trip when not in good condition, or when their spark-arresting devices were defective, it was held proper under the circumstances for the plaintiff to show that the defendant's engines in use, and running over the road past the place of the fire, generally and habitually scattered fire from their ash-pans and smoke-stacks in that vicinity. Cleavelands *v.* Grand Trunk R. Co., 42 Vt. 449.

Where the defendant's expert witness has testified that the engines and spark-arresters which had been in use by the defendant for more than a year before the fire were such that it was impossible for a fire to originate from sparks emitted from the engine, it is proper to permit the plaintiff in rebuttal to show that about a year before the fire other fires were set in the same neighborhood by sparks from engines on the defendant's road. Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

In an action to recover for the destruction of plaintiff's mill by fire alleged to have been communicated by one of defendant's locomotives, after the defendant had introduced evidence tending to show that its engines which ran by the plaintiff's mill were equipped with such apparatus that they would not, and could not, throw out sparks so as to set a fire, it was held proper to permit the plaintiff in rebuttal to introduce evidence tending to show that a certain kind of engine used by the defendant which ran by the plaintiff's mill when equipped with such apparatus

g. *Possibility of Throwing Fire Given Distance.* — As evidence that live sparks or cinders could have been thrown or carried as far from the track as the place where the fire originated it is competent to show that they had been carried or thrown that distance on other occasions.[16] Some cases do not seem to require preliminary proof of similarity of conditions,[17] while others apparently do.[18]

C. When Fire Started in Combustibles on Right of Way. Evidence may be competent of other fires occurring on the right of way at or near the place where the fire started[19] and at other

would throw out sparks and set fires and had done so, that there were no appliances which would prevent a locomotive under all circumstances from throwing out live sparks and setting fires, and that an engine supplied with the apparatus exhibited by the defendant would sometimes give out live cinders so as to set a fire; such evidence bore directly upon the issue whether an engine of the defendant caused or could have caused the fire. Bowen *v.* Boston & A. R. Co., 179 Mass. 524, 61 N. E. 141.

16. Burke *v.* Louisville & N. R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802; Ft. Worth & D. C. R. Co. *v.* Ratliffe, 2 Willson Civ. Cas. (Tex.) § 681; Black *v.* Minneapolis & St. L. R. Co., 122 Iowa 32, 96 N. W. 984 (there being evidence that all the engines of the defendant were in substantially the same condition); Sheldon *v.* Hudson R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155. See Crist *v.* Erie R. Co., 58 N. Y. 638; Ross *v.* Boston & W. R. Co., 6 Allen (Mass.) 87 (that the same engine using similar fuel has emitted burning sparks which have fallen at as great a distance).

Where the burned building was a considerable distance from the track and there was no direct evidence of the communication of sparks, it was held proper as tending to show that cinders from a passing engine might have been carried that distance on the occasion in question for the plaintiff to prove that previously cinders which must have come from a locomotive had fallen upon and burned through an awning in line with the plaintiff's buildings and still further from the track. Such evidence is similar to an experiment. "As the exceptions do not show how long this was before the occurrence complained of, it must be presumed to have been within such period as would have made evidence admissible in point of time." Hoskinson *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. 24.

17. See Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 279.

In an action for the burning of a barn by fire communicated from defendant's locomotive, the testimony of a witness, that he had seen subsequent to the fire a spark from an engine strike the center pole of a tent which had been erected on the site of the barn, was held properly admitted although objected to on the ground that there was no showing that the engine was of the same kind or in the same condition as the one from which it was alleged the fire originated, nor that the condition of the weather or the direction of the wind was the same. Matthews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 S. W. 802.

18. Sprague *v.* Atchison, T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828.

19. International & G. N. R. Co. *v.* Newman (Tex. Civ. App.), 40 S. W. 854; Texas & P. R. Co. *v.* Rutherford, 28 Tex. Civ. App. 590, 68 S. W. 825.

Where the fire is claimed to have originated in combustible material negligently left on the defendant's right of way and the defendant claimed that there was no combustible material on the right of way capable of being ignited by sparks from passing engines, it was held competent to show that this material was found burning on other occasions shortly after the passage of the defendant's trains. It was contended by the defendant that "evidence of

places[20] to show that combustible material had been allowed to collect on the right of way, where negligence in this respect is relied upon, and also in such case as bearing upon the degree of care which should have been exercised by the defendant.[21]

D. By Engines of Other Companies. — Evidence as to fires set in the same locality by properly equipped engines of other railway companies is not admissible,[22] nor can the defendant show that fires were set at about the same time by engines of other companies equipped with the same kind of spark-arresters.[23]

E. Preliminary Proof. — Even where it is competent to show other fires along the right of way, the evidence is not admissible without some showing that such fires were caused by the defendant's engines.[24]

F. Finding Coals and Cinders. — The fact that coals and cinders were found along the track and upon the plaintiff's premises after the passage of the engine or after the fire may be shown.[25]

10. Payment to Others for Damage Caused by Same Fire. — It has

other fires on the right of way is inadmissible to show the condition of the right of way; that this is a matter equally within the knowledge of both parties, and hence does not fall within the rule which permits other fires to be shown as proof of defective construction and negligent management of an engine, which, from the necessities of the case, must be entirely within the knowledge of the railway company. There are cases which maintain this position, but we think the better rule is the other way." Abrams *v.* Seattle & M. R. Co., 27 Wash. 507, 68 Pac. 78. To the same effect Wabash R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005 (in which the same argument was made).

But see *contra,* Lake Erie & W. R. Co. *v.* Miller, 24 Ind. App. 662, 57 N. E. 596.

20. Wabash R. Co. *v.* Miller, 158 Ind. 174, 61 N. E. 1005. See Railway Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

21. Pittsburgh, C., C. & St. L. R. Co. *v.* Indiana Horseshoe Co., 154 Ind. 322, 56 N. E. 766.

Evidence That Cinders From Passing Engines Usually Lodged upon the right of way is competent upon the question of the necessity of exercising care in keeping the right of way free from dry and combustible material. Donovan *v.* Chicago & N. W. R. Co., 93 Wis. 373, 67 N. W. 721.

22. Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521.

23. Cleveland, L. & W. R. Co. *v.* Fredenbur, 3 Ohio Cir. Ct. 23.

24. Railway Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Pennsylvania Co. *v.* Rossman, 13 Ohio Cir. Ct. 111; Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51, 24 N. W. 324.

25. In an action for damages caused by fire set by defendant's engine it is competent to show that cinders were found at different places on the plaintiff's farm after the fire. "This proof is rather remote, but to some extent it goes to establish the charge that the engines of defendant, which were all equipped alike, save those which had the smaller mesh, were all apt to throw sparks, thereby supporting the general allegation that this fire was so occasioned, and supporting the position that too much fire was thrown for well-equipped engines. It was of the same class of proof that this engine set other fires the same day, and tended to show frequent danger from the use of engines equipped with the spark-arresters in use on the road, and tended to contradict the position that the spark-arresters were well adapted to the purpose for which they were used." Lake Erie & W. R. Co. *v.* Kirts, 29 Ill. App. 175. But see Gulf, C. & S. F. R. Co. v. Johnson, 28 Tex. Civ. App. 395, 67 S. W. 182.

In an action for burning plaintiff's barn the latter may show that, soon

been held that the payment to other persons for damage caused by the same fire cannot be shown.[26]

11. Contributory Negligence. — The plaintiff may show that his alleged failure to take certain precautions did not contribute to the injury,[27] or that no fires had previously resulted under similar circumstances in numerous cases.[28] But he cannot show that other persons had likewise failed to take precautions against fire.[29] Facts tending to show that the defendant regarded the plaintiff's action as free from negligence are competent.[30] The defendant cannot show that the plaintiff failed to keep his property clear of combustible material.[31] The opinion of a witness as to whether the property would have burned had it been covered is not admissible.[32]

12. Damages. — A. GENERALLY. — The general rules of evidence as to proof of damages apply to actions for damages for the

after the engine claimed to have caused the fire passed the plaintiff's premises, not only was the barn on fire, but large fresh coals were scattered along the track and that some stumps near the track, on the same side as the barn, were burning, although they had not been on fire the night before. Such evidence was admissible as bearing upon the question of whether the engine caused the fire, and also upon the question of negligence in its operation. Brusberg *v.* Milwaukee, L. S. & W. R. Co., 55 Wis. 106, 12 N. W. 416.

26. Louisville, N. A. & C. R. Co. *v.* Roberts, 13 Ind. App. 692, 42 N. E. 247. But see Galveston, H. & S. A. R. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013, *holding* such evidence admissible where it was not clear from the record whether the evidence was objectionable as involving a statement of compromise, and no objection on the latter ground had been made.

27. Plaintiff may show that his failure to plow around the haystacks, for the loss of which he sues, did not contribute to the loss. Lewis *v.* Chicago, M. & St. P. R. Co., 57 Iowa 127, 10 N. W. 336.

28. In an action for burning plaintiff's cotton located near defendant's right of way in which the defendant claimed contributory negligence on the part of the plaintiff in leaving his cotton so near the track exposed to sparks, it was held error to exclude evidence on the part of the plaintiff that the defendant's trains frequently passed cotton in open cars near the track of defendant's railway from time to time about the time of the fire in question without setting fire to it. Bennett *v.* Missouri, K. & T. R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

29. Where the property burned was stacks of grain, testimony on the part of the plaintiff that ordinary and prudent farmers who had stacks of grain in their fields adjoining the railroad, had not up to the time of the fire plowed around them was held incompetent to show want of contributory negligence. Slossen *v.* Burlington, C. R. & N. R. Co., 60 Iowa 214, 10 N. W. 860, 14 N. W. 244.

30. The plaintiff may show that as an inducement to erect the elevator on the site it occupied when burned, the defendant company offered to haul lumber for such purpose at one-half the usual rate, as such evidence tends to show that the defendant company regarded the place selected as reasonably suitable and safe. Toledo, St. L. & K. C. R. Co. *v.* Oswald, 41 Ill. App. 590.

31. "The owner has a right to presume the railroad company will not be guilty of negligence, and has the right to use his property in the ordinary and usual way, and so long as he does so, will not be deemed guilty of contributory negligence." Cleveland, C. C. & St. L. R. Co. *v.* Tate, 104 Ill. App. 615.

32. Louisville, N. O. & T. R. Co. *v.* Natchez, J. & C. R. Co., 67 Miss. 399, 7 So. 350. See article "EXPERT AND OPINION EVIDENCE."

destruction of property by fire, and will be found elsewhere discussed.[33]

B. Insurance. — The fact that the property destroyed was insured,[34] and that the insurance has been paid,[35] is not relevant or material on the question of the damages due from the railway company.

C. Damage To Trees and Growing Crops. — The difficulty of replacing trees destroyed by fire may be shown.[36] And where an orchard has been burned the plaintiff may show to what extent its producing capacity has been impaired[37] and the revenue therefrom diminished.[38] As bearing upon the extent to which the value of the realty has been depreciated by the destruction of a perennial crop growing thereon it is competent to show all relevant circumstances bearing upon the nature and value of the crop and the manner in which its destruction has affected the realty.[39] Whether a grass meadow was permanently injured may be shown by evi-

33. See article "Damages," Vol. IV.

Evidence of the Cost of personal property destroyed by fire (St. Louis & S. W. R. Co. *v.* Moss (Tex. Civ. App.), 84 S. W. 281), and evidence of the cost of building a new house of the same kind as the one destroyed is relevant although not the criterion by which to measure the damages. Alabama, G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771.

A Letter Written by the Plaintiff to the defendant railroad company in which he states the amount of his damage, is not conclusive upon him. Castner *v.* Chicago, B. & Q. R. Co., 126 Iowa 581, 102 N. W. 499.

34. Missouri, K. & T. R. Co. *v.* Jordan (Tex. Civ. App.), 82 S. W. 791.

35. Collins *v.* New York Cent. & H. R. R. Co., 5 Hun (N. Y.) 503.

36. Evidence that it would be difficult to grow trees in the place of those destroyed, because of the shade of other trees, is competent as tending to show the value of the trees destroyed. Leiber *v.* Chicago, M. & St. P. R. Co., 84 Iowa 97, 50 N. W. 547.

37. Chicago & E. R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381 (what part of the orchard, if any, bore fruit after the fire).

38. Evidence of the income received therefrom during several years previous is competent as tending to show the value of the land before the fire. Rowe *v.* Chicago & N. W. R. Co., 102 Iowa 286, 71 N. W. 409.

39. The measure of damages in an action to recover for an injury to a perennial crop—in this case, growing grass—is the difference in the market value of the real property immediately before and its value immediately after the infliction of the injury, and, when ascertaining this difference, evidence that another crop of some character and value may be grown on the land the same growing period, and evidence of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the farm, may be considered. But evidence of matters occurring subsequently to the injury is not competent. Ward *v.* Chicago, M. & St. P. R. Co., 61 Minn. 449, 63 N. W. 1104, *overruling* on the last point Lommeland *v.* St. Paul M. & M. Co., 35 Minn. 412, 29 N. W. 119.

It is competent to show that as a meadow of the kind in question becomes older the quantity and quality of hay produced becomes better, and also to show the length of time the meadow continues to improve until it begins to deteriorate, so also it is

dence of the effect of a similar fire or another meadow under substantially the same conditions.[40] A properly qualified witness may state the effect which such a fire generally has upon the turf or sod of a perennial hay crop, under the same conditions,[41] and may give his opinion as to the value of such a crop for a particular purpose.[42]

D. Value of Other Crops. — Evidence that some other crop would have been more profitable is not admissible.[43]

IV. MISCELLANEOUS GENERAL RULES APPLICABLE TO ALL ACTIONS FOR INJURIES FROM OPERATION OF RAILROAD.

1. Judicial Notice. — Both the court and jury are at liberty to take judicial notice of matters of common knowledge relating to the operation of trains and locomotives.[44] The distance in which

competent to show the value of the meadow for pasture, this being a legitimate element of damage in the case. Terre Haute & L. R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534.

40. Where it appeared that the fire causing the damage to plaintiff's meadow had passed over and burned the meadow of his neighbor, evidence offered by the defendant to show that the roots of the grass in the neighboring meadow were not injured was held improperly excluded. It was shown that the grass of the two meadows was of equal height at the time of the fire. This was held a sufficient showing of similar conditions to warrant the admission of the testimony. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

Where plaintiff claimed that his meadow had been permanently damaged by the fire which consumed the grass standing thereon, the testimony of a witness who owned land some miles distant which had been burned over at about the same time of year and under similar circumstances that his meadow was not permanently injured by such burning but was better the next season that it had been before was held properly admitted for the defendant on the question of damages. The fact that the two pieces of land were not shown to be similarly situated was not a material factor in the similarity of conditions, it appearing that their condition at the time of the burning was substantially the same with reference to the damage which would be inflicted by burning the grass standing thereon. Castner *v.* Chicago B. & Q. R. Co., 126 Iowa 581, 102 N. W. 499.

41. Gulf, C. & S. F. R. Co. *v.* Jagoe (Tex. Civ. App.), 32 S. W. 1061.

42. Galveston, H. & S. A. R. Co. *v.* Rheiner (Tex. Civ. App.), 25 S. W. 971 (value for grazing).

Where the grass burned has no market value at the time of its destruction, competent experts may be permitted to give their opinion as to its value for the purpose for which it was to be used. Galveston, H. & S. A. R. Co. *v.* Chittim, 31 Tex. Civ. App. 40, 71 S. W. 294.

43. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

In an action for the destruction of a hay meadow by fire, the defendant cannot show that the land after the destruction of the meadow would have yielded a crop more valuable than the hay crop. Toledo, St. L. & K. C. R. Co. *v.* Kingman, 49 Ill. App. 43.

44. See article "Judicial Notice," Vol. VII, pp. 939-944.

It is a matter of common knowledge and observation that the improved coupler used on trains, by doing away with the slack incident to the antiquated pin and link system, places the train more completely and quickly under the control of the engineer. Wright *v.* Southern R. Co., 127 N. C. 225, 37 N. E. 221.

The court cannot take judicial notice that a steam locomotive may be operated without creating soot, smoke

a train could have been stopped under the circumstances shown by the evidence has been held to be a matter of which the jury may take judicial notice,[45] but there are more numerous authorities which seem to be to the contrary.[46] Courts judicially know that even the best spark-arresters do not entirely prevent the emission of sparks capable of setting fires.[47] But it seems that they also take notice that when carefully managed such apparatus largely eliminates the danger from this source.[48]

2. Statutes as to Necessity of Proving Negligence. — In some states are statutes which provide expressly, or are so construed,

and smell, or that a train of cars, even when carefully propelled, will not cause the ground to vibrate or shake adjacent buildings. "The very opposite might more appropriately be expected of us." Randle *v.* Pacific R., 65 Mo. 325, 333.

45. Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

With the data furnished by evidence it is the province of the jury either with or without additional light from expert witnesses to determine whether the engineer in a particular case could have stopped his train before colliding with a person lying on the rails in front, and they are at liberty to exercise their own common sense and to use the knowledge acquired by their observation and experience in every day life in solving this question, since courts and juries must take notice of matters of general knowledge and use their common sense. Deans *v.* Wilmington & W. R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902.

The jury is not bound by the opinion of a witness that the engineer on the train with the aid of the headlight could not, under the circumstances, have seen a person on the track in front of him in time to have stopped the train before coming in collision with such person. "How far the engineer ought to have been able to see in front by means of a good headlight is a question (like determining within what distance a train can be stopped under given circumstances) the solution of which depends upon the exercise of good common sense and the use of knowledge acquired by observation and experience. . . . Both inquiries were involved in passing upon the issues, and the jury were at liberty to take notice of such matters of general knowledge as are involved in the determination of the question whether a headlight in front would have enabled the engineer to see the injured person in time, by the use of the appliances at his command, to have prevented the accident." Lloyd *v.* Albemarle & R. R. Co., 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764.

46. State *v.* Mayberry, 33 Kan. 441, 448, 6 Pac. 553; Thornton *v.* Louisville & N. R. Co., 24 Ky. L. Rep. 854, 70 S. W. 53; Tully *v.* Fitchburg R. Co., 134 Mass. 499.

47. Menominee R. S. & D. Co. *v.* Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176.

In Watt *v.* Nevada Cent. R. Co., 23 Nev. 154, 44 Pac. 423, 62 Am. St. Rep. 772, it was held to be a matter of common knowledge, "based on common observation in this railway age, that railroad engines of the most approved construction and with the best known appliances, and managed by the most skillful engineers and firemen," are likely to and frequently do from necessity or by accident, emit sparks and fire capable of igniting combustible matter along the track.

48. It is a matter of common knowledge that an engine constructed with proper spark-arresters when carefully managed though not incapable of emitting sparks at all is not likely to throw them for any considerable distance. Abrams *v.* Seattle & M. R. Co., 27 Wash. 507, 68 Pac. 78. See Randle *v.* Pacific R. Co., 65 Mo. 325, 333; Fitch *v.* Pacific R. Co., 45 Mo. 322. But see article "JUDICIAL NOTICE," p. 942.

that proof of an injury caused by the operation of the railroad raises a presumption or makes a *prima facie* case of negligence.[49]

49. Alabama Statute. — For the interpretations of the Alabama statute and the changes which have been made in it from time to time, see the following cases: Alabama, G. S. R. Co. *v.* Boyd, 124 Ala. 525, 27 So. 408; Louisville & N. R. Co. *v.* Posey, 96 Ala. 262, 11 So. 423; Louisville & N. R. Co. *v.* Barker, 96 Ala. 435, 11 So. 453; Central R. & Bkg. Co. *v.* Lee, 96 Ala. 444, 11 So. 424; Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377 (overruling Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, 6 So. 413; Montgomery & E. R. Co. *v.* Perryman, 91 Ala. 413, 8 So. 699); Southern & N. Ala. R. Co. *v.* Williams, 65 Ala. 74; East Tennessee, Va. & Ga. R. Co. *v.* Bayliss, 74 Ala. 150; Clements *v.* East Tennessee, Va. & Ga. R. Co., 77 Ala. 533; East Tennessee, Va. & Ga. R. Co. *v.* Deaver, 79 Ala. 216; Alabama Gt. So. R. Co. *v.* McAlpine, 80 Ala. 73; Southern & N. Ala. R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752; Mobile & G. R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. 445.

Arkansas Statute. — Under a statute providing that railroads shall be responsible for all damages done or caused by the running of their trains, the burden is on the railway company to show due care on its part after proof that the injury was so caused. "That is not the express provision of the statute, but it is the nearest approach to the legislative intent that the court was able to extract from it, consistent with the constitution." Railway Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083.

The statute applies where the plaintiff was injured while walking along the side of the defendant's track in a city street by the falling upon him of a car door from a moving train (St. Louis, I. M. & S. R. Co. *v.* Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616) but not where the plaintiff when injured, or when property under his control was injured, was a trespasser (Railway Co. *v.* Taylor, 57 Ark. 136, 20 S. W. 1083), nor where the plaintiff was scalded by one of the trainmen engaged in wetting coal on the tender while the train was standing still. "The statute imposes upon the railroads a burden contrary to the general rule that should not extend it beyond the cases where it obviously applies, giving the words their plain, natural meaning." St. Louis & S. F. R. Co. *v.* Cooksey, 70 Ark. 481, 69 S. W. 259.

Georgia Statute. — Where the damage ensued from the running of defendant's cars the negligence of the defendant is presumed under the Code, § 3033. Georgia R. & Bkg. *v.* Monroe, 49 Ga. 373; Atlanta & G. R. *v.* Griffin, 61 Ga. 11; Western & Atlantic R. Co. *v.* Steadly, 65 Ga. 263; Central R. Co. *v.* Brinson, 64 Ga. 475; Central R. *v.* Moore, 61 Ga. 151. This statute is not applicable in an action against a receiver. Robinson *v.* Huidekoper, 98 Ga. 306, 25 S. E. 440.

Under the Mississippi Statute proof of injury to person or property inflicted by the running of a locomotive or cars is *prima facie* evidence of negligence. Vicksburg & M. R. Co. *v.* Hamilton, 62 Miss. 503; Vicksburg & M. R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537; Chicago, St. L. & N. O. R. Co. *v.* Packwood, 59 Miss. 280.

This statute applies to an injury by fire set by sparks from a locomotive (Louisville, N. O. & T. R. Co. *v.* Natchez, J. & C. R. Co., 67 Miss. 399, 7 So. 350); but does not apply to an action for killing an animal which became frightened at the defendant's train and ran into a trestle and was killed; the injury is not one caused by the running of locomotives or cars (Illinois Cent. R. Co. *v.* Weathersby, 63 Miss. 581); nor where the animal was killed by reason of its becoming frightened by the emission of steam from the defendant's engine and jumping into a ditch and breaking its neck. The injury in such case was not inflicted by the running of the locomotive or cars. Lowe *v.* Alabama & V. R. Co., 81 Miss. 9, 32 So. 907.

As soon as contrary evidence is in-

3. Subsequent Precautions and Repairs. — A. GENERALLY. — Although the courts are not entirely in harmony on the question, the great weight of authority is that as a general rule subsequent precautions or repairs by the defendant cannot be shown as evidence of its negligence.[50] But such evidence may be competent to show that the subsequent conditions did not exist at the time of the accident;[51] to explain evidence that no accidents had happened at

troduced the presumption created by the statute from the fact of injury ceases and the whole testimony is to be considered and the controversy decided by the weight of evidence on both sides. Jones *v.* Bond, 40 Fed. 281. The circumstances disclosed by the plaintiff's evidence may themselves rebut the statutory presumption of negligence. Vicksburg & M. R. Co. *v.* Phillips, 64 Miss. 693, 2 So. 537.

§ 1167 of the Tennessee Code places the burden of showing that all the precautions therein prescribed were taken by the defendant to prevent injury to persons or property upon its track. Smith *v.* Nashville & C. R. Co., 6 Coldw. (Tenn.) 589. The presumption is rebuttable (Savannah, F. & W. R. Co. *v.* Gray, 77 Ga. 440, 3 S. E. 158); and is overcome by uncontradicted evidence to the contrary; Central of Georgia R. Co. *v.* Waxelbaum, 111 Ga. 812, 35 S. E. 645; Georgia R. & Bkg. Co. *v.* Wall, 80 Ga. 202, 7 S. E. 639; Georgia R. & Bkg. Co. *v.* Wilhoit, 78 Ga. 714, 3 S. E. 698.

50. See article "NEGLIGENCE," Vol. VIII, p. 914 *et seq.*

Contra. — West Chester & Philadelphia R. Co. *v.* McElwee, 67 Pa. St. 311; St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176.

In an action for damages occasioned by fire alleged to have been set by sparks from defendant's engine, evidence to show the employment of more trackmen by the defendant after the fire than before, the necessity of having some men walk the track being conceded, was held properly admitted upon the question of whether too few or incompetent men had previously been employed. Westfall *v.* Erie R. Co., 5 Hun (N. Y.) 75, *distinguishing* this case from the general rule upon the ground that the necessity for having some men was conceded.

51. St. Louis, A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104 (in explanation of a photograph taken subsequent to the changes).

"The evidence was particularly pertinent in this case because the jury had been upon the ground, and had seen the gates there." To rebut an inference that the gates were there at the time of the accident it was held proper to inform them when they were erected. Lederman *v.* Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725, 44 Am. St. Rep. 644.

Although subsequent repairs of the defendant's fence cannot be shown as an admission of negligence, where a material issue in the case is whether the cattle went through a gate or through a fence a witness may properly testify as to the condition and appearance of the fence after the accident, that he found boards nailed on with new nails, fresh breaks in the boards, that the wire had been newly stretched and that there was hair on the boards and wire. Townsend *v.* Northern Pac. R. Co., 29 Wash. 185, 69 Pac. 750.

In an action for injuries to plaintiff's steer alleged to be due to the failure of the defendant railway company to fence its track as required by law, evidence that defendant's employes had worked the track at the place of the accident subsequent thereto prior to an inspection by the plaintiff was held proper to be considered on the question of whether the hoof prints of the steer had been purposely obliterated by such work and as affecting the credibility of defendant's witnesses who testified that there were no hoof prints. Klay *v.* Chicago, M. & St. P. R. Co., 126 Iowa 671, 102 N. W. 526.

that crossing since the one sued upon;[52] to rebut the contention that the defective condition could not have been prevented;[53] to show the defendant's ownership or control over the thing repaired;[54] that the defendant regarded the place of the accident as one that might be legally fenced;[55] or to show what ground had been in use as part of the right of way.[56] And it has been held competent to show that a subsequent change in a spark-arrester stopped the emission of dangerous sparks.[57] And evidence as to subsequent repairs not otherwise competent may be proper on cross-examination.[58]

B. At Crossings. — It is not competent to show that the crossing where the injury was inflicted has been subsequently repaired,[59] that an automatic signal apparatus has been put in[60] or that a

52. Where the defendant on cross-examination elicits testimony to the effect that no injury had occurred there before or since the one in question, it is competent on a re-direct examination of the witness to show that the crossing had been repaired since the accident. Tetherow *v.* St. Joseph & D. M. R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

53. St. Louis, A. & T. R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104.

54. Bateman *v.* New York Cent. & H. R. R. Co., 47 Hun (N. Y.) 429 (replacing worn-out stone in defective sidewalk).

55. Toledo, W. & W. R. Co. *v.* Owen, 43 Ind. 405.

56. In an action for damages from fire claimed to have originated on the defendant's right of way, evidence that the defendant plowed furrows subsequent to the fire as a fire-break on both sides of its track as required by statute is competent for the purpose of showing what right of way had been in use by the defendant. Young *v.* Great Northern R. Co., 8 N. D. 345, 79 N. W. 448, *distinguishing* Roehr *v.* Great Northern R. Co., 7 N. D. 95, 72 N. W. 1084.

57. Alpern *v.* Churchill, 53 Mich. 607, 19 N. W. 549.

58. Where one of defendant's witnesses had testified as to the character of the smoke-stack of the engine in question and the repairs previously made upon it and his testimony tended to show that it was in good order and not likely to scatter fire, it was held proper on cross-examination to ask him why he had, subsequent to the fire, changed the smoke-stack on the engine. The court says: "Had this question been put to a witness on the part of the plaintiff, it might be assumed that the object of the question was to prove that the defendant knew the engine to be defective and made the repairs for that reason; such evidence would be clearly incompetent. The question, however, was put to defendant's witness on cross-examination and was competent to test the accuracy of the witness as to the condition of the engine. If it had been repaired as extensively as he represented, the question would be a very natural one why, if that was true, was another smoke-stack put on so soon after the fire?" Bevier *v.* Delaware & Hudson Canal Co., 13 Hun (N. Y.) 254. But see article "Negligence," p. 916.

59. Cleveland, C. C. & St. L. R. Co. *v.* Doerr, 41 Ill. App. 530; Hudson *v.* Chicago & N. W. R. Co., 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692.

60. Evidence that subsequent to the accident the defendant placed an automatic bell at the crossing where it occurred is properly rejected. Hager *v.* Southern Pac. Co., 98 Cal. 309, 33 Pac. 119.

Contra. — Where there is evidence than an electric alarm-bell maintained by the defendant at the crossing where the accident occurred was out of order at the time of the accident and rung so lightly that it could be heard but a few feet away, it was held proper to show that a day or two after the accident the bell was repaired by the defendant.

flagman[61] or night watchman[62] has been stationed at the crossing.

C. At Other Places. — The same general rule applies to accidents at other places on or near the defendant's track or railway property.[63]

4. Statements and Declarations of Agents and Employes of Railroad Company. — The statements and declarations of the agents and employes of a railroad company are not competent evidence against it in an action for injuries unless part of the *res gestae* or made in connection with and as a part of an act within the scope of the agent's authority.[64]

Link *v.* Philadelphia & R. R. Co., 165 Pa. St. 75, 30 Atl. 820.

61. Menard *v.* Boston & Maine R. Co., 150 Mass. 386, 23 N. E. 214.

62. Where a person was killed at a railroad crossing in the daytime, evidence that the defendant company after the accident employed a night watchman at the crossing is irrelevant. Derk *v.* Northern Cent. R. Co., 164 Pa. St. 243, 30 Atl. 231.

63. Missouri, K. & T. R. Co. *v.* Wylie (Tex. Civ. App.), 26 S. W. 85 (defective platform); Timpson *v.* Manhattan R. Co., 49 Hun (N. Y.) 607, 1 N. Y. Supp. 673 (sprinkling ashes on icy platform); Dale *v.* Delaware, L. & W. R. Co., 73 N. Y. 468 (changing construction of bridge); Anderson *v.* Chicago, St. P., M. & O. R. Co., 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203 (running trains more slowly over trestle where accident happened); Wabash R. Co. *v.* Kime, 42 Ill. App. 272 (repairs to fence at point where injured animal entered).

Contra. — Evidence that after the accident the engines of the company ran more slowly at the place where it occurred than they did previously, although of slight value, is admissible, the authorities on the question being conflicting. Savannah, F. & W. R. Co. *v.* Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

64. Robinson *v.* Fitchburg & W. R. Co., 7 Gray (Mass.) 92. See articles "Admissions," "Principal and Agent," "Res Gestae."

Statements of Flagman. — Where the plaintiff was injured at a crossing at which the gates were down at the time, the declarations of the flagman a few days before the accident in response to plaintiff's question as to why he did not raise the gates were held incompetent because not part of the *res gestae,* nor forming a part of any act by the agent within the scope of his authority. Chicago & E. I. R. Co. *v.* Keegan, 112 Ill. App. 338.

Statements of Brakeman. — In an action for injuries received while attempting to pass between two cars blocking a street, the statement of the defendant's brakeman to the plaintiff two minutes after the accident that the plaintiff was not to blame was held properly excluded as a mere conclusion, not a fact, even conceding it to be a part of the *res gestae.* Scott *v.* St. Louis, K. & N. W. R. Co., 112 Iowa 54, 83 N. W. 818.

Statements of Engineer. — Although the subsequent statement of the engineer as to his conduct at the time of the accident is not competent against the defendant railroad as an admission it may be admissible to impeach the testimony of the engineer. Gregory *v.* Wabash R. Co., 126 Iowa 230, 101 N. W. 761.

The Admissions of the Engineer of the engine which struck the plaintiff, made on the same day, to the effect that he saw the plaintiff some time before he sounded the whistle, were held properly excluded as not binding upon the defendant. Cole *v.* New York, N. H. & H. R. Co., 174 Mass. 534, 55 N. E. 1044.

The Conversations Between Plaintiff's Intestate and Train Dispatcher and Station Telegraph Operator as to slowing down trains approaching the point where the former was working on the track are not competent in the absence of a showing that such agents had authority to make such an agreement binding on the

5. Reports and Records. — Reports to the defendant by its employes as to the transaction in question[65] and records of the movements of trains and cars[66] are not competent on behalf of the defendant.

6. Rules. — A. Of Railroad Company. — The violation of the rules prescribed by the defendant company for the management of its trains and the conduct of its employes tends to show negligence and is competent for this purpose on behalf of the plaintiff,[67] but

defendant railway company. Carpenter *v.* Chicago, R. I. & P. R. Co., 126 Iowa 94, 101 N. W. 758.

Statements of the Defendant's Section Boss and Station Agent in regard to the injured animal which are not part of the *res gestae* nor shown to be authorized by the employment of the persons who made them are not admissible. Wall *v.* Des Moines & N. W. R. Co., 89 Iowa 193, 56 N. W. 436.

The Declarations of the Section Foreman and the Depot Agent of the railroad company, made after the fire occurred, in regard to the condition and management of the engine and which had no connection with the business committed to them, are mere hearsay and not admissible on behalf of the plaintiff. Atchison, T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286.

Where the plaintiff's team was injured by being struck by a train upon a side-track near a spur-track, while he was unloading goods from a car on a spur-track of the defendant, the statements made by the station agent after the accident and not in the performance of his duty as to the use of the spur-track as a delivery track were held inadmissible against the defendant, but directions by such station agent to other consignees of freight or their servants to use the space between the spur-track and the side-track for the purpose of unloading goods from the cars were held competent to show that the method of unloading adopted by the plaintiff at the time of the accident was in accordance with the directions of the agent and the general course of business with others, and therefore should have been anticipated by the defendant. Bachant *v.* Boston & M. R., 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

65. Alabama G. S. R. Co. *v.* Taylor, 129 Ala. 238, 29 So. 673. See Jacksonville, T. & K. W. R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

Refreshing Memory. — For the use of such a report by the one who made it, to refresh his recollection, see article "Refreshing Memory."

66. Cleveland, C., C. & St. L. R. Co. *v.* Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; *citing* Railway Co. *v.* Noel, 77 Ind. 110.

67. Pennsylvania Co. *v.* Reidy, 72 Ill. App. 343; Oldenburg *v.* New York Cent. & H. R. R. Co., 9 N. Y. Supp. 419, judgment *affirmed* in 11 N. Y. Supp. 689 and 124 N. Y. 414, 26 N. E. 1021 (rule forbidding passengers to ride on the engine).

The jury may consider the rules of the defendant company requiring a bell to be rung a certain distance before reaching the crossing where the accident happened, upon the question whether such a precaution was reasonably necessary and the failure to so ring the bell negligence on the part of the defendant. Hecker *v.* Oregon R. Co., 40 Or. 6, 66 Pac. 270.

The Customary Violation of the rules of the company may be shown to fix its liability. Galveston, H. & S. A. R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

Where the Deceased Was Killed at a Farm Railway Crossing by a wild engine running at a high rate of speed, it was held competent to show the rules of the company requiring wild engines not to be run on crossings over fifteen miles an hour when a red flag has not been sent out on the preceding train. Lyman *v.* Boston & M. R., 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

Where the Plaintiff Was Injured While Walking Along Defendant's Track by a train approaching from behind him and running backwards,

such rules are not admissible to impose upon such employes a higher degree of care than is required by law.[68] Though intended solely for the defendant's own servants, these rules may have been known to and relied upon by the injured person, in which case their violation on the occasion of the injury is relevant also upon the question of contributory negligence;[69] and it has been held that knowledge of the rules by the injured person is not essential where he was familiar with the customary method of operating the train, presumably in compliance with the rules;[70] but there is authority to the contrary.[71] There must of course be some showing that the

it was held competent to show the rules of the company requiring that when a train was running backwards a man should be stationed at the end of the front car or should move abreast of it where he could be seen by the engineer and signal him in case of any obstruction on the track. Such rules, although not public and intended only for the guidance of the defendant's officers and agents, were held admissible as showing that the defendant regarded the moving of trains backward as more dangerous and required more care than running them in the usual manner. Georgia R. *v.* Williams, 74 Ga. 723.

68. Where the defendant owes to the plaintiff, whose property has been burned, the duty of exercising only ordinary care, it is not competent to introduce in evidence a rule adopted by the defendant for the government of its employes requiring the engineer to exercise a greater degree of care than that of an ordinarily prudent man. Alabama, G. S. R. Co. *v.* Clark, 136 Ala. 450, 34 So. 917.

69. Where the plaintiff was injured while walking upon the defendant's tracks, in accordance with the long continued custom of the people of his neighborhood, by an engine making a running switch on to the track upon which the plaintiff had stepped to avoid the approaching cars, it was held competent to show the plaintiff's knowledge of the rules of the company forbidding such flying switches as bearing upon the question of contributory negligence. International & G. N. R. Co. *v.* Brooks (Tex. Civ. App.), 54 S. W. 1056.

In an action by a United States mail clerk for injuries received by him while transferring mail from defendant's trains, it was held no error to admit on behalf of the plaintiff a rule of the railroad company regarding the operation of trains upon which the plaintiff claimed to have relied in spite of the contention by the defendant that such rules were made solely for its employes. Chicago & A. R. Co. *v.* Kelly, 75 Ill. App. 490.

70. Where it appears that the deceased was killed upon a crossing with which he was familiar and where there was a flag station, by a train running at the rate of more than forty miles per hour, a rule of the company providing that the speed of trains be reduced to fifteen miles an hour when passing stations is competent evidence on the question of the deceased's care in attempting to cross the tracks. "The train was running at a rate of speed three times as great as that allowed by the defendants' rules. It must be presumed that the rules were made to be enforced, and that they were generally obeyed. Although the deceased may not have known of the existence of the rule, yet he was familiar with the crossing, frequently travelled over it, and might reasonably act upon the belief that the train would be run at the usual speed in passing the station. There was at least fair room for argument that, if the rule had been obeyed, he would have had sufficient time for crossing without injury or unreasonable risk, and that it would not have been an imprudent act." Davis *v.* Concord & M. R., 68 N. H. 247, 44 Atl. 388, holding that the case of Davis *v.* Manchester, 62 N. H. 422, was not applicable.

71. In an action against a railroad

rules were in force at the time and place of the accident,[72] and the defendant may show that they did not apply to the place where the injury occurred.[73]

The Written or Printed Rules need not be produced as they are only collaterally in issue.[74]

Rate of Speed. — There are dicta to the effect that, as evidence of the speed of the train causing the injury, the plaintiff may show the rules governing its speed at the point where the accident occurred.[75]

company for damages for injuries resulting in the death of a person, the rule of a company requiring the display of lights on the rear of its engines at night, over the center of the track, is not admissible where the deceased person was neither directly nor indirectly in the service of the company or working for any one having contractual relations with it. "There is a marked distinction between testimony as to what the practice of a road was and is as to the running of its trains and what the printed or written rules of the company in respect to such matters have been and are. The habitual practice of a road, continued for some length of time, is a matter concerning which people who are much upon the road, or whose business brings them frequently where they observe such practice, would naturally become familiar with; but there can be no presumption that a person not an employe of the railroad, and not by his vocation either obliged to or having a duty resting upon him to familiarize himself with printed or written rules, is acquainted therewith. In the present case, for aught that appears, the rule introduced in evidence was made a rule of the company and promulgated for the first time on the very day of the accident. If a person not an employe of a railroad is presumed, when suit is brought against the company, to be familiar with its rules, then it would follow that if a knowledge of such rules would operate against his recovery, or the recovery of those who sue for an accident to him, the rule would be admissible upon proof of the existence of the rule, and that the party presumed to be charged with knowledge of it lived near the line of the road or in the vicinity of where it was in operation or posted." Chicago, R. I. & P. R. Co. *v.* Downey, 96 Ill. App. 398, *distinguishing* St. Louis, A. & T. H. R. Co. *v.* Bauer, 156 Ill. 106, 40 N. E. 448, and Chicago & A. R. Co. *v.* Kelly, 75 Ill. App. 490, 80 Ill. App. 675, and 182 Ill. 267, 54 N. E. 979, upon the ground that in these cases the injured person from his occupation and connection with the railway was presumed to be familiar with the rules as to the running of trains, and Chicago & E. I. R. Co. *v.* Jennings, 89 Ill. App. 335, on the ground that the deceased had for a long time been in the habit of riding almost daily upon the trains of the defendant passing at the place where he was injured and that necessarily he had acquired a familiarity with the practice of the road as to the running of trains at that point. See Pittsburgh, C. C. & St. L. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229.

72. Pittsburgh, C. C. & St. L. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229.

73. Where the plaintiff had introduced in evidence certain rules of the company as to the signals for stopping a train, it was held error to exclude evidence by the defendant that such rules did not apply within the corporate limits of the city where the plaintiff's injury was received, such evidence being proper on the question whether the defendant was chargeable with negligence by reason of the disobedience by its employes of the proper signals. Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 74.

74. Oldenburg *v.* New York Cent. & H. R. R. Co., 9 N. Y. Supp. 419, judgment *affirmed* in 11 N. Y. Supp. 689, and 124 N. Y. 414, 26 N. E. 1021.

75. Shaber *v.* St. Paul, M. & M. R. Co., 28 Minn. 103, 9 N. W. 575.

B. The Rules Prescribed by the Plaintiff's Employer for his conduct under the circumstances under which he was injured may be relevant on behalf of the plaintiff upon the question of contributory negligence,[76] but they are not admissible for the defendant,[77] where defendant is not the employe.

7. Operation and Ownership. — A. Generally. — The operation and ownership of the railway on which the injury occurred and of the engine or cars causing it may be sufficiently shown by circumstantial evidence in an action to recover for such injuries.[78]

B. Ownership. — Where it is shown or admitted that a certain company operates a line of railroad, its ownership of that road and the engines running upon it is presumed.[79] The pleadings in

76. Chicago, M. & St. P. R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398.

In Chicago & A. R. Co. *v.* Kelly, 75 Ill. App. 490, an action for injuries received by plaintiff, a mail clerk, while transferring mail from one of defendant's trains, a rule of the post-office department regulating the conduct of clerks in the transfer of mail and the diligence to be exercised by them was held properly admitted for the plaintiff as bearing upon his conduct at the time he was injured.

77. Where the plaintiff was injured in a collision between an electric car on which he was motorman and defendant's train, evidence that he had failed to obey a rule of his employer requiring its motormen to stop their cars before making the crossing in question until a conductor could signal them to advance was held properly excluded on the ground that whether the plaintiff's conduct was negligence "depended upon the characterizing facts, and not upon the existence or non-existence of rules of discipline governing plaintiff's relations to his own employers." Threlkeld *v.* Wabash R. Co., 68 Mo. App. 127.

78. Pittsburg, C. & St. L. R. Co. *v.* Knutson, 69 Ill. 103. See also Louisville, N. A. & C. R. Co. *v.* Meadows, 87 Ind. 441, and cases in notes following.

In an Action for Injuries From a Fire the presumption of ownership arises from proof that the engines which probably caused the fire were attached to the defendant's regular trains. "As said in MacDonald *v.* New York, N. H. & H. R. R. Co., 25 R. I. 40, 54 Atl. 795: 'It takes but slight evidence to make out a *prima facie* case, under circumstances like these, where the defendant has such ample and exclusive means of protecting itself against possible error, the best evidence being exclusively within its own control.'" Spink *v.* New York, N. H. & H. R. R. Co., 26 R. I. 115, 58 Atl. 499.

79. Illinois Cent. R. Co. *v.* Mills, 42 Ill. 407. See Lake Erie & W. R. Co. *v.* Wills, 140 Ill. 614, 31 N. E. 122.

Where the defendant admits that it operates a certain railroad and there is some evidence tending to show that all the engines operated on such road bear its name, a presumption of its ownership of an engine running on such road which caused the fire in question arises in an action for damages from such fire. Bush *v.* Southern R. Co., 63 S. C. 96, 40 S. E. 1029.

Where it was admitted that the defendant ran trains over the railroad at the place of the accident during the month in which it occurred and there was no proof that any other trains had passed over the road at that point during that month but those of the defendant, it was held that the inference was warranted that the fire was set by one of defendant's locomotives. Genung *v.* New York & N. E. R. Co., 66 Hun 632, 21 N. Y. Supp. 97.

An Engine is presumed to belong to the company over whose tracks it is being operated. Brooks *v.* Missouri Pac. R. Co., 98 Mo. App. 166. 71 S. W. 1083.

another suit may be competent as an admission of ownership.[80]

C. Operation. — It is presumed that a railroad is being operated by the company which owns it;[81] in fact the court may take judicial notice that this is generally the fact.[82]

D. Presumption From Initials. — The fact that the engine or cars in question bear an abbreviation of the name of a particular railroad company is *prima facie* evidence of that company's ownership and operation of such engine or cars.[83]

E. Acts and Declarations of Agents or Officers. — The acts and declarations of the agents or officers of a railroad company, while engaged in the company's business, as to its ownership, management or control of the railroad in question are competent evidence against such company.[84]

80. Martin *v.* Central Iowa R. Co., 59 Iowa 411, 13 N. W. 424; Kankakee & Seneca R. Co. *v.* Horan, 23 Ill. App. 259.

81. Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; Peabody *v.* Oregon, R. & N. Co., 21 Or. 121, 26 Pac. 1053, 12 L. R. A. 823; Plew *v.* Missouri, K. & T. R. Co. (Tex. Civ. App.), 29 S. W. 403; Ferguson *v.* Wisconsin Cent. R. Co., 63 Wis. 145, 23 N. W. 123; Lake Erie & W. R. Co. *v.* Carson, 4 Ind. App. 185, 30 N. E. 432.

A corporation shown to be the owner of a railroad, in the operation of which a wrong has been done, is presumed to be in the possession and operation of its road, and this presumption is not overcome by mere proof that the cars causing the injury belonged to and were moved by servants of another company. Gulf, C. & S. F. R. Co. *v.* Miller, 98 Tex. 270, 83 S. W. 182, *affirming* 79 S. W. 1109.

In an Action for Killing Stock the plaintiff is not bound to prove affirmatively that the train inflicting the injury was controlled by the defendant where it appears that the defendant owned the road. In the absence of evidence the jury is warranted in finding that the train was run by the defendant. South & North Ala. R. Co. *v.* Pilgreen, 62 Ala. 305.

82. South & North R. R. Co. *v.* Pilgreen, 62 Ala. 305.

83. Chicago Gen. St. R. Co. *v.* Capek, 68 Ill. App. 500; Ryan *v.* Baltimore & O. R. Co., 60 Ill. App. 612.

Evidence that the locomotive which caused the plaintiff's injury bore an abbreviation of defendant's corporate name is sufficient in the absence of any evidence by the defendant upon that question to justify the submission of the question of ownership and control of the engine to the jury. East St. Louis C. R. Co. *v.* Altgen, 210 Ill. 213, 71 N. E. 377.

That the Engine Which Caused the Plaintiff's Injury Was Not Running Upon the Defendant's Tracks at the Time but upon a track used by several railway companies does not destroy, although it may weaken, the presumption of ownership arising from the fact that the engine bore defendant's corporate name. East St. Louis C. R. Co. *v.* Altgen, 210 Ill. 213, 71 N. E. 377; *citing* Pittsburgh, Ft. W. & C. R. Co. *v.* Callaghan, 157 Ill. 406, 41 N. E. 909, in which it was held that the fact that a locomotive causing an injury on a track used by different companies was lettered with defendant's name established *prima facie* possession and ownership by the defendant and was sufficient proof on that question to justify the trial court in refusing to take the case from the jury.

84. Missouri Pac. R. Co. *v.* Owens, 1 White & W. Civ. Cas. (Tex.) § 390. See also articles "Admissions" and "Principal and Agent."

A report of the president and directors of a railroad company to its stockholders "with such data relating to the lines controlled by your company as will give you a clear understanding of their physical and financial condition" is not admissible

V. INJURIES FROM CONSTRUCTION OR MAINTENANCE OF RAILROAD.

In an action for damages to land caused by the negligent construction and maintenance of a railroad, evidence as to the market value of the land before and since the construction of the road is inadmissible.[85] The evidence should be confined to the effect upon the premises in question,[86] though when the damage to property and health is due to flooding the plaintiff's land the effect of the water upon the health of other persons residing with plaintiff,[87] or upon the health of the neighborhood, may be shown by him.[88] In the latter case the defendant may show that the plaintiff could have avoided the injury complained of.[89]

VI. PRIVATE CROSSING.

In a proceeding to compel a railway company to construct a private crossing for the complaining party the place selected by him is presumed to be the most convenient to him,[90] and evidence is competent to show the damage and inconvenience to which he would be subjected by crossing at a place designated by the railway company.[91]

in evidence for the purpose of showing that the first-named company controls the management of the other lines and thus to fix upon it a liability for the negligence of the officers of said lines, when it appears from other portions of the report, that the control referred to is that of a stockholder. Moynihan *v.* Pennsylvania R. Co., 19 D. C. 573.

85. Carson *v.* Norfolk & C. R. Co., 128 N. C. 95, 38 S. E. 287 (the measure of damages being the difference in the value of the land with the railroad constructed as it was and its value had the road been properly constructed).

86. In an action by the owner of a house and lot fronting upon a particular street for damages caused by the entry upon and use of such street by the defendant railway company, evidence that other houses several squares distant had been injured by smoke and cinders and by being shaken by passing trains, was held improperly admitted, since the evidence should be confined as nearly as practicable to the property alleged to be injured. So also it was held error to admit evidence tending to show that defendant's engines were sometimes run at a high and dangerous rate of speed along the street and that a man had been killed in the street by one of the defendant's trains. Jeffersonville, M. & I. R. Co. *v.* Esterle, 13 Bush (Ky.) 667.

87. Where the plaintiff claims damages on account of the sickness of his family, it is competent to show the effect upon the health of the plaintiff's mother-in-law living with him at the time, although damages therefor are not claimed and could not be allowed. Texas & P. R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134. See also article "NUISANCE," Vol. IX, III, 4.

88. Texas & P. R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

89. In an action for damages from the flooding of plaintiff's land by the erection of a railway embankment, the testimony of a civil engineer that culverts through the embankment would assist in draining the land was held proper as showing one of the means by which the defendant could have avoided the injury complained of. Willitts *v.* Chicago, B. & K. C. R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608.

90. Boggs *v.* Chicago, B. & Q. R. Co., 54 Iowa 435, 6 N. W. 744.

91. In an action to compel the de-

VII. CRIMINAL PROCEEDINGS.

1. Indictment for Recovery of Penalty for Benefit of Surviving Kin. — Under a statute providing for the indictment of a railroad company for negligently killing a human being and for the recovery of a penalty for the benefit of the deceased's surviving kin the same rules are applied as in analogous civil actions for damages; no different degree or kind of evidence is necessary.[92]

2. Prosecution for Obstructing Railroad. — On a prosecuton for obstructing a railroad track circumstantial evidence tending to show the defendant's guilt is admissible,[93] and his complicity in the placing of obstructions other than those alleged may be shown if such other acts tend to connect him with the act charged.[94]

fendant railway company to construct a farm crossing, it was held proper for the plaintiff to show the value of the farm and the cost of hauling stone over the railroad at the crossing which had been made by the defendant in another place as bearing upon the question whether the court should exercise its equity powers and order a crossing, or give the plaintiff such damages as he had sustained by reason of the failure to place a crossing at a suitable and convenient point in case the company's erecting such a crossing should be disproportionate to the value of the property. Buffalo S. & C. Co. *v.* Delaware, L. & W. R. Co., 7 N. Y. Supp. 604.

92. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258.

93. On a prosecution for obstructing a railroad track, a shovel found under the defendant's house after his arrest and which was identified as one which had been hidden several months before in the grass and near the point of the obstruction and which could not be found there on the day after the track was obstructed was held properly introduced in evidence. Mitchell *v.* State, 94 Ala. 68, 10 So. 518.

94. State *v.* Wentworth, 37 N. H. 196; Barton *v.* State, 28 Tex. App. 483, 13 S. W. 783 (the placing of a different obstruction at a contiguous point on the railway very soon after the placing of the obstruction charged in the indictment).

RAPE, AND ASSAULT WITH INTENT TO RAPE.

By A. P. Rittenhouse.

RAPE.

ASSAULT WITH INTENT TO RAPE.

I. PRESUMPTIONS.

1. From Age of Defendant. — It is presumed that a boy under the age of fourteen years is incapable of committing the crime of rape; this presumption is, in some jurisdictions, conclusive;[1] in other jurisdictions, it may be rebutted by evidence.[2]

2. From Age of Prosecutrix. — The law presumes that a female under the age of ten years is incapable of consenting to an act of sexual intercourse.[3]

II. BURDEN OF PROOF.

1. Burden on the State. — To warrant a conviction for rape, the prosecution must show beyond a reasonable doubt that the act of sexual intercourse was done by the defendant with force, either actual or constructive, and against the woman's consent, express or implied.[4]

1. *England.* — Reg. *v.* Phillips, 8 Car. & P. 736.

Delaware. — State *v.* Handy, 4 Har. 566.

Florida. — Chism *v.* State, 42 Fla. 232, 28 So. 399; McKinney *v.* State, 29 Fla. 565, 10 So. 732, 30 Am. St. Rep. 140; Williams *v.* State, 20 Fla. 777.

Massachusetts. — Com. *v.* Green, 2 Pick. 380.

North Carolina. — State *v.* McNair, 93 N. C. 628.

Virginia. — Foster *v.* Com. 96 Va. 306, 31 S. E. 503, 70 Am. St. Rep. 846, 42 L. R. A. 589.

In Queen *v.* Waite, 2 Q. B. 600, Lord Coleridge said: "The rule at common law is clearly laid down by Lord Hale, that in regard to the offense of rape, *malitia non supplet aetatem;* a boy under fourteen is under a physical incapacity to commit the offense. This is a *presumptio juris et de jure,* and judges have time after time refused to receive evidence to show that a particular prisoner was in fact capable of committing the offense."

The presumption against the commission of rape by persons below the age of puberty is conclusive. This is not so much upon the ground of incapacity of mind or will, as it is upon the ground of physical impotency. State *v.* Sam, 60 N. C. 293.

2. *Georgia.* — Gordon *v.* State, 93 Ga. 531, 21 S. E. 54, 44 Am. St. Rep. 189; Bird *v.* State, 110 Ga. 315, 35 S. E. 156.

Kentucky — Heilman *v.* Com., 84 Ky. 457, 1 S. W. 731, 4 Am. St. Rep. 207.

Louisiana. — State *v.* Jones, 39 La. Am. 935, 3 So. 57.

New York. — People *v.* Randolph, 2 Park. Crim. 174.

Ohio. — Hiltabiddle *v.* State, 35 Ohio St. 52, 35 Am. Rep. 592; Jeffers v. State, 20 Ohio Cir. Ct. 294.

Tennessee. — Wagoner *v.* State, 5 Lea, 352, 40 Am. Rep. 36.

3. Toulet *v.* State, 100 Ala. 72, 14 So. 403; People *v.* Ten Elshof, 92 Mich. 167, 52 N. W. 297; Dickey *v.* State, 86 Miss. 525, 38 So. 776.

The presumption that a female under the age of ten years is incapable of consenting to an act of carnal knowledge, or any assault with intent to commit the act, has at all times been the rule of the common law, but the presumption may be rebutted by proof that she understood the nature of the act committed or intended. O'Meara *v.* State, 17 Ohio St. 516.

Under Age of Consent. — In State *v.* Smith, 9 Houst. 1 Del. 588, the court said: "The law conclusively presumes that carnal knowledge of a female under either the common law, or any statutory age of consent, has been accomplished by force and against her will; and no evidence to the contrary can lawfully be received or considered by the jury for the purpose of rebutting this presumption."

4. McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; Wesley

2. Girl Under Age. — Where rape is charged to have been committed upon a girl under the age of consent, it is incumbent on the state to prove that she was under that age.[5]

3. Boy Over Fourteen. — The state is not required to prove in the first instance, that the defendant was over the age of fourteen when the act was committed.[6] And, it has been held that where the defendant sets up the defense that he was under the age of fourteen years when the alleged offense was committed, the burden is upon him to establish that fact by evidence.[7]

III. CARNAL KNOWLEDGE.

1. Penetration. — To establish the fact of carnal knowledge the evidence must show that the male sexual organ entered into the private parts of the female, to some extent; the slightest penetration is sufficient.[8]

v. State, 65 Ga. 731; State *v.* Smith, 9 Houst. Del. 588; Rodriguiz *v.* State, 20 Tex. App. 542.

It is incumbent on the state to prove all the material facts constituting the crime, such for instance as the minority of the child, the perpetration of the crime in the county where charged; the actual fact of sexual intercourse, beyond a reasonable doubt. State *v.* Pucca, 4 Del. 71, 55 Atl. 831.

5. People *v.* Howard, 143 Cal. 316, 76 Pac. 1116; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

6. Peckham *v.* People, 32 Colo. 140, 75 Pac. 422.

7. In State *v.* McNair, 93 N. C. 628, the defendant set up the defense that he was under the age of fourteen years when the alleged offense was committed. *Held,* that the burden of proving his age was upon the prisoner and that his appearance and growth might be considered in determining his age.

8. *England.* — Rex *v.* Allen, 9 Car. & P. 31; Rex. *v.* Hughes, 9 Car. & P. 752; Rex. *v.* Sheridan, 1 East P. C. 438; Hill's case, 1 East P. C. 439; Rex. *v.* Flemming, 1 East P. C. 440; Rex. *v.* Russen, 1 East P. C. 439.

Alabama. — Posey *v.* State, 38 So. 1019; Waller *v.* State, 40 Ala. 325.

Connecticut. — State *v.* Shields, 45 Conn. 256.

Florida. — Barker *v.* State, 40 Fla. 178, 24 So. 69; Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Georgia. — Wesley *v.* State, 65 Ga. 731; Morris *v.* State, 54 Ga. 440.

Indiana. — Bradburn *v.* State, 162 Ind. 689, 71 N. E. 133.

Iowa. — State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805; State *v.* Watson, 81 Iowa 380, 389, 46 N. W. 868.

Kansas. — State *v.* Grubb, 55 Kan. 678, 41 Pac. 951.

Massachusetts. — Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632.

Michigan. — People *v.* Bernor, 115 Mich. 692, 74 N. W. 184; People *v.* Courier, 79 Mich. 366, 44 N. W. 571.

Minnesota. — State *v.* Rollins, 80 Minn. 216, 83 N. W. 141.

Missouri. — State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961; State *v.* Dalton, 106 Mo. 463, 17 S. W. 700.

Nebraska. — Comstock *v.* State, 14 Neb. 205, 15 N. W. 355.

North Carolina. — State *v.* Hargrave, 65 N. C. 466.

Texas. — Young *v.* State (Tex. Crim.), 93 S. W. 743; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077.

Virginia. — Bailey *v.* Com., 82 Va. 107, 3 Am. St. Rep. 87.

Wisconsin. — Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

There must be proof of some degree of entrance of the male organ within the *labia pudendum* of the female. State *v.* Smith, 9 Houst. (Del.) 588.

In Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112, the court said: "*Res in re,* the engagement of the sexual

2. How Proved. — Penetration may be proved by direct or circumstantial evidence like any other fact.[9]

3. Emission. — It is not necessary to prove emission, as it is not an essential element of the crime of rape.[10]

IV. FORCE.

1. Generally. — Force, either actual or constructive, is an essential element in the crime of rape, and must be proved beyond a reasonable doubt to warrant conviction.[11]

2. Constructive Force. — In a prosecution for rape it is not necessary to prove that physical force was applied to the person

organs at all beyond surface contact, all the other essentials of the crime charged being present, fully consummates the offense of rape."

9. State *v.* Dalton, 106 Mo. 463, 17 S. W. 700; Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723; Brauer *v.* State, 25 Wis. 413.

It is essential that sexual penetration be proved, or that facts be proven from which it may be inferred. People *v.* Howard, 143 Cal. 316, 76 Pac. 1116.

In People *v.* Scouten, 130 Mich. 620, 90 N. W. 332, the court said: "The fact of penetration must be proved, although any penetration however slight, is sufficient. But it may be proved, as any other fact is proved, by circumstantial evidence, or by one who witnessed the act, but who is unable to testify in terms to the actual fact of penetration."

10. *England.* — Rex *v.* Sheridan, 1 East Pl. Cr. 438; Rex. *v.* Flemming, 1 East Pl. Cr. 440; Hill's case, 1 East Pl. Cr. 439.

Alabama. — Waller *v.* State, 40 Ala. 325.

Florida. — Barker *v.* State, 40 Fla. 178, 24 So. 69; Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Michigan. — People *v.* Bernor, 115 Mich. 692, 74 N. W. 184.

Minnesota. — State *v.* Rollins, 80 Minn. 216, 83 N. W. 141.

Nebraska. — Comstock *v.* State, 14 Neb. 205, 15 N. W. 355.

North Carolina. — State *v.* Hargrave, 65 N. C. 466.

Ohio. — Hiltabiddle *v.* State, 35 Ohio St. 52, 35 Am. Rep. 592.

11. *Alabama.* — Posey *v.* State (Ala.), 38 So. 1019; Dawkins *v.* State, 58 Ala. 376, 29 Am. Rep. 754; Vasser *v.* State, 55 Ala. 264; McNair *v.* State, 53 Ala. 453; Lewis *v.* State, 30 Ala. 54, 68 Am. Dec. 113.

Arkansas. — Bradley *v.* State, 32 Ark. 704.

California. — People *v.* Royal, 53 Cal. 62.

Delaware. — State *v.* Smith, 9 Houst. 588.

Florida. — Cato *v.* State, 9 Fla. 163, 185.

Georgia. — Taylor *v.* State, 50 Ga. 79.

Indiana. — Mills *v.* State, 52 Ind. 187.

Kentucky. — Brown *v.* Com. 102 Ky. 227, 43 S. W. 214.

Louisiana. — State *v.* Williams, 32 La. Ann. 335, 36 Am. Rep. 267.

Maine. — State *v.* Blake, 39 Me. 322.

Michigan. — Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283.

Missouri. — State *v.* Cunningham, 100 Mo. 382, 394, 12 S. W. 376.

Ohio. — Martin *v.* State, 13 Ohio Cir. Ct. 604.

Oklahoma. — Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765, Sowers *v.* Territory, 6 Okla. 436, 50 Pac. 257.

Tennessee. — Wyatt *v.* State, 2 Swan (Tenn.), 394.

Texas. — Elliott *v.* State (Tex. Crim.), 93 S. W. 742; Carter *v.* State 44 Tex. Crim. 312, 70 S. W. 971; McCullough *v.* State (Tex. Crim.), 47 S. W. 990; Owens *v.* State 39 Tex. Crim. 391, 46 S. W. 240; McAdoo *v.* State, 35 Tex. Crim. 603, 34 S. W. 955, 60 Am. St. Rep. 61; Passmore *v.* State, 29 Tex. App. 241, 15 S. W. 286; Sharp *v.* State, 15 Tex. App. 171, 186; State *v.* McCune, 16 Utah 170, 51 Pac. 818; O'Boyle

of the prosecutrix at the time of the act of sexual intercourse; it is sufficient to show that threats of violence or injury overcame her will and caused her to yield.[12]

3. Presumption of Force. — Where the evidence shows that sexual intercourse was had with a female who was at the time in a state of stupefaction, or unconsciousness force is presumed by law.[13]

v. State, 100 Wis. 296, 75 N. W. 989.

12. *Alabama.* — Posey *v.* State (Ala.), 38 So. 1019.

Kentucky. — Smith *v.* Com., 26 Ky. 1229, 83 S. W. 647; Clymer *v.* Com., 23 Ky. 1041, 64 S. W. 409; Brown *v.* Com. 102 Ky. 227, 43 S. W. 214.

Nebraska. — Hammond *v.* State. 39 Neb. 252, 58 N. W. 92; Richards *v.* State, 36 Neb. 17, 24, 53 N. W. 1027.

Texas. — Sharp *v.* State, 15 Tex. App. 171.

Fear and Terror. — In State *v.* Smith, 9 Houst. (Del.) 588, the court said: "Upon proof of carnal penetration of a female of the age of consent, the burden is upon the prosecution to further prove to the satisfaction of the jury beyond a reasonable doubt that the penetration was consummated by force and against her will, or by putting her in great fear and terror, before a conviction can be had."

A stepfather was accused of rape committed upon his stepdaughter who was between ten and eleven year old. The step-daughter testified that the defendant was in the habit of cruelly beating her, and thus keeping her in constant fear and terror, under which she submitted to him. A neighbor testified that she heard the defendant whipping and beating the prosecutrix. *Held,* that the evidence was admissible in corroboration of the prosecutrix's statement as to cruel treatment and fear. People *v.* Lenon, 79 Cal. 625, 21 Pac. 967.

Abuse. — Evidence tending to show that the defendant who was the father of the prosecutrix, had abused and beaten her before, and that he was abusive to his wife and other children, and the language used on these occasions was held competent and important for the jury to consider in determining whether she yielded under those circumstances which under the law are the equivalent of force. People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

In Cardwell *v.* State, 60 Neb. 480, 83 N. W. 665, it was declared that overcoming the will by threats of death or great bodily harm is equivalent to physical force.

13. The Queen *v.* Ryan, 2 Cox C. C. (Eng.), 115; McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; Harlan *v.* People, 32 Colo. 397, 76 Pac. 792.

Proof that carnal knowledge of a woman was accomplished by administering to her some substance, with intent to produce such stupor or imbecility of mind, or weakness of body, as to prevent effectual resistance, and which did have such result, will warrant a conviction for rape. State *v.* Porter, 57 Iowa 691, 11 N. W. 644.

Proof that when the act of carnal intercourse took place the woman was asleep establishes force and her want of consent to the act. Payne *v.* State, 40 Tex. Crim. 202, 49 S. W. 604.

In Mooney *v.* State, 29 Tex. App. 257, it was held that the act of copulation by the defendant with the wife of another person while she was asleep, she being incapable of consenting at the time, was rape by force.

In Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283, the doctrine was announced that in cases where the female with whom sexual connection is had may be said to have no will, because of idiocy, insanity, or a state of unconsciousness, the force necessary to constitute the act of sexual intercourse is deemed sufficient as the force which constitutes one of the elements of rape. But this doctrine is denied and strongly condemned in Walter *v.* People, 50 Barb. (N. Y.) 144.

In Reg. *v.* Dee, 15 Cox C. C. 579, the court said: "Rape may be defined

4. Fraud and Deception. — As to whether force can be inferred from proof that carnal connection with a woman was procured by practicing fraud and deception upon her, the authorities are in conflict. Proof that carnal connection was obtained by personating the husband of the woman, has been held to involve the element of force, as well as want of consent;[14] and it has been held to the contrary.[15]

5. Pretended Surgical Operation. — Proof that carnal connection with a woman was procured by deceiving her as to the nature of the act, and inducing her to believe that it was a necessary surgical operation, amounts to proof of force and want of consent.[16]

as sexual connection with a woman, forcibly and without her will. . . . It is plain, however, 'forcibly' does not mean violently, but with that description of force which must be exercised in order to accomplish the act, for there is no doubt that unlawful connection with a woman in a state of unconsciousness, produced by profound sleep, stupor or otherwise, if the man knows that the woman is in such a state, amounts to rape."

14. Reg. *v.* Dee, 15 Cox C. C. 579, 598; Ledbetter *v.* State, 33 Tex. Crim. 400, 26 S. W. 725.

In North Carolina by statute, proof that a man had carnal connection with a married woman by fraud in personating her husband constitutes rape. Code 1881 § 1103. Revisal 1905, 3624; State *v.* Williams, 128 N. C. 573, 37 S. E. 952.

In Payne *v.* State, 38 Tex. Crim. 494, 43 S. W. 515, 70 Am. St. Rep. 75, the court said: "In England, as in this country, it appears that rape is a statutory offense, and we understand that under an ordinary indictment in England for rape by force and without the consent of the alleged injured female, the proof can be made for rape by procuring the intercourse by a false personation of the husband of the female."

Sham Marriage. — Under a statute which declares rape to be the carnal knowledge of a woman without her consent, obtained by force, threats or fraud and declares that fraud must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband. Proof that defendant had sexual intercourse with prosecutrix by reason of a sham marriage will warrant a conviction. Lee *v.* State, 44 Tex. Crim. 354, 72 S. W. 1005, 61 L. R. A. 904.

15. Rex *v.* Jackson, 1 Russ. & R. C. C. (Eng.) 486; Reg. *v.* Saunders, 8 Car. & P. (Eng.) 265; Reg. *v.* Clarke, 6 Cox C. C. (Eng.) 412; Reg. *v.* Francis, 13 U. C. Q. B. 116; Lewis *v.* State, 30 Ala. 54, 68 Am. Dec. 113.

16. In Queen *v.* Flattery, 2 L. R. Q. B. (Eng.) 410, the prosecutrix, a girl of nineteen, was subject to fits, and she and her mother consulted the defendant who was a physician and surgeon, in regard to her case and informed him of her condition. He made an examination of her person, and advised that a surgical operation be performed, and under the pretense of performing it, had carnal connection with her. *Held,* to be rape, Mellor J. saying: "It is said that submission is equivalent to consent, and that here, there was submission. But submission to what? Not to carnal connection. The case is exactly within the words of Wilde C. J. in Reg. *v.* Case, 1 Den. C. C. 580: 'She consented to one thing, he did another, materially different, on which she had been prevented by his fraud from exercising her judgment and will.'"

The prosecutrix testified that the defendant who was a physician, while attending her in a professional capacity, told her she had a disease of the womb, and that a physical examination was necessary; that she submitted with much reluctance; that he had carnal connection with her on two occasions, while professing to be making such examination; that this occurred in the parlor of her

6. Under Age of Consent. — Proof that carnal connection was had with a female under the age of consent necessarily involves the element of force, and it need not be specifically proved.[17]

V. ABSENCE OF CONSENT.

1. Resistance. — To warrant conviction for rape the evidence must show the fact of non-consent, and the exercise of all the means of resistance which, under the circumstances of the case and the condition of the mental faculties of the prosecutrix, were within her power to make.[18]

brother's house, in the daytime, while the wife of her brother was in an adjoining room; that she made no outcry; that she believed that while the defendant was doing these acts, he was making a medical examination in the usual way; that she made no revelation of these occurrences until after she had been told that she was pregnant. *Held,* that such statement made by a female of mature age, and possessing any intellectual capacity, ought not to be allowed to become the basis of a judicial action. Walter *v.* People, 50 Barb. (N. Y.) 144.

17. State *v.* Smith, 9 Houst. (Del.) 588; Hanes *v.* State, 155 Ind. 112, 57 N. E. 704; State *v.* Rollins, 80 Minn. 216, 83 N. W. 141.

Proof of Age. — The prosecutrix may testify as to her age, although her parents are in court and gave testimony thereto. State *v.* Miller, 71 Kan. 200, 80 Pac. 51.

In statutory rape testimony of the mother and sister of the prosecutrix as to her age is admissible. George *v.* State, 61 Neb. 669, 85 N. W. 840.

18. *Connecticut.* — State *v.* Shields, 45 Conn. 256.

Indiana. — Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; Felton *v.* State, 139 Ind. 531, 39 N. E. 228; Huber *v.* State, 126 Ind. 185, 25 N. E. 904; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Iowa. — State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

Kansas. — State *v.* Brown, 54 Kan. 71, 37 Pac. 996.

Massachusetts. — Com. *v.* McDonald, 110 Mass. 405.

Missouri. — State *v.* Cunningham, 100 Mo. 382, 394, 12 S. W. 376; State *v.* Montgomery, 63 Mo. 296.

Nebraska. — Thompson *v.* State, 44 Neb. 366, 62 N. W. 1060; Mathews *v.* State, 19 Neb. 330, 27 N. W. 234; Oleson *v.* State, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366.

New Mexico. — Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165.

New York. — People *v.* Clemons, 37 Hun (N. Y.) 580.

North Carolina. — State *v.* Massey, 86, N. C. 658, 41 Am. Rep. 478.

Oklahoma. — Harmon *v.* Territory, 15 Okla. 147, 79 Pac. 765.

Texas. — Owens *v.* State, 39 Tex. Crim. 391, 46 S. W. 240.

Utah. — State *v.* McCune, 16 Utah 170, 51 Pac. 818.

Wisconsin. — Brown *v.* State (Wis.), 106 N. W. 536; Devoy *v.* State, 122 Wis. 148, 99 N. W. 455; Bohlmann *v.* State, 98 Wis. 617, 74 N. W. 343; Whittaker *v.* State, 50 Wis. 518, 7 N. W. 431, 36 Am. Rep. 856.

Wyoming. — Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

Where fear is relied upon to account for or supply the place of actual resistance, the testimony should show such circumstances as clearly justify the conclusion that it existed. Hollis *v.* State, 27 Fla. 387, 9 So. 67.

The evidence must show that the woman did not consent. Her resistance must not be mere pretense, but in good faith. It is not necessary that a woman should use all the physical force she has, in resistance, but it must be real, and have been overcome by the defendant. Eberhart *v.* State, 134 Ind. 651, 34 N. E. 637.

The evidence in a charge of rape

2. Incapacity to Consent. — Absence of consent may be shown by proving that the woman was the subject of mania, or idiocy, or asleep, or in a state of stupefaction or unconsciousness, when the act of sexual intercourse took place.[19]

must show that the act of sexual intercourse was against the will of the prosecutrix. It is sufficient if it shows that her will was subdued to submission by menace or duress. Pollard *v.* State, 2 Iowa 566.

It is competent for the prosecution to show the mental and physical condition of the prosecutrix as bearing upon the extent of the resistance the law requires her to make. People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

To constitute the crime of rape upon a female over the age of consent when it appears that at the time of the alleged offense she was conscious, had the possession of her natural mental and physical powers, was not overcome by numbers or terrified by threats, or in such place or position that resistance would have been useless, it must be made to appear that she did resist to the extent of her ability at the time and under the circumstances. People *v.* Dohring, 59 N. Y. 374, 386, 17 Am. Rep. 349.

In O'Boyle *v.* State, 100 Wis. 296, 75 N. W. 989, the court said: "The allegation of force is to be proved by competent evidence showing either that the person of the woman was violated and her resistance was overcome by physical force, or that her will was overcome by duress or fear. But, before the defendant can be convicted of rape, it must be shown that the woman did not consent to intercourse, but that she used all the resistance in her power under the circumstances up to the time of the intercourse."

Condition of Place. — Where the consent of the prosecutrix is in issue the condition of the ground where the alleged rape was alleged to have taken place as it appeared the next day may be given in evidence. Tyler *v.* State, 46 Tex. Crim. 10, 79 S. W. 558.

19. *England.* — Reg. *v.* Fletcher, 8 Cox C. C. 131; Reg. *v.* Fletcher, 10 Cox C. C. 248; Reg. *v.* Ryan, 2 Cox C. C. 115.

Alabama. — McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

Colorado. — Harlan *v.* People, 32 Colo. 397, 76 Pac. 792.

Iowa. — State *v.* Porter, 57 Iowa 691, 11 N. W. 644; State *v.* Atherton, 50 Iowa 189, 32 Am. Rep. 134.

Massachusetts. — Com. *v.* Burke, 105 Mass. 376, 7 Am. Rep. 531.

Michigan. — Don Moran *v.* People, 25 Mich. 356, 12 Am. Rep. 283.

Texas. — Payne *v.* State, 40 Tex. Crim. 202, 49 S. W. 604; Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724.

In Reg. *v.* Barratt, 12 Cox C. C. 498, Blackburn, J. after reviewing the two cases of Reg. *v.* Fletcher, *supra*, which are apparently in conflict, and other cases, said: "In all these cases the question is, whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent, or exercising any judgment upon the matter, or in other words, is there sufficient evidence of such an extent of idiocy or want of capacity."

In Reg. *v.* Connolly, 26 U. C. Q. B. 317, the court said: "In the case of rape of an idiot or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury; there must be some evidence that it was without her consent, *e. g.*, that she was incapable of expressing consent or dissent, or from exercising any judgment upon the matter, from imbecility of mind, or defect of understanding."

In Reg. *v.* Dee, 15 Cox C. C. 579, 598 (Ire.), the court said: "Whether the act of consent be the result of overpowering force, or of fear, or of incapacity, or of natural condition, or of deception, it is still want of consent, and the consent must be, not consent to the act, but to the act of the particular person."

In Posey *v.* State (Ala.), 38 So. 1019, the girl upon whom the alleged rape was alleged to have been committed testified that during a portion of the time she was being outraged

3. Under Age of Consent. — Where the evidence shows that sexual intercourse was had with a female child under the age of consent, the law presumes that it was against her will and it is not necessary for the prosecution to prove resistance or want of consent.[20]

4. Character of Prosecutrix. — The character of the prosecutrix is presumed to be good, and evidence of that fact is not admissible in advance of attack, but may be given in rebuttal.[21]

she was unconscious. *Held,* that it was competent to cross-examine her to test the truthfulness of this statement, and to test her recollection and truthfulness as to all other statements testified to by her.

In Gore *alias* Goings *v.* State, 119 Ga. 418, 46 S. E. 671, 100 Am. St. Rep. 182, the court said: "The authorities generally, however, construe the words, 'against her consent' to be synonymous with 'without her consent,' and hold that the act of sexual intercourse is against the woman's will, when, from any cause, she is not in a position to exercise any judgment about the matter. Thus intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from the use of drugs or other cause, or sleep, etc., is rape."

20. *California.* — People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; People *v.* Roach, 129 Cal. 33, 61 Pac. 574; People *v.* Vann, 129 Cal. 118, 61 Pac. 776; People *v.* Verdegreen, 106 Cal. 211, 39 Pac. 607, 46 Am. St. Rep. 234.

Dakota. — Territory *v.* Keyes, 5 Dak. 244, 38 N. W. 440.

Delaware. — State *v.* Barrett (Del.), 59 Atl. 45.

Indiana. — Eberhart *v.* State, 134 Ind. 651, 34 N. E. 637.

Iowa. — State *v.* Bailor, 104 Iowa, 73 N. W. 344; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292; State *v.* Grossheim, 79 Iowa 75, 44 N. W. 541.

Michigan. — People *v.* Goulette, 82 Mich. 36, 45 N. W. 1124; People *v.* Courier, 79 Mich. 366, 44 N. W. 571.

Missouri. — State *v.* Day, 188 Mo. 359, 87 S. W. 465.

Montana. — State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

Nebraska. — Hubert *v.* State (Neb.), 106 N. W. 774.

Oregon. — State *v.* Sargent, 32 Ore. 110, 49 Pac. 889.

Texas. — Knowles *v.* State, 44 Tex. Crim. 322, 72 S. W. 398; Callison *v.* State, 37 Tex. Crim. 211, 39 S. W. 300; Hamilton *v.* State, 36 Tex. Crim. 372, 37 S. W. 431; Comer *v.* State (Tex. Crim.), 20 S. W. 547; Rodgers *v.* State, 30 Tex. App. 510, 17 S. W. 1077; Nicholas *v.* State, 23 Tex. App. 317, 5 S. W. 239.

Utah. — State *v.* Hilberg, 22 Utah 27, 61 Pac. 215; State *v.* McCune, 16 Utah 170, 51 Pac. 818.

Virginia. — Givens *v.* Com., 29 Gratt. 830.

Washington. — State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

Wisconsin. — Loose *v.* State, 120 Wis. 115, 97 N. W. 526; Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128; Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

In People *v.* Edwards, 139 Cal. 527, 73 Pac. 416, the prosecutrix was a child under the age of consent. *Held,* that evidence tending to show that she requested the defendant to give her money and presents and that he did so, as circumstances tending to show her consent, was incompetent.

A female child under the age of ten years is incapable of consenting to the act of sexual intercourse. Stephen *v.* State, 11 Ga. 225.

In People *v.* Brown (Mich.), 106 N. W. 149, the prosecutrix was under the age of consent. *Held,* that evidence of other acts of sexual intercourse with the defendant subsequent to the offense charged, and also evidence of her being pregnant, were inadmissible.

21. People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; Com. *v.* Allen, 135 Pac. St. 483, 492, 19 Atl. 957.

VI. CORROBORATIVE EVIDENCE.

1. Complaint of Prosecutrix. — A. General Rule. — After the prosecutrix has testified to the commission of the outrage upon her, it is competent for the prosecution to prove in corroboration of her testimony as to the main fact, either by her or other witnesses that recently after the perpetration of the offense, she made complaint to those to whom complaint of such an occurrence would naturally be made, but on direct examination, such testimony is confined to the bare fact of complaint, and neither the details of the occurrence, nor the name of the offender, can be proved.[22]

Matter of Inducement. — The prosecution is entitled to show as a matter of inducement how the prosecutrix came to be in a lonely spot where the assault was committed after night, and in the company of her alleged assailants, in order to rebut the presumption of consent which would naturally arise in the minds of the jurors, if her presence there was unexplained. Stevens *v.* Com., 20 Ky. 48, 45 S. W. 76.

22. *Alabama.* — Posey *v.* State (Ala.), 38 So. 1019; Oakley *v.* State, 135 Ala. 15, 33 So. 23; Bray *v.* State, 131 Ala. 46, 31 So. 107; Smith *v.* State, 47 Ala. 540.

Arizona. — Kirby *v.* Territory, 28 Pac. 1134.

Arkansas. — Williams *v.* State, 66 Ark. 264, 50 S. W. 517; Pleasants *v.* State, 15 Ark. 624.

California. — People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; People *v.* Tierney, 67 Cal. 54, 7 Pac. 37; People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Colorado. — Donaldson *v.* People, 33 Colo. 333, 80 Pac. 906.

Florida. — Ellis *v.* State, 25 Fla. 702, 6 So. 768.

Georgia. — Lowe *v.* State, 97 Ga. 792, 25 S. E. 676; Stephen *v.* State, 11 Ga. 225.

Illinois. — Stevens *v.* People, 158 Ill. 111, 41 N. E. 856; Bean *v.* People, 124 Ill. 576, 16 N. E. 656.

Indiana. — Thompson *v.* State, 38 Ind. 39; Weldon *v.* State, 32 Ind. 81.

Iowa. — State *v.* Clark, 69 Iowa 294, 28 N. W. 606; State *v.* Richards, 33 Iowa 420.

Kansas. — State *v.* Daugherty, 63 Kan. 473, 65 Pac. 695.

Kentucky. — Douglas *v.* Com., 24 Ky. 562, 68 S. W. 1107.

Louisiana. — State *v.* McCoy, 109 La. Ann. 682, 33 So. 730; State *v.* Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; State *v.* Robertson, 38 La. Ann. 618, 58 Am. Rep. 201.

Maryland. — Legore *v.* State, 87 Md. 735, 41 Atl. 60; Parker *v.* State, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

Michigan. — People *v.* Marrs, 125 Mich. 376, 84 N. W. 284.

Minnesota. — State *v.* Shettleworth, 18 Minn. 191.

Mississippi. — Dickey *v.* State, 86 Miss. 525, 38 So. 776; Anderson *v.* State, 82 Miss. 784, 35 So. 202; Ashford *v.* State, 81 Miss. 414, 33 So. 174.

Missouri. — State *v.* Patrick, 107 Mo. 147, 17 S. W. 666; State *v.* Jones, Jr., 61 Mo. 232.

Nebraska. — Welsh *v.* State, 60 Neb. 101, 82 N. W. 368; Wood *v.* State, 46 Neb. 58, 64 N. W. 355; Oleson *v.* State, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366.

Nevada. — State *v.* Campbell, 20 Nev. 122, 17 Pac. 620.

New Jersey. — State *v.* Ivins, 36 N. J. L. 233.

New York. — People *v.* Clemons, 37 Hun 580; People *v.* Batterson, 2 N. Y. Supp. 376.

North Carolina. — State *v.* Stines, 138 N. C. 686, 50 S. E. 851.

Oklahoma. — Harmon *v.* Territory, 5 Okla. 368, 49 Pac. 55.

Oregon. — State *v.* Sargent, 32 Ore. 110, 49 Pac. 889.

Texas. — Cox *v.* State (Tex. Crim.), 44 S. W. 157; Reddick *v.* State, 35 Tex. Crim. 463, 34 S. W. 274; Caudle *v.* State, 34 Tex. Crim.

B. Details of Complaint. — In England, and in some of the states of the Union, the details of the complaint made by the prosecutrix recently after the alleged outrage upon her, including the name of the offender, may be given in evidence.[23]

26, 28 S. W. 810; Holst *v.* State, 23 Tex. App. 1, 3 S. W. 757, 59 Am. Rep. 770; Pefferling *v.* State, 40 Tex. 486.

Utah. — State *v.* Neel, 21 Utah 151, 60 Pac. 510.

Vermont. — State *v.* Carroll, 67 Vt. 477, 32 Atl. 235; State *v.* Niles, 47 Vt. 82.

Washington. — State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

Wisconsin. — Bannen *v.* State, 115 Wis. 317, 329, 91 N. W. 107, 965; Lee *v.* State, 74 Wis. 45, 41 N. W. 960; Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

Proof of complaint made by the prosecutrix, yes or no, is all that is admissible in the direct examination. The particulars may be inquired into by the defense, or in corroboration of the testimony by the prosecutrix, if she is assailed in the matter of her complaint. Of course it is competent to prove whatever circumstances and signs of injury she showed. Scott *v.* State, 48 Ala. 420.

In Griffin v. State, 76 Ala. 29, the court said: "On an indictment for rape, it is competent to show by the prosecutrix, or by another, or by both, that recently after the alleged rape she made complaint to persons to whom complaint, on the occurrence of such outrage, would naturally be made. When the complaint constitutes no part of the *res gestae*, and is received only as corroborative of her testimony, neither the particulars detailed by her, nor the name of the person whom she mentioned as the offender, can be given in evidence in the first instance. But the defendant may, on cross-examination, inquire into the particulars of the complaint, and thus make admissible evidence relating thereto by both parties; or, if the defendant introduces evidence to impeach the prosecutrix, the prosecution may sustain her by showing that her statements in making the complaint, and her testimony on the trial, correspond."

To precisely same effect in all the propositions see Barnett *v.* State, 83 Ala. 40, 3 So. 612.

In Thompson *v.* State, 38 Ind. 39, the court said: "The prosecutor may show by the testimony of the prosecuting witness, or that of other witnesses, that she made complaint of the outrage recently after its commission, and when, where, and to whom it was made. He cannot be allowed to prove the name of the person charged with the crime, or the particulars as narrated by her, the practice being merely to ask whether she made the complaint that such an outrage had been perpetrated upon her, and to receive in answer only, simply yes or no. Such statement is only corroborative of her testimony, and is not evidence of the fact upon which the jury can find the defendant guilty; and when she is not a witness in the case, it is wholly inadmissible."

Husband's Testimony. — The complaint of an outraged wife made to her husband may be proved by his testimony. Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48.

Declarations of prosecutrix made in *extremo travil* as to who was the father of her child cannot be given in evidence against a defendant charged with rape. State *v.* Hussey, 7 Iowa 409.

23. *English.* — Reg. *v.* Wood, 14 Cox C. C. 46.

Iowa. — State *v.* Cook, 92 Iowa 483, 61 N. W. 185; State *v.* Watson, 81 Iowa 380, 46 N. W. 868; State *v.* Mitchell, 68 Iowa 116, 26 N. W. 44.

Ohio. — Burt *v.* State, 23 Ohio St. 394; Johnson *v.* State, 17 Ohio 593; McCombs *v.* State, 8 Ohio St. 643.

North Carolina. — State *v.* Mitchell, 89 N. C. 521.

Tennessee. — Benstine *v.* State, 2 Lea 169; Phillips *v.* State, 9 Humph. 246.

In State *v.* Kinney, 44 Conn. 153, 26 Am. Rep. 436, the prosecutrix was sworn as a witness and testified to

C. Res Gestae. — Where the particulars of the complaint made by the prosecutrix constitute part of the *res gestae* they may be given in evidence.[24]

D. Corroborative Only. — Unless the complaint made by the prosecutrix constitutes part of the *res gestae* evidence of it can be given only in corroboration of the testimony of the prosecutrix, and is inadmissible in case she does not testify.[25]

the principal facts in the case, and after counsel for the prisoner had cross-examined her, and asked her many questions relative to the principal facts charged in the indictment, some of which tended to discredit her evidence, but before any attempt on his part to discredit her testimony otherwise than by such cross-examination, the state against objection, proved by two witnesses that she had previously, and soon after the alleged rape, told them the same story she had now testified to in court, with the particulars of the alleged crime, as related to them by her. The court held this evidence competent, saying substantially, that such a decision goes farther than the courts have gone in England, and in most of the states of this country, but it was more conducive to the ascertainment of truth than the rule elsewhere established.

In Laughlin *v.* State, 18 Ohio 99, 51 Am. Dec. 444, the court said: "Whatever may be the rule elsewhere, it is settled in Ohio, that in a prosecution for rape, or for assault with intent etc., the substance of what the prosecutrix said, or the declarations made by her immediately after the offense was committed, may be given in evidence in the first instance to corroborate her testimony."

In State *v.* Freeman, 100 N. C. 429, 5 S. E. 921, the court in considering the general rule that evidence may be given that a complaint was made by the prosecutrix soon after the outrage, but that particulars of such complaint are incompetent, says: "The rule which thus shuts out the words in which the complaint is made, and early arrests the testimony so that it cannot be seen *what kind of complaint was made*, and its import, as corroborating the charge, seems, notwithstanding its general acceptance, not to commend itself, for sufficient and satisfactory reasons, to the judicial mind."

In Hill *v.* State, 73 Tenn. 725, the prosecutrix was under the age of ten years. Her mother and aunt were permitted by the court to state to the jury the particulars of the child's complaint when first made to them. *Held*, proper, the court saying: "Such statements, made recently after the commission of the offense, are admissible as confirmatory of the witness's credibility."

24. People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; Strang *v.* People, 24 Mich. 1; Phillips *v.* State, 9 Humph. (Tenn.) 246; Sentell *v.* State, 34 Tex. Crim. 260, 30 S. W. 226; State *v.* Neel, 21 Utah 151, 60 Pac. 510.

The details and circumstances, and the particulars of the complaints made by the prosecutrix against the accused immediately after the commission of the offense are admissible as part of the *res gestae*, but not as proof of the truth of the statements as made. State *v.* Peter, 14 La. Ann. 521.

In State *v.* Imlay, 22 Utah 156, 61 Pac. 557, the court said: "When the complaint and the particulars thereof can be fairly considered a part of the *res gestae*, the rule seems to be well settled that they are admissible."

25. *England.* — Reg. *v.* Nicholas 61 E. C. L. 246.

Indiana. — Weldon *v.* State, 32 Ind. 81.

Iowa. — State *v.* Wolf, 118 Iowa 564, 92 N. W. 673; State *v.* Wheeler, 116 Iowa 212, 89 N. W. 978, 93 Am. St. Rep. 236.

Nebraska. — Mathews *v.* State, 19 Neb. 330, 27 N. W. 234.

New York. — Baccio *v.* People, 41 N. Y. 265, People *v.* McGee, 1 Denio 19.

Ohio. — Hornbeck *v.* State, 35

2. Delay in Making Complaint. — A. ADMISSIBILITY. — In some states it is held necessary to show that the prosecutrix made complaint of the outrage recently after its occurrence, or that her delay so to do, be satisfactorily explained, in order to admit evidence of such complaint.[26]

B. WEIGHT. — The general rule is, that lapse of time between

Ohio St. 277, 35 Am. Rep. 608; Johnson *v.* State, 17 Ohio 593.

Wisconsin. — Hannon *v.* State, 70 Wis. 448, 36 N. W. 1.

While it is permissible to show that the prosecutrix made complaint of the alleged injury, such complaint constitutes no part of the *res gestae*, but is a circumstance only, corroborative of the story of the prosecutrix, and unless she is a witness it is wholly inadmissible. State *v.* Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423.

Complaint of Young Child. — Where by reason of tender years the injured child is incompetent to testify, evidence that she made complaint of the injury recently after it was committed upon her, is nevertheless admissible. People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202. To same effect State *v.* Washington, 104 La. Ann. 57, 28 So. 904.

26. Donaldson *v.* People, 33 Colo. 333, 80 Pac. 906; State *v.* Reid, 39 Minn. 277, 39 N. W. 796; State *v.* Shettleworth, 18 Minn. 191; Dunn *v.* State, 45 Ohio St. 249, 12 N. E. 826.

In Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417, the charge was rape by a father upon his daughter aged over eighteen years. The evidence showed that no outcry or complaint was made by the prosecutrix immediately after the alleged offense, and she testified that the defendant had sexual intercourse with her at various times while they were going through certain woods, and that he had threatened to kill her and the rest of the family if she told any one about it. The people introduced a letter written by the prosecutrix to her mother, from one to seven days after the alleged offense, in which she related a series of disgraceful acts, which she said had taken place between her and the defendant. This was introduced as evidence of a complaint or outcry, and it was objected that the so called outcry was not so recent after the act relied on, as to entitle it to be read in evidence. The court said: "The ruling of the court admitting this evidence cannot be sustained in the absence of some showing, which is altogether absent, that it was made within such time after the commission of the offense as, in the circumstances of the case, an honest woman would be likely to do."

The question as to whether a complaint was made too late to be admissible in evidence, is to be determined by the trial judge. Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746.

A delay from January to the following September in making complaint was held to be too long to render evidence of the making of it admissible to corroborate the complainant. People *v.* Loftus, 11 N. Y. Supp. 905.

A complaint made twenty hours after the alleged rape held not too long to be given in evidence. State *v.* Sudduth, 52 S. C. 488, 30 S. E. 408.

Hearsay. — In Lowe *v.* State, 97 Ga. 792, 25 S. E. 676, the alleged rape was committed in Clarke County, and the prosecutrix promptly made complaint of the outrage which she asserted had been committed upon her. Some days afterwards she came to the city of Atlanta, and there gave her mother a narrative of what she claimed had occurred, in the course of which she exhibited certain garments which she represented were on her person at the time of the alleged rape. *Held*, that these declarations were clearly inadmissible for any purpose, that they can add nothing to the corroborative value of the complaint originally made, and were at best merely hearsay.

the alleged outrage and the making of complaint does not render evidence of the complaint inadmissible, but merely affects its weight by tending to discredit the testimony of the prosecutrix.[27]

3. Condition of Person of Prosecutrix. — Evidence of the physical and mental condition of the prosecutrix, as indicated by marks and

27. *Arizona.* — Trimble *v.* Territory, 71 Pac. 932.

California. — People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Indiana. — Polson *v.* State, 137 Ind. 519, 35 N. E. 907; Eyler *v.* State, 71 Ind. 49.

Iowa. — State *v.* Bebb, 96 N. W. 714; but see *s. c.* reported in 125 Iowa 494, 101 N. W. 189; State *v.* Peterson, 110 Iowa 647, 82 N. W. 329; State *v.* Richards, 33 Iowa 420; State *v.* Cross, 12 Iowa 66, 79 Am. Dec. 519.

Kansas. — State *v.* Brown, 54 Kan. 71, 37 Pac. 996.

Maryland. — Legore *v.* State, 87 Md. 735, 41 Atl. 60.

Michigan. — People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854.

Missouri. — State *v.* Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; State *v.* Witten, 100 Mo. 525, 13 S. W. 871.

Montana. — State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

Nebraska. — Cardwell *v.* State, 60 Neb. 480, 83 N. W. 665.

Texas. — Roberson *v.* State (Tex. Crim.), 49 S. W. 398; Sentell *v.* State, 34 Tex. Crim. 260, 30 S. W. 226; Sharp *v.* State, 15 Tex. App. 171.

Utah. — State *v.* Halford, 17 Utah 475, 54 Pac. 819.

Vermont. — State *v.* Wilkins, 66 Vt. 1, 17, 28 Atl. 323; State *v.* Niles, 47 Vt. 82.

In Lowe *v.* State, 97 Ga. 792, 25 S. E. 676, the court said: "Where it appears that sexual intercourse has taken place between a man and a woman her subsequent silence affords presumptive evidence of consent on her part and negatives the idea that the intercourse was accomplished by force."

In State *v.* Bebb, 125 Iowa 494, 101 N. W. 189, the court said: "We do not say that a complaint may not be so long delayed as to rob it of all force, and hence warrant a refusal to receive it in evidence. But that delay is fatal to the admissibility of the evidence is not true of necessity. Ordinarily the fact of delay goes to the weight of the evidence only, and is, therefore, a subject of consideration for the jury."

In State *v.* Mulkern, 85 Me 106, 26 Atl. 1017, the court said: "Mere lapse of time between the perpetration of the act, and the complaint, is not the test of its admissibility. The time that intervenes is a subject for the jury to consider in passing upon the weight of her testimony; and the degree of credit to be given it on account of the delay in making it, depends upon the particular circumstances of the case."

It is competent for the prosecution to show when complaint was made by the prosecutrix, and to show the reason why she did not make it sooner. People *v.* Marrs, 125 Mich. 376, 84 N. W. 284. To same effect People *v.* Ezzo, 104 Mich. 341, 62 N. W. 407.

In Higgins *v.* People, 58 N. Y. 377, the court said: "Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity of fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt, but there is and can be no particular time specified.

Explanation of Delay. — The State may introduce evidence to show why the complaint was not sooner made. State *v.* Bebb, 125 Iowa 494, 101 N. W. 189; State *v.* Snider, 119 Iowa 15, 91 N. W. 762.

bruises upon her person, and by the appearance of fright and terror in her conduct and demeanor immediately after the commission of the alleged offense, is admissible.[28]

4. Condition of Clothing of Prosecutrix. — Evidence may be given of the condition of the clothing worn by the prosecutrix at the time of the alleged offense, as the same appeared shortly afterwards.[29]

28. *California.* — People *v.* Keith, 141 Cal. 686, 75 Pac. 304; People *v.* Benc, 130 Cal. 159, 62 Pac. 404.

Iowa. — State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610; State *v.* Steffens, 116 Iowa 227, 89 N. W. 974.

Massachusetts. — Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632.

Texas. — Kearse *v.* State (Tex. Crim.), 88 S. W. 363; Caudle *v.* State, 34 Tex. Crim. 26, 28 S. W. 810.

Vermont. — State *v.* Bedard, 65 Vt. 278, 26 Atl. 719.

Wisconsin. — Bannen *v.* State, 115 Wis. 317, 328, 91 N. W. 107, 965.

In State *v.* McLaughlin, 44 Iowa 82, evidence was introduced showing that bruises were found upon the person of the prosecuting witness from two and a half to three weeks after the time the offense is alleged to have been committed. *Held,* competent the court saying: "The fact that the bruises were not seen until so long after the alleged injury was sustained, would, very properly, weaken the force of the fact that bruises existed, but could not render evidence of their existence incompetent."

In State *v.* Sanford, 124 Mo. 484, 27 S. W. 1099, the prosecutrix was a child eight years old. Her mother testified as to what she saw wrong with the child's private parts, within a week after the alleged rape. *Held,* clearly admissible for the purpose of showing the condition of her private parts, and in corroboration of the statements of the prosecuting witness, as well also as of the physician, who examined both her and the defendant, a few days after the alleged offense.

In State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686, it was held competent to prove the physical condition of the prosecutrix immediately after the outrage as tending to prove the commission of the offense, but evidence of her condition three months thereafter was held incompetent as too remote to throw any light on the real issues in the case.

In Brown *v.* State, 72 Miss. 997, 17 So. 278, the prosecutrix testified that after the defendant had ravished her, he tied her to a tree and struck her on the head with a gun and left her; that she got loose and went to a neighboring house with her hands tied, and had persons there untie them. These persons were permitted over objection of the defendant to testify that the prosecutrix came to them bloody, with her hands tied, and that they untied them and she became unconscious, and that they went to the place of the alleged rape, and saw blood on the ground, and that the grass was beaten down. This evidence was *held* competent as part of the *res gestae.*

It is competent to show the condition of the prosecutrix mentally and otherwise immediately after the offense, in order that the jury may judge more accurately as to the credit that should be given to her testimony. *Held,* that evidence as to her disheveled hair, her frightened appearance, red face and swollen eyes, and of her crying was competent. People *v.* Batterson, 2 N. Y. Supp. 376.

Where the prosecutrix is a child of tender years it is proper for her mother to testify that she made complaint, and to describe her manner and appearance at the time, and the condition in which she found her person. State *v.* Sargent, 32 Ore. 110, 49 Pac. 889.

29. People *v.* Figueroa, 134 Cal. 159, 66 Pac. 202; State *v.* Montgomery, 79 Iowa 737, 45 N. W. 292.

Bloody underclothing of the prosecutrix being fully identified, and

5. Expert Evidence. — The condition of the private parts of the prosecutrix after the alleged outrage may be proved by the testimony of a physician who has made an examination of them, although considerable time may have intervened between the alleged offense and such examination, the length of time affecting the weight of the evidence, and not its admissibility.[30]

A. Limited to General Effects. — An expert is competent to testify to the effects which rape would have upon the sexual organs of a female, but not as to the fact that the sexual organs of a fe-

their keeping after the alleged outrage accounted for, *held,* properly admitted in evidence and testimony of a witness as to bruises on the person of the prosecutrix and the condition of her clothing next day, admissible. State *v.* Murphy, 118 Mo. 7, 25 S. W. 95.

In Long *v.* State (Tex. Crim.), 46 S. W. 640, the bloody clothes which were worn by the prosecutrix at the time of the alleged assault were introduced in evidence. *Held,* competent.

Recent complaint, state and appearance of the prosecutrix and marks of violence upon her, and the condition of her dress shortly after the alleged offense admissible. Caudle *v.* State, 34 Tex. Crim. 26, 28 S. W. 810.

30. *California.* — People *v.* Benc, 130 Cal. 159, 62 Pac. 404.

Iowa. — State *v.* King, 117 Iowa 484, 493, 91 N. W. 768; State *v.* Watson, 81 Iowa 380, 46 N. W. 868; State *v.* McLaughlin, 44 Iowa 82.

Michigan. — People *v.* Duncan, 104 Mich. 460, 467, 62 N. W. 566.

Minnesota. — State *v.* Teipner, 36 Minn. 535, 32 N. W. 678.

Pennsylvania. — Com. *v.* Allen, 135 Pa. St. 483, 19 Atl. 957.

Texas. — Gonzales *v.* State, 32 Tex. Crim. 611, 620, 25 S. W. 781; Pless *v.* State, 23 Tex. App. 73, 3 S. W. 576.

In Gifford *v.* People, 148 Ill. 173, 35 N. E. 754, the prosecutrix was a girl eleven years old; the defendant was her father. A physician testified that "five or six months after the alleged rape he made an examination of the prosecuting witness and found that her hymen was somewhat ruptured." *Held,* that the evidence was competent, the court saying: "The fact that the girl's hymen was ruptured was a circumstance proper to be considered, along with other facts and circumstances in the case, and the remoteness of the examination from the time of the alleged rape, goes merely to the probative force of the fact, that the hymen was found to be ruptured at the time of the examination, and not to its admissibility."

Against the objection of a defendant the state was permitted to prove by two physicians that they made an examination of the private parts of the prosecutrix about four months after the time of the alleged rape and found the hymen destroyed and a laceration of the tensor vagina muscle which had not yet entirely healed. *Held,* not too remote, and competent as a fact tending to prove that the child had been raped. State *v.* Scott, 172 Mo. 536, 72 S. W. 897.

A physician may testify as an expert as to whether the privates of a well developed man could penetrate the privates of a girl twelve years of age. Hardtke *v.* State, 67 Wis. 552, 30 N. W. 723.

Contra. — Evidence by a physician that he examined the private parts of the prosecutrix twenty months after the time of the alleged offense and as to their condition, was held inadmissible in People *v.* Butler, 66 N. Y. Supp. 851, and the results of an examination by a physician made four years after the alleged offense were held incompetent in People *v.* Cornelius, 55 N. Y. Supp. 723.

male examined by him showed a certain condition which was the result of rape.[31]

B. Sexual Incapacity of Defendant. — A medical expert may testify as to the effect which age has upon sexual desires.[32]

C. Compulsory Examination of Defendant. — Expert testimony as to the result of an examination of the defendant to which he was forced to submit, is not admissible against his objection.[33]

31. Effects of Rape Generally. — An expert may testify as to the effect which rape would have upon the sexual organs of a female, but he cannot be permitted to testify in a particular case where he has made an examination of the sexual organs of a female, that the condition in which he found them, was in his opinion, produced by rape. State *v.* Hull, 45 W. Va. 767, 32 S. E. 240.

In Noonan *v.* State, 55 Wis. 258, 12 N. W. 379, a medical witness who made an examination of the prosecutrix several days after the rape was alleged to have been committed testified that on such examination he found an exaggerated inflammation of the uterus, vagina and other sexual organs. He was then allowed under objection to testify that in his opinion, such inflammation "was produced by her having connection,— a violent, not a free connection." The testimony quoted was given in answer to the question put by the judge viz.: "To what do you attribute the inflamed condition that you say you found?" *Held,* that the question and the answer were clearly incompetent, the court saying: "The witness was competent to state what effects might result from a rape, but it was going far beyond the range of authorized expert testimony to allow him to give an opinion that the inflammation he discovered was produced by rape."

32. Effect of Age Upon Defendant. In State *v.* Walke, 69 Kan. 183, 76 Pac. 408, the defendant was a man sixty-eight years old. "His wife testified that he had lost virility to the extent that he was incapable of having sexual commerce with a woman. That she knew this from intimate relations with him. Upon rebuttal, physicians were called and permitted to testify as experts, that a man of that age who had lost sexual desire as to his wife, might still have such desire and ability to consummate it upon other and younger women." The court said: "We find no error here. The question involved was not one so clearly falling within the range of common experience and observation, as to exclude expert evidence in proof of the same, or that the jury might surely assume its truth without the evidence of an expert."

33. In State *v.* Height, 117 Iowa 650, 91 N. W. 935, 94 Am. St. Rep. 323, 59 L. R. A. 437, the evidence tended to show that the prosecutrix, a child of ten years, did not make complaint of the alleged outrage until about eleven days after its commission, and then on examination by physicians was found to be affected with venereal disease. For the purpose of showing that the defendant at the time of the alleged intercourse was afflicted with the same disease which he might have communicated to the prosecutrix at that time, and thereby produced in her the diseased condition found on such examination, the prosecution called as witnesses certain physicians who had made an examination of defendant's private parts while he was confined in jail under arrest for the crime charged, who testified that he then had or had recently had the disease in question. It appeared from the evidence that the defendant was compelled to submit to such examination; that it was made by the physicians under the direction of the prosecuting attorney, and was at first resisted by the defendant, who finally consented thereto, if at all, only after he had been told by one of the officers who made the arrest, and who was present acting under the direction of the county attorney, and

6. Previous Conduct of Defendant. — A. Towards Prosecutrix. While it is generally incompetent for the state to prove that the defendant committed another offense upon the prosecutrix similar to the one charged, yet if it appears that such other offense was perpetrated under such circumstances as would tend to explain, or show intent as to the crime charged, it may be proved.[34]

And, where the prosecutrix is under the age of consent, the state may prove lewd and lascivious conduct, and acts of sexual intercourse between the parties, for the purpose of corroborating the testimony of the prosecutrix, and showing the lascivious disposition of the parties.[35]

in his presence, that the state had the right to require such examination, and that the defendant must submit to it. The court in the course of a very elaborate opinion, held the evidence of the physicians incompetent, and after citing many authorities said: "The search was for the mere purpose of securing evidence by an invasion of the private person of the defendant, and we think there is no consideration whatever, which will justify it. Without further elaboration, or the multiplication of authorities, it is enough to say, that the officers acted unlawfully in compelling defendant to submit to this examination, and all evidence with reference to information secured thereby, should have been excluded on defendant's objection."

34. *California.* — People *v.* Fultz, 109 Cal. 258, 41 Pac. 1040; People *v.* Lenon, 79 Cal. 625, 21 Pac. 967.

Iowa. — State *v.* Crouch (Iowa), 107 N. W. 173; State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775.

Missouri. — State *v.* Patrick, 107 Mo. 147, 17 S. W. 666.

Nebraska. — Palin *v.* State, 38 Neb. 862, 57 N. W. 743.

New Hampshire. — State *v.* Knapp, 45 N. H. 148.

New Jersey. — State *v.* Cannon (N. J. L.), 60 Atl. 177.

New York. — People *v.* O'Sullivan, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530.

Tennessee. — Williams *v.* State, 8 Humph. 585.

Texas. — Taylor *v.* State, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656.

It is not competent for the state to introduce evidence of other offenses of like character with the one complained of, which were barred by statute, or acts of sexual intercourse other than the one relied on, for any other purpose than corroboration and explanation of the act upon which the prosecution relies. Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.

In People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360, it was *held*, that the prosecutrix might testify that the defendant had had intercourse with her prior to the date of the alleged offense for the purpose of showing the relations of the parties, and the opportunity afforded the defendant for meeting her.

Reinoehl *v.* State, 62 Neb. 619, 87 N. W. 355, was a prosecution for statutory rape. The girl testified regarding prior associations and certain alleged statements and conversations by the defendant to her some three or four months prior to the time of the alleged crime, which tended to prove that the defendant was desirous of being alone with the prosecutrix, and at such times would speak to her of indecent and vulgar things which were well calculated to familiarize the child with, and obtain her acquiescence in the acts of the defendant with which he was charged. *Held*, competent, and properly admitted for the purpose of showing the intentions of the defendant towards the prosecutrix.

35. *California.* — People *v.* Morris, 84 Pac. 463; People *v.* Castro, 133 Cal. 11, 65 Pac. 13.

Indiana. — State *v.* Markins, 95 Ind. 464, 48 Am. Rep. 733.

Iowa. — State *v.* Trusty, 122 Iowa

B. Subsequent Acts. — Evidence of acts of sexual intercourse between the defendant and the prosecutrix subsequent to the alleged offense is not admissible.[36]

82, 97 N. W. 989; State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Forsythe, 99 Iowa 1, 68 N. W. 446.

Michigan. — People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360.

Montana. — State *v.* Peres, 27 Mont. 358, 71 Pac. 162.

New York. — People *v.* Flaherty, 50 N. Y. Supp. 574; People *v.* Grauer, 42 N. Y. Supp. 721.

Oregon. — State *v.* Robinson, 48 Pac. 537.

Tennessee. — Sykes *v.* State, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972.

Texas. — Manning *v.* State, 43 Tex. Crim. 302, 65 S. W. 920; Smith *v.* State, 44 Tex. Crim. 137, 68 S. W. 995; Hamilton *v.* State, 36 Tex. Crim. 372, 37 S. W. 431; Rogers *v.* State, 1 Tex. App. 187.

Utah. — State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

Washington. — State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810.

Wisconsin. — Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

Upon a trial for carnally knowing a female under the age of consent the evidence disclosed an agreement between the parties to marry; a lustful desire on the part of the defendant to have sexual intercourse with the girl which was gratified and then temporary grief and seeming repentance for the act, and a vow against its repetition; Sunday visits, evening calls three or four times a week, attendance upon church and balls together, and otherwise intimate relations, until another act of sexual intercourse took place; pregnancy of the girl; her submission to an attempt of abortion with medicine procured by the defendant; renewed promises to marry, and statements on his part concerning preparations for a place for them to live; his flight to another state, and the subsequent birth of her babe. All this evidence was held competent. State *v.* Stone (Kan.), 85 Pac. 808.

In State *v.* Borchert, 68 Kan. 360, 74 Pac. 1108, the charge was rape on a girl under the age of consent. The state was permitted over defendant's objection to give evidence of a number of acts of illicit intercourse, other than that upon which reliance was had for conviction, each of such acts constituting a violation of the statute under which the charge was made. *Held,* properly admitted, the court saying: "It is well settled that in prosecutions, for a single act forming a part of a course of illicit commerce, between the sexes, it is permissible to show prior acts of the same character."

In statutory rape, evidence of improper familiarities between the parties may be admitted to prove the adulterous disposition of the parties and to corroborate the testimony of the prosecutrix. Blair *v.* State (Neb.), 101 N. W. 17.

In a case of statutory rape, evidence of acts of illicit intercourse between the defendant and the prosecutrix subsequent to the alleged offense, if in some way connected with it, is competent for the purpose of showing the relationship and familiarity of the parties and to corroborate the testimony of the prosecutrix. Woodruff *v.* State (Neb.), 101 N. W. 1114.

Contra. — Shults *v.* State (Tex. Crim.), 91 S. W. 786; Henard *v.* State (Tex. Crim.), 82 S. W. 655; Smith *v.* State (Tex. Crim.), 74 S. W. 556.

Proof of sexual intercourse between defendant and prosecutrix after she reached the age of consent cannot be given by the defendant who is charged with rape on her when she was under the age of consent. People *v.* Etter, 81 Mich. 570, 45 N. W. 1109.

36. People *v.* Robertson, 84 N. Y. Supp. 401; Smith *v.* State (Tex. Crim.), 73 S. W. 401; Knowles *v.* State, 44 Tex. Crim. 322, 72 S. W. 398.

Evidence of admissions made by the defendant that he had had sex-

C. Towards Others. — In a prosecution for rape it is not competent for the state to introduce evidence tending to show that the defendant attempted or committed a similar offense upon a female other than the prosecutrix.[37]

7. Relation of Parties. — On a trial for rape, it is competent for the state to prove the relations existing between the prosecutrix and the defendant, including acts of acquaintanceship and familiarity, tending to show likelihood and opportunity for the defendant to commit the crime.[38]

8. Declarations and Acts of Defendant. — It is competent for the state to prove declarations of the defendant made prior to the alleged rape, tending to show his intention to commit the crime.[39] Also

ual intercourse with the prosecutrix at divers times, some two years after the time of the alleged offense, is not admissible. State *v.* Lawrence (Ohio), 77 N. E. 266.

37. Barton *v.* People, 135 Ill. 405, 25 N. E. 776, 10 L. R. A. 91, 25 Am. St. Rep. 375; State *v.* Walters, 45 Iowa 389.

In Janzen *v.* People, 159 Ill. 440, 42 N. E. 862, the defendant was indicted for rape upon his own daughter, a girl twelve years old. On the trial evidence was introduced to prove that he had been guilty of a like crime on another daughter, who was only a year or two older. *Held,* improperly admitted.

Declarations of the defendant to the prosecutrix at the time of the alleged offense, with reference to his having had illicit sexual intercourse with other women, are admissible as part of the *res gestae.* State *v.* Bebb, 125 Iowa 494, 101 N. W. 189.

38. People *v.* Lenon, 79 Cal. 625, 21 Pac. 967; Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419; Strang *v.* People, 24 Mich. 1; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179; Henard *v.* State (Tex. Crim.), 82 S. W. 655.

In Shepherd *v.* State, 135 Ala. 9, 33 So. 266, the evidence showed that the prosecutrix was a girl about twelve years old, and lived with the defendant who was her step-father. She testified that there were at the defendant's house, three children and herself, and that the defendant made the others beside herself go out of the house to play; that he shut the door and made her get on the bed, when he committed the act of sexual intercourse with her; that he shook her and said he would kill her if she did not give up to him. The evidence showed that she was very ignorant and illiterate. The state proved by her and other witnesses that her mother had died about three weeks before the occurrence. This was objected to. *Held,* that such evidence was pertinent to show the situation of the parties, and opportunity for the defendant to commit the act.

In Maillet *v.* People, 42 Mich. 262, 3 N. W. 854, the prosecutrix, a girl between fifteen and sixteen years of age was allowed to testify that the prisoner was her father; that he was a man of great strength, had been abusive to his family, and had many times beaten her mother; that he was in liquor when he outraged her, and that she was frightened and in great fear of him. Many particulars were given by her. *Held,* competent, the court saying: "It was proper to lay before the jury the natural and actual relations between the accused and the prosecutrix, and also such other facts as bore fairly upon the accusation. Without such aids the charge could not be intelligently investigated. They were necessary clues to truth."

39. In Barnes *v.* State, 88 Ala. 204, 7 So. 38, 16 Am. St. Rep. 48, a witness testified to statements made by the defendant three months before the commission of the alleged offense, to the effect that he desired carnal intercourse with the prosecutrix, but did not believe she would yield to him. *Held,* competent as affording the jury a basis for the in-

declarations made afterwards, tending to show that he had committed the crime;[40] also acts tending to show guilty knowledge, such as flight to escape arrest,[41] and attempts to influence witnesses.[42]

9. Identity of Defendant. — The identity of the defendant with the perpetrator of the crime charged may be proved by the testimony of the prosecutrix, and the testimony of other witnesses who

ference that the defendant had gratified his passion in the manner charged in the indictment.

Declarations of the defendant made recently before the alleged offense was committed, which clearly identify the transaction about which he is talking, as the crime with which he is afterwards charged, are admissible. People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

Declarations made by the defendant several days before the commission of the alleged offense that he intended to commit it may be given in evidence. State *v.* Harris, 150 Mo. 56, 51 S. W. 481.

Proof may be given that shortly previous to the commission of the alleged offense the defendant made threats that he would have sexual intercourse with some female by force. Massey *v.* State, 31 Tex. Crim. 371, 379, 20 S. W. 758.

But testimony of a witness that a third person said that the defendant told him before the time of the alleged rape that he was going down to the wagon yard to have sexual intercourse with the prosecutrix is mere hearsay, and incompetent. Wells *v.* State, 43 Tex. Crim. 451, 67 S. W. 1020.

40. People *v.* Harlan, 133 Cal. 16, 65 Pac. 9.

In Fredrickson *v.* State, 44 Tex. Crim. 288, 70 S. W. 754, rape was alleged to have been committed upon a woman who was so mentally diseased as to have no will to oppose the act of carnal knowledge. On the trial the prosecutrix being alleged *non compos mentis*, was not introduced, and the state depended on evidence to the effect that the prosecutrix was *enciente*—about two or three months in a state of pregnancy. In addition to this the state introduced appellant's confessions to having had carnal intercourse with her; also evidence showing such opportunity on his part. *Held*, sufficient to prove the *corpus delicti*.

In Darrell *v.* Com., 26 Ky. 541, 82 S. W. 289, the defendant admitted sexual intercourse with the prosecutrix, and the only question was as to her consent. *Held*, that evidence tending to show that the defendant endeavored to procure medicines for the purpose of producing an abortion upon the prosecutrix, was not admissible.

41. People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 50 Am. Rep. 126; State *v.* Thomas, 58 Kan. 805, 51 Pac. 228; George *v.* State, 61 Neb. 669, 85 N. W. 840.

A father was charged with rape upon his daughter. It appeared that to escape arrest he left his home and went to British Columbia where he was arrested and extradited. While he was under arrest in British Columbia he wrote his son Floyd as follows: "Vernon, B. C., Dear Floyd: : They have me in jail. If it comes to court, have Lulu to refuse to testify. She can if she wants to. She doesn't have to go against her own father. Please do and get me out of this scrape. Yours as ever." The fact of defendant's flight, and this letter were held admissible in corroboration of the testimony of the prosecutrix. State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

42. State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

In State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647, the evidence showed that while the defendant was in jail charged with rape and the prosecutrix was also held in the same jail as a witness, the defendant secretly conveyed to her a letter in which he advised her to "deny everything," urging her to not sign anything or

saw him about the time of the outrage near the place where it occurred.[43]

10. Birth of Child. — Where the prosecutrix is under the age of consent, evidence that she gave birth to a child which might have been begotten at about the date of the offense charged, is admissible,[44] and the child itself may be exhibited to corroborate such evidence, but not to prove its resemblance to the defendant,[45]

say anything and to remember her promise. This letter was admitted in evidence. *Held,* competent.

43. Cotton *v.* State, 87 Ala. 75, 6 So. 396; People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071; Dove *v.* State, 36 Tex. Crim. 105, 35 S. W. 648.

In Smith *v.* Com., 17 Ky. 1162, 33 S. W. 825, the prosecutrix testified to the actual and complete commission of the crime, and without hesitation or expression of doubt, identified the defendant as the perpetrator. Another woman at whose house defendant got water testified that he went from there in the direction the injured woman had gone, and that in about ten or fifteen minutes she heard the screams of a woman who turned out to be the prosecutrix, and saw the defendant running across a cornfield. A third witness who knew defendant well saw him about the time not far from the place where the rape was alleged to have been committed going along the railroad. *Held,* sufficient to identify the defendant as the perpetrator of the crime.

In State *v.* Johnson, 67 N. C. 55, the court said: "One of the first things which the state has to do, is to have the prisoner *identified* as the person charged, and as the person who committed the offence. Not merely one of that *name*, but the very person present. What would it avail for the witness to say, John Smith did it, unless the witness can point out which John Smith is meant? In many cases the *only* way, and in every case the *best* way to identify a person, is to have him present and pointed out. This is a right which the state claims not only to enable it to punish the *right* man, but, what is regarded as of at least equal importance, to avoid punishing the *wrong* man."

In Lander *v.* People, 104 Ill. 248, two witnesses testified that they saw the rape perpetrated, and that on the day following they were passing near the place where it happened when one of them called the attention of the other to the accused who was near by, walking along a railroad track, and exclaimed, "There goes the man," and the other then said, "yes, there he goes." The court permitted this testimony, including the exclamations. *Held,* no error, the court saying: "It was perfectly competent to show that the witnesses saw and readily recognized the accused near the scene of the transaction on the following day, as testified to by them, and it must be admitted that the spontaneous exclamation, 'There goes the man,' with the response, 'yes, there he goes,' is highly characteristic of the fact of their recognition."

44. Woodruff *v.* State (Neb.), 101 N. W. 1114; People *v.* Flaherty, 50 N. Y. Supp. 574, 581; State *v.* Robinson, 32 Ore. 43, 48 Pac. 357; State *v.* Neel, 23 Utah 541, 65 Pac. 494.

The prosecutrix may testify that conception followed the intercourse charged, and that a child was born and that the defendant is its father. State *v.* Walke, 69 Kan. 183, 76 Pac. 408.

45. State *v.* Danforth, 48 Iowa 43, 30 Am. Rep. 387; Gray *v.* State (Tex. Crim.), 65 S. W. 375.

In State *v.* Neel, 23 Utah 541, 65 Pac. 494, defendant was charged with rape on a girl under the age of consent. The prosecutrix testified that she had given birth to a child, and that the defendant was its father. The prosecutor then exhibited the child to the jury as evidence against the objection of the defendant. *Held,* improper and incompetent, the court said: "It was competent in

though as to the latter proposition the contrary has been held.[46]

VII. SUFFICIENCY OF EVIDENCE.

1. Testimony of Prosecutrix Sufficient. — In the absence of a statute to the contrary a defendant may be convicted of rape upon the uncorroborated testimony of the prosecutrix.[47]

2. Corroboration Necessary. — In some states the statute requires the testimony of the prosecutrix to be corroborated, in order to

corroboration of the testimony of the prosecutrix to bring the child into court and to prove its birth, and identify it as a result of the illicit intercourse; but it is not competent to introduce the child in evidence, for the purpose of comparing its features with those of the accused, to show a resemblance."

46. In State *v.* Danforth, 73 N. H. 215, 60 Atl. 839, the defendant was charged with rape upon a woman child under the age of consent. It was proved that the prosecutrix had given birth to a child, and the state was permitted to exhibit the child to the jury and to argue from peculiarities of features claimed to be common to the child and the defendant and a general resemblance between them, that defendant was the father of the child. *Held,* competent, the court saying: "The birth of the child conclusively established a prior act of intercourse. The fact was relevant upon the issue tried. The state could not be confined to proof by oral testimony, and excluded from presenting the child to the jury as evidence tending to establish the fact of birth, and prior unlawful intercourse. It was the right of the state to prove its case by competent evidence from all sources. There was no error in exhibiting the child to the jury."

47. *Alabama.* — Barnett *v.* State, 83 Ala. 40, 3 So. 612; Boddie *v.* State, 52 Ala. 395.

Arizona. — Trimble *v.* Territory, 71 Pac. 932; Curby *v.* Territory, 42 Pac. 953.

California. — People *v.* Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

Colorado. — Peckham *v.* People, 32 Colo. 140, 75 Pac. 422; Bueno *v.* People, 1 Colo. App. 232, 28 Pac. 248.

Connecticut. — State *v.* Lattin, 29 Conn. 389.

Florida. — Doyle *v.* State, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159.

Idaho. — State *v.* Baker, 6 Idaho 496, 56 Pac. 81.

Mississippi. — Monroe *v.* State, 71 Miss., 196, 13 So. 884.

Nebraska. — Fager *v.* State, 22 Neb. 332, 35 N. W. 195.

Oklahoma. — Brenton *v.* Territory, 78 Pac. 83.

Oregon. — State *v.* Knighten, 39 Ore. 63, 64 Pac. 866, 87 Am. St. Rep. 647.

Texas. — Hill *v.* State (Tex. Crim.), 77 S. W. 808; Keith *v.* State (Tex. Crim.), 56 S. W. 628; Gonzales *v.* State, 32 Tex. Crim. 611, 620, 25 S. W. 781; Montresser *v.* State, 19 Tex. App. 281.

Washington. — State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810; State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

Wisconsin. — Brown *v.* State, 106 N. W. 536; Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

A defendant may be convicted of the crime of rape upon the uncorroborated testimony of the prosecutrix but this is only so when the character of the prosecutrix for chastity as well as for truth is unimpeached, and where the circumstances surrounding the commission of the offense are clearly corroborative of the statements of the prosecutrix. State *v.* Anderson, 6 Idaho 706, 59 Pac. 180.

In most cases it is to a great extent within the discretion of the court whether corroboration shall be required, and how much. State *v.* Juneau, 88 Wis. 180, 59 N. W.

warrant a conviction for rape. Where this is the case the courts hold, that slight corroborative evidence is sufficient.[48]

580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

48. *Georgia.* — Davis *v.* State, 120 Ga. 433, 48 S. E. 180.

Iowa. — State *v.* Bartlett, 127 Iowa 689, 104 N. W. 285; State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775; State *v.* Norris, 122 Iowa 154, 97 N. W. 999; State *v.* Wheeler, 116 Iowa 212, 89 N. W. 978, 93 Am. St. Rep. 236; State *v.* Baker, 106 Iowa 99, 76 N. W. 509; State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1; State *v.* Stowell, 60 Iowa 535, 15 N. W. 417; State *v.* Painter, 50 Iowa 317; State *v.* Comstock, 46 Iowa 265; State *v.* Laughlin, 44 Iowa 82.

Missouri. — State *v.* Patrick, 107 Mo. 147, 17 S. W. 666.

Nebraska. — Livinghouse *v.* State, 107 N. W. 854; Loar *v.* State, 107 N. W. 229; Dunn *v.* State, 58 Neb. 807, 79 N. W. 719; Hammond *v.* State, 39 Neb. 252, 58 N. W. 92; Richards *v.* State, 36 Neb. 17, 24, 53 N. W. 1027; Fager *v.* State, 22 Neb. 332, 35 N. W. 195; Krum *v.* State, 19 Neb. 728, 28 N. W. 278.

New Mexico. — Mares *v.* Territory, 10 N. M. 770, 65 Pac. 165.

New York. — People *v.* Hosmer, 72 N. Y. Supp. 480; People *v.* Grauer, 42 N. Y. Supp. 721; People *v.* McKeon, 19 N. Y. Supp. 486; People *v.* Morris, 12 N. Y. Supp. 492.

Contra. — See State *v.* Wilcox, 111 Mo. 569, 20 S. W. 314, 33 Am. St. Rep. 551.

Under a statute which provides that a defendant cannot be convicted of rape, or assault to commit rape, upon the testimony of the prosecutrix, unless she be corroborated by other evidence tending to connect the defendant with the commission of the crime, slight corroborative evidence is sufficient. The sufficiency of such corroborative evidence is for the jury. State *v.* Norris, 127 Iowa 683, 104 N. W. 282.

In Iowa the testimony of the prosecutrix must be corroborated by evidence tending to connect the accused with the commission of the crime. In State *v.* Comstock, 46 Iowa 265, the *corpus delicti* was sufficiently proved, but it was contended that the evidence failed to connect the defendant with the commission of the crime. The evidence showed that the morning after the crime was perpetrated, at a time when the injured woman had revealed it to but two persons, to whose house she had fled for safety after the outrage, bearing marks upon her person declaring the crime and its atrocious character—when no other persons were informed thereof, the defendant made inquiries of a son of the person's of whom she sought protection, in regard to her declarations about the matter, and declared that if he belonged "to Masons or Elder Davis clique, he would get clear." *Held,* that these admissions sufficiently connected him with the crime.

In Klawitter *v.* State (Neb.), 107 N. W. 121, the court said: "The rule is settled in this state that in cases of rape, unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, her testimony alone is not sufficient to warrant a conviction. . . . But this rule is qualified by the other principle that it is not essential that she be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn."

Where the law says a conviction shall not be had on the testimony of the complaining witness or the prosecutrix unsupported by other evidence, it does not mean that her testimony as to the very act itself shall be supported by that of other persons as eye-witnesses of the act, because such acts are very seldom in the presence of witnesses. It means that there must be other evidence in the case supporting her testimony, not as to every act done, or everything said, but as to certain es-

VIII. DEFENSIVE EVIDENCE.

1. Reputation of Prosecutrix for Chastity. — Where the prosecutrix is over the age of consent, and is capable of consenting to sexual intercourse, her general reputation for chastity is a proper subject of inquiry as bearing upon the probability of her consent to the act with which the defendant is charged, and while he is generally not permitted to prove specific acts of unchastity, he may show that her general reputation for chastity is bad.[49]

sential features of the crime charged as testified to by her. People *v.* Adams, 76 N. Y. Supp. 361.

In People *v.* Morris, 12 N. Y. Supp. 492, the injured girl testified to the circumstances of the offense, and that she, more than a month afterwards disclosed the fact to her stepfather, and both testified substantially, that thereupon he took her with him to defendant's residence, and defendant's wife being present, accused him of having done a great injury to the girl, and she at her step-father's request, narrated the circumstances of her complaint, to which defendant made no denial, but appeared to be overcome by agitation, and when importuned by his wife to say whether this was so, nodded his head affirmatively. The girl was under the age of consent. *Held,* sufficient corroboration to satisfy a statute which requires the testimony of the prosecutrix to be corroborated.

49. *England.* — Rex *v.* Clarke, 2 Stark N. P. C. 241; Rex *v.* Hodgson, Russ. & R. C. C. R. 211.

Alabama. — McQuirk *v.* State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

California. — People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297; People *v.* Tyler, 36 Calif. 522.

Indiana. — Carney *v.* State, 118 Ind. 525, 21 N. E. 48.

Iowa. — State *v.* Case, 96 Iowa 264, 65 N. W. 149; State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

Kansas. — State *v.* Brown, 55 Kan. 766, 42 Pac. 363.

Kentucky. — Neace *v.* Com. (Ky. App.), 62 S. W. 733.

Maryland. — Shartzer *v.* State, 63 Md. 149, 52 Am. Rep. 501.

Massachusetts. — Com. *v.* Harris, 131 Mass. 336.

Michigan. — People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People *v.* McLean, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263.

Missouri. — State *v.* Day, 188 Mo. 359, 87 S. W. 465; State *v.* Duffey, 128 Mo. 549, 558, 31 S. W. 98.

Nevada. — State *v.* Campbell, 20 Nev. 122, 17 Pac. 620.

New Hampshire. — State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132.

New Jersey. — O'Blenis *v.* State, 47 N. J. L. 279.

New York. — Brennan *v.* People, 7 Hun. 171; Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309; People *v.* Abbot, 19 Wend. 192.

North Carolina. — State *v.* Hairston, 121 N. C. 579, 28 S. E. 492; State *v.* Daniel, 87 N. C. 507; State *v.* Jefferson, 28 N. C. 305.

Ohio. — McDermott *v.* State, 13 Ohio St. 332, 82 Am. Dec. 444; McCombs *v.* State, 8 Ohio St. 643.

Oregon. — State *v.* Ogden, 39 Ore. 195, 65 Pac. 449.

Rhode Island. — State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

South Carolina. — State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575.

Texas. — Tyler *v.* State, 46 Tex. Crim. 10, 79 S. W. 558; Pefferling *v.* State, 40 Tex. 486; Steinke *v.* State, 33 Tex. Crim. 65, 24 S. W. 909, 25 S. W. 287; Favors *v.* State, 20 Tex. App. 155; Wilson *v.* State, 17 Tex. App. 525; Dorsey *v.* State, 1 Tex. App. 33; Rogers *v.* State, 1 Tex. App. 187.

Virginia. — Fry *v.* Com., 82 Va. 334.

Washington. — State *v.* Hunter, 18 Wash. 670, 52 Pac. 247.

In Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245, the court said: "The character of the

Under Age of Consent. — Where the prosecutrix is under the age of consent at the time of the alleged rape, evidence as to her reputation for chastity is not admissible.[50]

2. Reputation for Truth. — The defendant may prove that the prosecutrix for chastity, or the want of it, is competent evidence as bearing upon the probability of her consent to defendant's act, but the impeachment of her character in this respect, must be confined to evidence of her general reputation, except that she may be interrogated as to her previous intercourse with the defendant, or as to promiscuous intercourse with men, or common prostitution."

In Seals *v.* State, 114 Ga. 518, 40 S. E. 731, 88 Am. St. Rep. 33, the court said: "It seems to be well established that independently of the question of the woman's credibility as a witness, the jury may properly consider evidence of her previous bad character for chastity, in determining whether or not she really consented to the sexual intercourse, which she testifies was had against her will."

Moral Character. — Chastity. — In Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, the court said: "Evidence as to the moral character of the prosecutrix, and as to her reputation for chastity and virtue are admissible, but only for the purpose of affecting her credibility as a witness and as a circumstance affecting the probability of the act of intercourse being voluntary, or against her will, upon the theory that a person of bad moral character is less likely to speak the truth as a witness, than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse, than one who is unchaste."

In Turney *v.* State, 8 Smed. & M. (Miss.), 104, 116, 47 Am. Dec. 74, evidence of the good fame of the prosecutrix was held admissible because she testified as a witness. The court said: "The party ravished is a competent witness to prove the fact, but the credibility of her testimony must be left to the jury. It is legitimate to support her credibility by evidence of her good fame, or to attack it by evidence of her evil fame. Such evidence tends to show that the connection with the woman was had against, or with, her consent."

Birth of Child. — Proof that the prosecutrix who was an unmarried woman gave birth to a child previous to the alleged rape is competent to show her general reputation for chastity. Wilson *v.* State, 17 Tex. App. 525.

Time of Reputation. — Evidence of the general reputation of a prosecutrix for chastity, must be confined to the time prior to the commission of the alleged rape. State *v.* Ward, 73 Iowa 532, 35 N. W. 617; State *v.* Day, 188 Mo. 359, 87 N. W. 465.

Reputation of House. — In State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575, the prosecutrix was between fifteen and sixteen years old at the time of the alleged rape, and lived in the house with her grandmother, mother, sisters and brother. An attempt was made to prove the reputation of the house where the prosecutrix dwelt. *Held*, incompetent, the court saying: "While the reputation for chastity of the prosecutrix was a legitimate subject of inquiry, as bearing on the issue whether she consented to the act, it is too far removed to extend the inquiry to the reputation of the house in which she lived with others. The evidence as to reputation must be confined to what is said of her."

To same effect. — Manning *v.* State, 43 Tex. Crim. 302, 65 S. W. 920.

50. People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; People *v.* Benc, 130 Cal. 159, 62 Pac. 404; People *v.* Johnson, 106 Cal. 289, 39 Pac. 622; People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People *v.* Glover, 71 Mich. 303, 38 N. W. 874; State *v.* Duffey, 128 Mo. 549, 558, 31 S. W. 98; State *v.* Hilberg, 22 Utah 27, 61 Pac. 215.

general reputation of the prosecuting witness for truth and veracity is bad.[51]

3. Conduct of Prosecutrix With Defendant. — Evidence of previous voluntary sexual intercourse between the prosecutrix and the defendant is admissible on behalf of the defense;[52] and their subsequent relations may be shown.[53]

4. Conduct of Prosecutrix With Others. — Some courts hold that the defendant may introduce evidence that the prosecutrix had vol-

51. Brennan *v.* People, 7 Hun. (N. Y.), 171; Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309; People *v.* Abbot, 19 Wend. (N. Y.), 192.

In People *v.* Evans, 72 Mich. 367, 379, 40 N. W. 473, the prosecutrix charged her father with having committed a rape upon her. The defendant offered to prove that the prosecutrix had made similar accusations against two of her brothers, and other people in a great multitude of cases, and then admitted that they were not true, and that she had a sort of mania for telling that men made assaults on her of like character; and that she had also made a charge against a prominent citizen of the village, of having taken her into a compromising position with himself, and having exhibited his person to her, and compelled her to handle his private parts, and that she afterwards admitted its falsity. *Held*, that this evidence was competent and should have been admitted.

The prosecuting witness may be impeached by proving that her reputation for truth was bad at the time of the examination, and it was error to limit the inquiry to her character as it existed at and before the time of the commission of the alleged offense. Pratt *v.* State, 19 Ohio St. 277.

52. Bedgood *v.* State, 115 Ind. 275, 17 N. E. 621; People *v.* Abbot, 19 Wend. (N. Y.) 102.

Friendly Relations. — The defendant has a right to prove that the relations previously existing between him and the prosecutrix were of a friendly character, even though such evidence would have no tendency to show that improper relations existed between them, or that her general character was bad. Hall *v.* People, 47 Mich. 636, 11 N. W. 414.

In State *v.* Ogden, 39 Ore. 195, 65 Pac. 449, the court said: "If the prosecutrix has attained the legal age so as to be able to yield her consent to her own degradation, her character may be challenged by inquiring of her on cross-examination, whether she has ever had illicit sexual intercourse with the accused at any time prior to the act with the commission of which he is charged; evidence of such previous connection being admissible to give rise to a presumption that she consented to the act in question."

53. In State *v.* Shouse, 188 Mo. 473, 87 S. W. 480, the evidence showed that the defendant was the step-father of the prosecutrix. She testified that she told her mother of the outrage the night it occurred and that the next morning the defendant came into her room where she was sleeping with a Mrs. Adams and gave prosecutrix a whipping because she had told her mother. Prosecutrix testified that she left home that day and never had any communication with the defendant afterwards. The defendant offered to prove by Mrs. Adams that the prosecutrix was playing April fool with the defendant, three days after the alleged rape, which offer was denied. *Held*, that the evidence was competent and was improperly excluded.

Defendant may show that his relations with the prosecutrix were friendly and cordial at the time of the alleged commission of the act complained of, and continued so thereafter for the purpose of discrediting her claim that the act was by force and against her will. State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696.

untary sexual intercourse with other men, prior to the time of the alleged offense;[54] other courts hold to the contrary.[55]

5. Under Age of Consent. — As a general rule, evidence that the prosecutrix has had sexual intercourse with men other than the defendant, prior to the time of the alleged offense, is inadmissible if the prosecutrix be under the age of consent;[56] but this has been

54. *California.* — People *v.* Benson, 6 Cal. 221, 65 Am. Dec. 506.

Iowa. — State *v.* Cassidy, 85 Iowa 145, 52 N. W. 1.

New York. — People *v.* Abbot, 19 Wend. 192.

North Carolina. — State *v.* Murray, 63 N. C. 31.

Tennessee. — Benstine *v.* State, 2 Lea 169, 31 Am. Rep. 593; Titus *v.* State, 7 Baxt. 132.

Vermont. — State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696; State *v.* Reed, 39 Vt. 417, 94 Am. Dec. 337; State *v.* Johnson, 28 Vt. 512.

In State *v.* Height, 117 Iowa 650, 91 N. W. 935, 94 Am. St. Rep. 323, 59 L. R. A. 437, the state introduced evidence to show that the prosecutrix had contracted a venereal disease from the defendant by reason of the alleged connection, and it was held competent for the defendant to prove that the prosecutrix had sexual intercourse with others than him about the time of the alleged rape, to show that the prosecutrix might have contracted the disease otherwise than from the defendant, but such evidence is not competent to show the unchaste character of the prosecutrix.

In Brown *v.* Com., 19 Ky. L. Rep. 1174, 43 S. W. 214, it was held error for the court to refuse to permit the defendant to prove by third parties and by the prosecuting witness on cross-examination, if he could, acts of a lewd or lascivious character on her part, occurring shortly before the alleged rape, such as that other young men had taken undue liberties with her person, by putting their hands under her clothes and feeling her person, to which she submitted without objection, the court said: "In all the courts it is held admissible to show the reputation of the prosecutrix for general chastity by general evidence, but in some of the states it is held incompetent to prove particular acts of unchastity. We think, however, the contrary rule is more in accord with reason."

For the purpose of showing that the prosecutrix is a common prostitute, proof of separate acts of sexual intercourse with parties named, other than the defendant, continuing over a considerable period of time and down to the time of the trial, tending to show a continuous uninterrupted course of common prostitution, is competent. Brown *v.* State, 72 Miss. 997, 1004, 17 So. 278.

In People *v.* Betsinger, 11 N. Y. Supp. 916, a physician testified that nearly three months after the date of the alleged offense he made an examination of the prosecutrix, a girl about sixteen years old, and that he found the hymen absent, not in a normal condition for a virgin. *Held,* that it was competent for the defendant to show, if he could, by evidence that the complainant had been having intercourse with other parties, which would account for the condition in which the doctor stated he found her sexual organ.

55. State *v.* Turner, Houst. (Del.), Cr. Cases, Vol. 1, 76; Rice *v.* State, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245; Richie *v.* State, 58 Ind. 355; State *v.* Bebb, 125 Iowa 494, 101 N. W. 189.

Subsequent Conduct. — Evidence of unchaste conduct of the prosecutrix after she has been debauched is not competent. State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

In Fry *v.* Com., 82 Va. 334, the trial court refused to allow the prosecutrix to be asked if she had not been before the commission of the alleged rape a person of unchaste character. *Held,* properly excluded.

56. Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845; People *v.* Abbot, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; People *v.* Glover, 71 Mich. 303, 38 N. W. 874; State *v.*

held otherwise and such evidence admitted for certain purposes.[57]

6. Circumstances Discrediting Prosecutrix. —On a trial for rape, the defendant may introduce evidence tending to show that the prosecutrix failed to make complaint of the alleged outrage;[58] that her declarations afterwards were inconsistent with her innocence;[59] that the prosecution was instituted in bad faith for the purpose of extorting money,[60] or shielding a lover.[61]

ASSAULT WITH INTENT TO RAPE.

I. BURDEN OF PROOF.

1. General Rule. — Upon a trial for assault to commit rape it is incumbent upon the state to prove every ingredient of the crime of rape, except the actual accomplishment of it.[62]

Whitesell, 142 Mo. 467, 44 S. W. 332.

57. Nugent *v.* State, 18 Ala. 521; Bice *v.* State (Tex. Crim.), 38 S. W. 801.

In People *v.* Flaherty, 29 N. Y. Supp. 641, it was shown that the prosecutrix, a girl under the age of consent, had given birth to a child. She testified that no person other than the defendant had had sexual intercourse with her. *Held*, that the defendant should have been allowed to prove that others had had sexual intercourse with the prosecutrix about the time the child might have been begotten.

58. Eyler *v.* State, 71 Ind. 49; State *v.* Wolf, 118 Iowa 564, 92 N. W. 673; People *v.* Gage, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; Olesen *v.* State, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366.

59. Shirwin *v.* People, 69 Ill. 55.

Evidence that the prosecutrix said to another woman on the day when the alleged offense was committed that she had had sexual intercourse with the defendant and would have it again, and did not care what other people might say, was held admissible as a circumstance tending to show that the intercourse with which defendant was charged was with her consent. State *v.* Cook, 65 Iowa 560, 22 N. W. 675.

60. Huff *v.* State, 106 Ga. 432, 32 S. E. 348; Gaines *v.* State, 99 Ga. 703, 26 S. E. 760; State *v.* McDevitt, 69 Iowa 549, 29 N. W. 459.

Upon a proper foundation being laid, evidence may be given that the prosecutrix had declared that the accused was not guilty and had admitted that the prosecution was carried on for the sole purpose of extorting money. Shirwin *v.* People, 69 Ill. 55.

61. Curby *v.* Territory, 4 Ariz. 371, 42 Pac. 953.

62. *Alabama.* — Brown *v.* State, 121 Ala. 9, 25 So. 744.

Delaware. — State *v.* Smith, 9 Houst. 588.

Georgia. — Horseford *v.* State, 124 Ga. 784, 53 S. E. 322; Darden *v.* State, 97 Ga. 407, 25 S. E. 676; Jackson *v.* State, 91 Ga. 322, 330, 18 S. E. 132, 44 Am. St. Rep. 25.

Texas. — Marthall *v.* State, 34 Tex. Crim. 22, 36 S. W. 1062; House *v.* State, 9 Tex. App. 567; Thompson *v.* State, 43 Tex. 583.

In Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135 the court said: "To make out a case of assault with intent to rape, it is absolutely essential that the evidence should show beyond a reasonable doubt, first an assault second an intent to have carnal knowledge of the female and third a purpose to carry into effect this intent with force and against the consent of the female. If any one of these three elements is lacking the offense is not made out."

In assault with intent to rape, the proof must show every ingredient of

2. Assault and Intent. — The crime of assault with intent to rape, can only be established by proof of force or attempted force, coupled with an intent to ravish by the use of any means necessary to accomplish that purpose against the will of the female.[63]

the crime of rape except the accomplishment of it. The proof must show beyond a reasonable doubt, the unlawful attempt which constitutes an assault with an intention to have carnal knowledge of the female, forcibly and against her will. It must show an intention to use such force as may be necessary to accomplish the object. Franey *v.* People, 210 Ill. 206, 71 N. E. 443.

In order to warrant a conviction for assault with intent to commit rape, the state must prove the following facts: "that the defendant made an assault upon the woman; that the assault was accompanied with the specific intention to rape; with the specific intention to have carnal knowledge of the woman; to have carnal knowledge of the woman by force; to have carnal knowledge of the woman without her consent, and, by the use of such force as is sufficient to overcome such resistance as the woman should make." Shields *v.* State, 32 Tex. Crim. 498, 23 S. W. 893.

63. *England.* — Rex. *v.* Williams, 32 C. L. R. 524.

Alabama. — Toulet *v.* State, 100 Ala. 72, 14 So. 403; Lewis *v.* State, 35 Ala. 380.

Arkansas. — Charles *v.* State, 11 Ark. 389, 409.

Iowa. — State *v.* Delong, 96 Iowa 471, 65 N. W. 402; State *v.* Biggs, 93 Iowa 125, 61 N. W. 417; State *v.* Kendall, 73 Iowa 255, 34 N. W. 843, 5 Am. St. Rep. 679; State *v.* Canada, 68 Iowa 397, 27 N. W. 288.

Missouri. — State *v.* Scholl, 130 Mo. 396, 32 S. W. 968; State *v.* Owsley, 102 Mo. 678, 15 S. W. 137; State *v.* Priestley, 74 Mo. 24.

Nebraska. — Skinner *v.* State, 28 Neb. 814, 45 N. W. 53; Johnson *v.* State, 27 Neb. 687, 43 N. W. 425; Krum *v.* State, 19 Neb. 728, 28 N. W. 278.

Texas. — Price *v.* State, 36 Tex. Crim. 143, 35 S. W. 988; Ellenberg *v.* State, 36 Tex. Crim. 139, 35 S. W. 989; Dockery *v.* State, 35 Tex. Crim. 487, 34 S. W. 281; Milton *v.* State, 23 Tex. App. 204; 4 S. W. 574; Burney *v.* State, 21 Tex. App. 565, 1 S. W. 458.

Wisconsin. — Moore *v.* State, 79 Wis. 546, 48 N. W. 653.

In order to justify a conviction of assault with intent to rape, the evidence should show such acts and conduct of the accused that there is no reasonable doubt of his intention to gratify his lustful desire, against the consent of the female, notwithstanding resistance on her part. Jones *v.* State, 90 Ala. 628, 8 So. 383, 24 Am. St. Rep. 850.

In State *v.* Riseling, 186 Mo. 521, 529, 85 S. W. 372, the court said: "The fact that the prosecutrix is under the age of consent, and is incapable of consenting to carnal knowledge, does not dispense with the necessity of charging and proving one of the essential elements of the offense, that is, the assault. . . . There must be some physical force put in motion, not that the prosecutrix, who is incapable of consenting, must resist such force or object to it, but there must be such force in making the assault, together with other circumstances in the case, as will demonstrate the purpose and intent of the party charged to have carnal knowledge of the female under the age of consent."

To warrant a conviction, it is necessary that there should be not only sufficient proof of the alleged assault, but also proof beyond a reasonable doubt that the accused at the time intended to use whatever force might be necessary to overcome all resistance, and accomplish his purpose. Dunn *v.* State, 58 Neb. 807, 79 N. W. 719.

In assault with intent to rape, the evidence must show that the assault and the specific intention to have carnal intercourse, by whatever force was necessary, concurred in point of time and were accompanied by an

3. Admissibility of Evidence. — The same rules which govern the admissibility of evidence on a trial for rape apply in cases of assault with intent to commit rape.[64]

II. CORROBORATING CIRCUMSTANCES.

1. Complaint and Condition of Prosecutrix. — The condition and appearance of the prosecutrix, recently after the alleged assault, and the fact that she made complaint may be given in evidence.[65]

act or acts, in some manner adapted to the accomplishment of the thing intended. Head *v.* State, 43 Neb. 30, 61 N. W. 494.

In People *v.* Connor, 126 N. Y. 278, 282, 27 N. E. 252, the court said: "When an assault is committed by the sudden and unexpected exercise of overpowering force upon a timid and inexperienced girl, under circumstances indicating the power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, it would seem to present a case for the jury to say, whether the fear naturally inspired by such circumstances had not taken away or impaired the ability of the assaulted party to make effectual resistance to the assault." . . . "It would be unreasonable to require the same measure of resistance from such a person, that would be expected from an older and more experienced woman, who was familiar with the springs and motives of human action, and acquainted with the means necessary to be used to protect her person from violence."

In Pefferling *v.* State, 40 Tex. 486, 494, the court said: "To constitute the crime of assault with intent to commit rape there must be an intent where force is the means by which the purpose is to be accomplished, that the carnal knowledge of the woman without her consent, shall be accomplished, by reason or means of the assault."

64. People *v.* Barney, 114 Cal. 554, 47 Pac. 41; State *v.* Imlay, 22 Utah 156, 61 Pac. 557.

65. People *v.* Stewart, 97 Cal. 238, 32 Pac. 8; Bennett *v.* State, 102 Ga. 656, 29 S. E. 918; Cunningham *v.* People, 210 Ill. 410, 71 N. E. 389; State *v.* Snider, 119 Iowa 15, 91 N. W. 762; Grimmett *v.* State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630.

A conviction of an assault with intent to commit rape, may be had upon the uncontradicted evidence of the prosecutrix, the weight to be accorded the evidence, being a question for the jury. People *v.* Stewart, 90 Cal. 212, 27 Pac. 200.

In State *v.* Snider, 119 Iowa 15, 91 N. W. 762, the prosecutrix testified that the assault was made about eleven o'clock A. M. while she was at home alone. Immediately thereafter she went to the home of a near-by neighbor and reported the matter. Her parents had gone to a town some miles away, and returned home about two o'clock P. M. that day. The parents were permitted against the objection of the defendant to testify concerning the physical condition of the prosecutrix upon their return, and as to what was said by her concerning the alleged outrage. *Held*, properly admitted.

Statements and actions of a child so recently after the commission of an alleged assault with intent to rape upon her, as to constitute part of the *res gestae* will not be excluded because the child is too young to testify. Thomas *v.* State (Tex. Crim.), 84 S. W. 823.

In Berry *v.* State, 44 Tex. Crim. 395, 72 S. W. 170, the mother of the prosecutrix testified that when the latter reached home on the evening of the alleged assault, a distance of three-fourths of a mile from where the alleged assault took place, she fell down on her knees at the gate, that she was crying and was very much excited and exhausted

2. Previous Conduct of Defendant. — Evidence of previous assaults of the defendant upon the prosecutrix is admissible to show intent.[66] But evidence of the defendant's bad habits or immoral character is generally not admissible.[67]

3. Identity of Defendant. — Circumstantial evidence is competent to prove the identity of the defendant.[68]

III. EVIDENCE FOR THE DEFENSE.

Reputation of the Prosecutrix for Chastity. — The defendant may introduce evidence showing the bad reputation of the prosecutrix for chastity.[69] In all respects the admission of evidence in cases

and when her mother reached her she could scarcely speak, that her mother asked her what was the matter, and she said a man had run her on horseback, and had got off his horse, and had caught her by the arm, and put his hand over her mouth, and that she had gotten loose from him and run all the way home. This testimony was held admissible as part of the *res gestae*.

Recent complaint by the person injured, her state and appearance, marks of violence, and the condition of her dress shortly after the alleged occurrence, may be proved as original evidence. Lights *v.* State, 21 Tex. App. 308, 17 S. W. 428.

66. Com. *v.* Bean, 137 Mass. 570. In assault with intent to commit rape, evidence of previous assaults made by the defendant upon the prosecutrix, is admissible to show the intent with which the act charged was committed. State *v.* Walters, 45 Iowa 389.

67. People *v.* Stewart, 85 Cal. 174, 24 Pac. 722; People *v.* Bowen, 49 Cal. 654; Addison *v.* People, 193 Ill. 405, 62 N. E. 235.

Contra. — In State *v.* Sheets, 127 Iowa 73, 102 N. W. 415, the evidence showed that the defendant was a teacher in a country school; that on the day when the offense was alleged to have been committed, there were only four pupils at his school, all girls, the eldest being fifteen years old, and the youngest eight. He was charged with assault on one of the girls aged eleven years. It appeared that every one of them was assaulted by the defendant, in quick succession, one after another. Notes which the defendant had previously written to the prosecuting witness and other girl pupils, containing obscene and disgusting matter in some of which he stated, that when opportunity offered he would have sexual intercourse with them, were introduced in evidence. *Held*, admissible for the purpose of proving defendant's intent.

68. The prosecutrix, a girl of thirteen years, testified that the man who assaulted her wore striped pants and a checkered shirt, and that she scratched his face and hurt his eye. The evidence showed that when arrested on the same day, the defendant was so clothed, and that his face appeared to have been recently scratched, and his eye bruised. When his attention was called to it, he manifested ignorance of the condition of his face and eye, but explained on the trial that in chopping wood for his breakfast, a stick flew up and hit him in the face. Other evidence tended to show that after he finished chopping and before eating, he washed his face and it was uninjured. *Held*, that these circumstances tended to identify and point out the defendant as the perpetrator of the crime. State *v.* Baker, 106 Iowa 99, 76 N. W. 509.

69. Rex. *v.* Clarke, 2 Stark. N. P. 241; Rex. *v.* Barker, 3 Car. & P. 589; Rex. *v.* Hodgson, Russ. & R. C. C. 211; Reg. *v.* Riley, 18 Q. B. 481.

"Evidence that the person charged to have been injured is in fact a common prostitute, or evidence of

of assault with intent, etc., is governed by the same rules that apply in cases of rape.[70]

reputation that she is a woman of ill fame, may be submitted to the jury to impeach her credibility and disprove her statement that the attempt was forcibly and against her consent," . . . but testimony of specific acts of lewdness, is not admissible. Camp *v.* State, 3 Ga. 417. *Cited* and *quoted* in Black *v.* State, 119 Ga. 746, 47 S. E. 370, which was a case of rape. To same effect see, Shirwin *v.* People, 69 Ill. 55.

Reputation of Family. — In the prosecution of a negro for assault to commit rape on a white girl, evidence that the girl and her family were in the habit of associating with negroes is not admissible. State *v.* Finger, 131 N. C. 781, 42 S. E. 820.

70. People *v.* Barney, 114 Cal. 554, 47 Pac. 41; State *v.* Imlay, 22 Utah 156, 61 Pac. 557.

Defendant's Reputation. — Evidence of the defendant's reputation in another state, seven or eight years before the commission of the alleged offense is not competent. State *v.* Shouse, 188 Mo. 473, 87 S. W. 480.

Defendant's Belief As to Age of Prosecutrix. — Testimony of the defendant that he had reasons to believe that the prosecutrix was over the age of consent, is not admissible. State *v.* Baskett, 111 Mo. 271, 19 S. W. 1097; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

Defendant Ex-Convict. — In Keith *v.* State (Tex. Crim.), 56 S. W. 628, evidence that the defendant had been convicted of a felony and was an ex-convict was held proper for the jury to consider in passing upon his credibility as a witness in his own behalf.

Book on Anatomy. — Statements contained in a book on anatomy are not competent as substantive evidence on a trial for rape. State *v.* Carpenter, 124 Iowa 5, 98 N. W. 775.

RATIFICATION.

By Charles A. Robbins.

I. BURDEN OF PROOF.

1. Act of Infant. — The burden of proving that the voidable contract or conveyance of an infant has been ratified by him after attaining his majority, rests upon the person who claims such ratification.[1] But the person alleging his infancy at the time of the making of a new promise to pay the original debt or perform the original contract must prove it.[2] If the new promise is conditional or contingent, the person relying upon it must show the performance of the condition or the happening of the contingency.[3]

2. Act of Representative. — The burden rests with the person

1. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788; Henderson *v.* Fox, 5 Ind. 489; Tyler *v.* Gallop's Estate, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336. See also Outland *v.* Vance, 17 Ky. L. Rep. 1226, 34 S. W. 22; Stone *v.* Ellis, 69 Tex. 325, 7 S. W. 349.

2. Bigelow *v.* Grannis, 4 Hill (N. Y.) 206; Bay *v.* Gunn, 1 Den. (N. Y.) 108; Borthwick *v.* Carruthers, 1 T. R. (Eng.) 648.

3. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Thompson *v.* Lay,

claiming the ratification of an unauthorized conveyance, contract, or act, to prove that the principal or master had knowledge of all the material facts at the time of the alleged ratification,[4] and also to prove the promise, conduct, or acts claimed to establish ratification.[5] The rule that the burden is on one claiming ratification

4 Pick (Mass.) 48, 16 Am. Dec. 325. See article "INFANTS," Vol. VII, p. 270.

4. *Alabama.* — Moore *v.* Ensley, 112 Ala. 228, 20 So. 744.

Arkansas. — Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049.

Colorado. — Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670.

Georgia. — Mapp *v.* Phillips, 32 Ga. 72.

Indiana. — Richmond Trading & Mfg. Co. *v.* Farquar, 8 Blackf. 89.

Massachusetts. — Price *v.* Moore, 158 Mass. 524, 33 N. E. 927.

New Jersey. — Annan *v.* Hill Union Brew. Co., 59 N. J. Eq. 414, 46 Atl. 563.

New York. — Thompson *v.* Craig, 16 Abb. Pr. N. S. 29; Roach *v.* Coe, 1 E. D. Smith 175.

South Dakota. — Jewell Nursery Co. *v.* State, 5 S. D. 623, 59 N. W. 1025.

Texas. — Tynburg *v.* Cohen, 67 Tex. 220, 2 S. W. 734.

Compare Meehan *v.* Forrester, 52 N. Y. 277. See also Estevez *v.* Purdy, 66 N. Y. 446.

Knowledge of Corporation. — A vague reference to an unauthorized loan in a report to the directors of a corporation is not sufficient evidence of ratification of the loan. Clarke *v.* Acosta, 9 Bosw. (N. Y.) 158.

Mere knowledge by a corporation that a person is in its employment is not sufficient proof of knowledge of a written contract of employment containing an unauthorized term as to the period of employment. The copying of a letter containing the terms of an unauthorized contract in the letter books of a corporation by direction of the officer making the contract is not proof of knowledge of the contract by the corporation. Camacho *v.* Hamilton B. N. & E. Co., 2 App. Div. 369, 37 N. Y. Supp. 725.

Knowledge of Firm. — Entries in the firm books are *prima facie* evidence against all the partners to prove ratification. Perry *v.* Butt, 14 Ga. 699. *In re* Norris, 2 Hask. 19, 18 Fed. Cas. No. 10,302.

Such entries are not conclusive evidence of ratification. Brewster *v.* Mott, 5 Ill. 378.

A partner may show that he did not have access to the books. United States Bank *v.* Binney, 5 Mason (U. S.) 176, *affirmed* 5 Pet. (U. S.) 529.

5. *United States.* — Long *v.* Thayer, 150 U. S. 520.

Colorado. — Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670; Dean *v.* Hipp, 16 Colo. App. 537, 66 Pac. 804.

Iowa. — Haynes *v.* Seachrest, 13 Iowa 455.

Massachusetts. — Price *v.* Moore, 158 Mass. 524, 33 N. E. 927.

Minnesota. — Allis *v.* Goldsmith, 22 Minn. 123.

Missouri. — Minter *v.* Cupp, 98 Mo. 26, 10 S. W. 862.

Montana. — Wagner *v.* St. Peter's Hospital, 32 Mont. 206, 79 Pac. 1054.

New Jersey. — Leslie *v.* Leslie, 52 N. J. Eq. 332, 31 Atl. 724; Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563.

Pennsylvania. — Thrall *v.* Wilson, 17 Pa. Super. Ct. 376.

Texas. — Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Commercial & Agricultural Bank *v.* Jones, 18 Tex. 811.

Wisconsin. — Wisconsin Bank *v.* Morley, 19 Wis. 62. See also Simon *v.* Johnson, 105 Ala. 344, 16 So. 884, 53 Am. St. Rep. 125, *s. c.* 108 Ala. 241, 19 So. 244. *Compare* James *v.* Lewis, 26 La. Ann. 664.

The evidence to justify a court of equity in decreeing the specific performance of an unauthorized contract to sell lands which are rising rapidly in value, upon the ground that the owner has ratified the contract, should be clear. De Sollar *v.* Hanscome, 158 U. S. 216.

Trusts. — The burden of proof is upon the person who claims the ratification of an act in breach of a trust

applies to the ratification of the unauthorized act of a partner.[6]

3. Fraud. — The ratification of a contract or conveyance rendered voidable by fraud must be proved by the person claiming ratification by a preponderance of the evidence.[7]

II. PROVINCE OF JURY.

Where the acts shown to establish ratification of a contract or conveyance by an infant are susceptible of different interpretations, the question of intent is for the jury.[8] A like rule applies to evidence adduced to prove the ratification of an unauthorized act by a principal or partner.[9] It is, of course, for the jury to de-

Newton *v.* Rebenack, 90 Mo. App. 650; Smith *v.* Miller, 98 Va. 535, 37 S. E. 10.

6. Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888; Sweetser *v.* French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215.

It has been held that the evidence to prove ratification by partners, of a contract from which the firm received no benefit, must be clear Hamilton *v.* Hodges, 30 La. Ann 1290.

7. See article, "FRAUD," Vol. VI, p. 78.

8. *United States.* — Irvine *v.* Irvine, 9 Wall. 617.

Indiana. — Stringer *v.* Northwestern Mut. L. Ins. Co., 82 Ind. 100; Wiley *v.* Wilson, 77 Ind. 596.

Michigan. — Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908; Tyler *v.* Gallop's Estate, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521.

New Hampshire. — State *v.* Plaisted, 43 N. H. 413.

New York. — Bay *v.* Gunn, 1 Denio 108

North Carolina. — Alexander *v.* Hutchinson, 12 N. C. (1 Dev.) 13; Hobdy *v.* Egerton, 3 N. C. (2 Hayw.) 79.

Tennessee. — Scott *v.* Buchanan, 11 Humph. 468. See also Burdett *v.* Williams, 30 Fed. 697; Wilcox *v.* Roath, 12 Conn. 550. *Compare* Goodnow *v.* Empire Lumb. Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798. See note 24, *post.*

It has been held a question for the jury to decide whether an acknowledgment of a debt was equivalent to a new promise. Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908.

9. *England.* — Lewis *v.* Read, 13 Mees. & Welsb. 834.

United States. — Cunningham *v.* Bell, 5 Mason 161, 6 Fed. Cas. No. 3,479.

Alabama. — Abbott *v.* May, 50 Ala. 97.

Georgia. — Burr *v.* Howard, 58 Ga. 564; Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193.

Michigan. — McPherson *v.* Pinch, 119 Mich. 36, 77 N. W. 321.

Missouri. — Bank of Commerce *v.* Bernero, 17 Mo. App. 313.

New York. — Gray *v.* Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, *reversing* 40 App. Div. 506, 58 N. Y. Supp. 182, 82 Am. St. Rep. 720; Stokes *v.* Mackay, 140 N. Y. 640, 35 N. E. 786; Hopkins *v.* Clark, 7 App. Div. 207, 40 N. Y. Supp. 130.

Pennsylvania. — Sword *v.* Reformed Congregation Keneseth Israel, 29 Pa. Super. Ct. 626; Farmers' & Mechanics' Bank *v.* Third Nat. Bank, 165 Pa. St. 500, 30 Atl. 1008.

Texas. — Commercial Bank *v.* Jones, 18 Tex. 811.

Virginia. — Hortons *v.* Townes, 6 Leigh 47.

Wisconsin. — Cooper *v.* Schwartz, 40 Wis. 54. See also Garrett *v.* Gonter, 42 Pa. St. 143.

termine, upon conflicting evidence, whether such acts are sufficiently proved.[10]

III. ADMISSIBILITY OF EVIDENCE.

1. Act of Infant. — A. Express Ratification. — At common law, the express ratification by an infant of a contract, written or unwritten, simple or sealed, may be proved by evidence of an oral promise.[11] The ratification of an executed conveyance of land does not require the execution of a new deed.[12] Under the English Statute known as Lord Tenterden's Act, 9 Geo. IV, Chapter 14, Section 5 (1828), the evidence of a new promise to pay a debt, or ratification thereof, must be in writing.[13] Similar statutes exist in a number of the states.[14]

Either written or oral language relied upon to prove an express ratification must clearly indicate a present intention to pay the debt or perform the contract; that is, must be equivalent to a new promise.[15] But an explicit acknowledgment of the debt or con-

10. Quale *v.* Hazel (S. D.) 104 N. W. 215; Lewis *v.* Read, 13 Mees. & Welsb. (Eng.) 834.

11. *Alabama.* — West *v.* Penny, 16 Ala. 186.

Arkansas. — Vaughan *v.* Parr, 20 Ark. 600.

Colorado. — Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Kentucky. — Stern *v.* Freeman, 4 Met. 309.

Massachusetts. — Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103.

Mississippi. — Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

New Hampshire. — Hoit *v.* Underhill, 10 N. H. 220, 34 Am. Dec. 148.

New York. — Halsey *v.* Reid, 4 Hun. 777; Henry *v.* Root, 33 N. Y. 526.

North Carolina. — Houser *v.* Reynolds, 2 N. C. (1 Hayw.) 114, 1 Am. Dec. 551.

Virginia. — Buckner *v.* Smith, 1 Wash. 296, 1 Am. Dec. 463.

Insane Person. — No formal act is necessary to ratify an instrument executed by a person while insane. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806.

12. Hoffert *v.* Miller, 9 Ky. L. Rep. 732, 6 S. W. 447; Wheaton *v.* East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Scott *v.* Buchanan, 11 Humph. (Tenn.) 468; Irvine *v.* Irvine, 9 Wall. (U. S.) 617.

13. Harris *v.* Wall, 1 Exch. (Eng.) 122; Hartley *v.* Wharton, 11 Ad. and El. (Eng.) 934, 39 E. C. L. 276. For a discussion of the English cases, see Henry *v.* Root 33 N. Y. 526.

14. Stern *v.* Freeman, 4 Met. (Ky.) 309; Thurlow *v.* Gilmore, 40 Me. 378; Bird *v.* Swain, 79 Me. 529, 11 Atl. 421; Ward *v.* Scherer, 96 Va. 318, 31 S. E. 518. See also Keller *v.* Cooper, 12 Ky. L. Rep. 188.

Under the Missouri statute the ratification of an infant's contract cannot be proved by any evidence of his having exercised control over property received under the contract short of the disposition of the property or his refusal to surrender it. Koerner *v.* Wilkinson, 96 Mo. App. 510, 70 S. W. 509.

15. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Wilcox *v.* Roath, 12 Com. 550; Thompson *v.* Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Tyler *v.* Gallop's Estate, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Hale *v.* Gerrish, 8 N. H. 374; Goodsell *v.* Myers, 3 Wend. (N. Y.) 479; Hodges *v.* Hunt, 22 Barb. (N. Y.) 150. See also Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103.

tract as a present obligation is sufficient evidence of intent.[16]

Promises and promissory declarations not made to the party or his authorized agent are not conclusive evidence of ratification.[17]

B. Admissions. — The admissions of a quondam infant, made after attaining his majority, are admissible to prove the making of a new promise to the creditor[18] or the acquiescence of the former infant in an executed contract or conveyance.[19] Such admissions coupled with acquiescence are satisfactory evidence of ratification.[20]

C. Conduct. — The acts and conduct of a person after attaining majority, inconsistent with the disaffirmance of a contract or a

Compare Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908.

An offer to ratify on a certain contingency is not evidence of a present ratification. Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

Writing Required. — "The memorandum or writing, to be sufficient, must recognize the debt as a debt binding upon the party who signs it. It must, either in terms or on a fair construction of the instrument refer to the contract which is to be ratified, and treat it as a subsisting contract." Ward *v.* Scherer, 96 Va. 318, 31 S. E. 518.

A written acknowledgment of an unspecified "open account" is not a ratification of a bond for a different amount. Ward *v.* Scherer, 96 Va. 318, 31 S. E. 518.

An indorsement upon a note given in part payment of the price of a horse, of the words, "The within note being paid, I hereby discharge the property thereby secured," was held not a "ratification in writing" of an oral warranty of the soundness of the horse. Bird *v.* Swain, 79 Me. 529 11 Atl. 421.

16. Bank of Silver Creek *v.* Browning, 16 Abb. Pr. (N. Y.) 272; Ward *v.* Scherer, 96 Va. 318, 31 S. E. 518.

17. *Illinois.* — Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

Mississippi. — Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190.

New Hampshire. — Hoit *v.* Underhill, 10 N. H. 220, 34 Am. Dec. 148; Orvis *v.* Kimball, 3 N. H. 314; Hoit *v.* Underhill, 9 N. H. 436, 32 Am. Dec. 380.

New York. — Bigelow *v.* Grannis, 2 Hill 120; Goodsell *v.* Myers, 3 Wend. 479.

Pennsylvania. — Gillingham *v.* Gillingham, 17 Pa. St. 302; Chandler *v.* Glover. 32 Pa. St. 509. See also Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103.

18. Hoit *v.* Underhill, 10 N. H. 220, 34 Am. Dec. 148; Stern *v.* Freeman, 4 Met. (Ky.) 309.

A writing showing that the quondam infant has previously performed an act of ratification seems to meet the requirements of the statute. Stern *v.* Freeman, 4 Met. (Ky.) 309.

19. Terrell *v.* Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94; Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908; Ownes *v.* Ownes, 23 N. J. Eq. 60; Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468.

20. Wheaton *v.* East. 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; Eubanks *v.* Peak, 2 Bailey (S. C.) 497.

Where a libelous article concerning a ticket broker remained posted for forty days in the ticket office of a railroad company whose principal office was in the same city, and the general passenger agent of the railroad company refused to interfere with the publication a month before its discontinuance, the jury were justified in finding that the railroad company ratified the publication. Fogg *v.* Boston & L. R. Corp. 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583.

conveyance[21] or mortgage[22] of property are evidence of the ratification thereof. In most cases, such acts appear to have been held either conclusive evidence of ratification or to constitute ratification.[23]

Acquiescence. — Long acquiescence after majority in an executed conveyance has sometimes been held conclusive evidence of ratification,[24] but many courts refuse to hold it conclusive.[25] With other facts, it is always evidence of the ratification of a conveyance or contract.[26] Acquiescence in a conveyance of land, with knowl-

21. *United States.* — Irvine *v.* Irvine, 9 Wall. 617 (accepting lease of part of land sold).

Illinois. — Curry *v.* St. John Plow Co., 55 Ill. App. 82 (retaining and selling property).

Massachusetts. — Boyden *v.* Boyden, 9 Met. 519 (retaining and using personal property).

Minnesota. — Montgomery *v.* Witbeck, 23 Minn. 172 (retaining and mortgaging property).

Missouri. — Huth *v.* Carondelet Marine R. & Dock Co., 56 Mo. 202; Highley *v.* Barron, 49 Mo. 103 (consenting to use of consideration money).

New Hampshire. — Robbins *v.* Eaton, 10 N. H. 561 (retaining possession of land).

New Jersey. — Ownes *v.* Ownes, 23 N. J. Eq. 60 (taking orders as to management of property from grantee and paying over rent collected).

New York. — Henry *v.* Root, 33 N. Y. 526 (retaining possession and selling part of land).

North Carolina. — Owens *v.* Phelps, 95 N. C. 286 (consenting to use of consideration).

That a sailor had authorized a lawyer to file a petition making him co-libelant in a libel by seamen for wages within a few months after attaining his majority, was held unsatisfactory proof of ratification of a contract of employment entered into while an infant. Burdett *v.* Williams, 30 Fed. 697.

Insane Person. — The retention and use of property by the administrator of a deceased insane person is evidence of ratification of the contract of purchase. Bunn *v.* Postell, 107 Ga. 490, 33 S. E. 707.

22. Wilson *v.* Darragh, 55 Hun 605, 7 N. Y. Supp. 810.

23. Allen *v.* Poole, 54 Miss. 323; Boston Bank *v.* Chamberlin, 15 Mass. 220; Uecker *v.* Koehn, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849; Lynde *v.* Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; Palmer *v.* Miller, 25 Barb. (N. Y.) 399.

24. Thomasson *v.* Boyd, 13 Ala. 419; Jamison *v.* Smith, 35 La. Ann. 609.

25. Bagley *v.* Fletcher, 44 Ark. 153; Hoffert *v.* Miller, 9 Ky. L. Rep. 732, 6 S. W. 447; Boody *v.* McKenney, 23 Me. 517; Allen *v.* Poole, 54 Miss. 323; Huth *v.* Carondelet Marine Ry. & Dock Co., 56 Mo. 202; Tucker *v.* Moreland, 10 Pet. (U. S.) 58.

26. Vaughan *v.* Parr, 20 Ark. 600; Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616; Hobdy *v.* Egerton, 3 N. C. (2 Hayw.) 79; Wise *v.* Loeb, 15 Pa. Super. Ct. 601; Irvine *v.* Irvine, 9 Wall. (U. S.) 617. See also Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521; Tucker *v.* Moreland, 10 Pet. (U. S.) 58.

A letter from the owner of lands to persons who have assumed authority to sell it as his agents is not proof of ratification of the sale because the owner does not expressly repudiate their authority and seems willing to approve the contract should the terms be as favorable as those named in the letter, where the terms are, in fact, less favorable Stillman *v.* Fitzgerald, 37 Minn. 186, 33 N. W. 564.

Silence of Partner. — The failure of a partner to object when informed of the making or indorsing of a note by his co-partner is evidence of ratification only. Reuben *v.* Cohen, 48 Cal. 545. See also Hendrie *v.* Ber-

edge of the making of improvements on the land, is usually sufficient evidence of ratification.[27]

2. Act of Representative. — A. Necessity of Writing. — At common law, the express ratification by a principal or partner of an unauthorized simple written or oral contract need not be in writing.[28] Where, by statute, the authority of an agent to execute a conveyance or written contract must be in writing, an express ratification of his unauthorized act must also be in writing;[29] but where the statute does not require written evidence of his authority, express ratification of his act may be proved by parol evidence.[30]

B. Sealed Instruments. — As a general rule, the ratification of a contract or conveyance required to be sealed must be evidenced by an instrument under seal.[31] In some jurisdictions, how-

kowitz, 37 Cal. 113, 99 Am. Dec. 251; Taylor *v.* Herron, 72 Kan. 652, 82 Pac. 1104.

Ratification of Judgment. — The failure of a creditor to object to a judgment confessed in his favor by his debtor was held evidence only of his consent to such judgment. Haggerty *v.* Juday, 58 Ind. 154.

27. Wheaton *v.* East, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251.

It was held not conclusive evidence of the ratification of a conveyance of property by a minor daughter to her father that the father continued to occupy the property as a homestead until the time of his death, six years after the daughter attained her majority, and spent sufficient money on the premises to keep them in good repair, and that during his lifetime she never asserted ownership of the property. Eagan *v.* Scully, 29 App. Div. 617, 51 N. Y. Supp. 680.

28. Goetz *v.* Goldbaum (Cal.), 37 Pac. 646; Emerson *v.* Coggswell, 16 Me. 77; Keim *v.* Lindley (N. J. Eq.), 30 Atl. 1063; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Murphy *v.* Renkert, 59 Tenn. (12 Heisk.) 397.

29. *California.* — Videau *v.* Griffin, 21 Cal. 389; Borderre *v.* Den, 106 Cal. 594, 39 Pac. 946.

Kentucky. — Ragan *v.* Chenault, 78 Ky. 545; Riggan *v.* Crain, 86 Ky. 249, 5 S. W. 561.

Minnesota. — Judd *v.* Arnold, 31 Minn. 430, 18 N. W. 151.

Missouri. — Hawkins *v.* McGroarty, 110 Mo. 546, 19 S. W. 830.

New York. — Squier *v.* Norris, 1 Lans. 282; Long *v.* Poth, 16 Misc. 85, 37 N. Y. Supp. 670; Haydock *v.* Stow, 40 N. Y. 363; Whitlock *v.* Washburn, 62 Hun. 369, 17 N. Y. Supp. 60.

Pennsylvania. — McDowell *v.* Simpson, 3 Watts 129, 27 Am. Dec. 338.

Under a Minnesota statute it was held that the filling of blanks in a deed after execution thereof by a married woman could be ratified only by a reacknowledgment of the deed. Drury *v.* Foster, 1 Dill. 461, 7 Fed. Cas. No. 4,096.

30. Lindley *v.* Keim, 54 N. J. Eq. 418, 34 Atl. 1073; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

31. *England.* — Steiglitz *v.* Egginton, 1 Holt 141, 3 E. C. L. 54.

Georgia. — McCalla *v.* American Freehold Land Mtg. Co., 90 Ga. 113, 15 S. E. 687.

Illinois. — Ingraham *v.* Edwards, 64 Ill. 526.

Maine. — Paine *v.* Tucker, 21 Me. 138, 38 Am. Dec. 255; Stetson *v.* Patten, 2 Me. 358, 11 Am. Dec. 111; Spofford *v.* Hobbs, 29 Me. 148, 48 Am. Dec. 521; Heath *v.* Nutter, 50 Me. 378.

New Hampshire. — Despatch Line *v.* Bellamy, 12 N. H. 205, 37 Am. Dec. 203.

New York. — Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Hanford *v.* McNair, 9 Wend. 54.

North Carolina. — Davenport *v.* Sleight, 19 N. C. (2 Dev. & B. L.) 381, 31 Am. Dec. 420.

ever, the ratification of a sealed contract or conveyance may be proved by acts or conduct amounting to an estoppel *in pais*.[32] Where the seal may be treated as surplusage, ratification may be proved by acts or oral promises or admissions.[33] The ratification of an unauthorized sealed instrument executed by a partner in the name of all the partners may be shown by parol evidence.[34]

Pennsylvania. — Bellas *v.* Hays, 5 S. & R. 427, 9 Am. Dec. 385; Chess *v.* Chess, 1 Pen. & W. 32, 21 Am. Dec. 350.

Tennessee. — Turbeville *v.* Ryan, 1 Humph. 113, 34 Am. Dec. 622; Smith *v.* Dickinson, 6 Humph. 261, 44 Am. Dec. 306; Cain *v.* Heard, 41 Tenn. 163.

Texas. — Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611.

See also Sans *v.* People, 8 Ill. 327.

32. *Alabama.* — Taylor *v.* Agricultural & Mechanical Assn., 68 Ala. 229.

Connecticut. — Howe *v.* Keeler, 27 Conn. 538.

Kansas. — Tucker *v.* Allen, 16 Kan. 312.

Massachusetts. — Holbrook *v.* Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; McIntyre *v.* Park, 11 Gray 102, 71 Am. Dec. 690.

Pennsylvania. — Garrett *v.* Gonter, 42 Pa. St. 143.

Texas. — Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Zimpelman *v.* Keating, 72 Tex. 318, 12 S. W. 177. But see Blood *v.* La Serena Land & Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252 (under special statute).

33. *England.* — Hunter *v.* Parker, 7 Mees. & Welsb. 322.

United States. — Jenkins *v.* Mayer, 2 Biss. 303, 13 Fed. Cas. No. 7,272.

Colorado. — Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670; *s. c.* 25 Colo. 103, 54 Pac. 634.

Michigan. — Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

Mississippi. — Adams *v.* Power, 52 Miss. 828.

Missouri. — Shuetze *v.* Bailey, 40 Mo. 69, *affirmed* 58 Mo. 290.

New Hampshire. — Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New York. — Lawrence *v.* Taylor, 5 Hill 107; Worral *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Randall *v.* Van Vechten, 19 Johns. 60, 10 Am. Dec. 193.

South Carolina — State *v.* Spartanburg & U. R. Co., 8 Rich. 129.

Vermont. — McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303.

34. *Alabama.* — Herbert *v.* Honrick, 16 Ala. 581; Gunter *v.* Williams, 40 Ala. 561; Grady *v.* Robinson, 28 Ala. 289.

Florida. — Jeffreys *v.* Coleman, 20 Fla. 536; Tischler *v.* Kurtz, 35 Fla. 323, 17 So. 661.

Georgia. — Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738.

Illinois. — Wilcox *v.* Dodge, 12 Ill. App. 517; Peine *v.* Weber, 47 Ill. 41.

Iowa. — Price *v.* Alexander, 2 G. Greene 427, 52 Am. Dec. 526; Haynes *v.* Seachrest, 13 Iowa 455.

Maine. — Pike *v.* Bacon, Admx., 21 Me. 280, 38 Am. Dec. 259.

Massachusetts. — Holbrook *v.* Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Cady *v.* Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Swan *v.* Stedman, 4 Met. 548.

Michigan. — Fox *v.* Norton, 9 Mich. 207.

Minnesota. — Sterling *v.* Bock, 40 Minn. 11, 41 N. W. 236.

New York. — Smith *v.* Kerr, 3 N. Y. 144; Gansevoort *v.* Williams, 14 Wend. 133; Gram *v.* Seton, 1 Hall 262; Skinner *v.* Dayton, 19 Johns. 513, 10 Am. Dec. 286.

Pennsylvania. — Bond *v.* Aitkin, 6 Watts & S. 165, 40 Am. Dec. 550; Miller *v.* Royal Flint Glass Wks., 172 Pa. St. 70, 33 Atl. 350; Johns *v.* Battin, 30 Pa. St. 84.

South Carolina. — Sibley *v.* Young, 26 S. C. 415, 2 S. E. 314.

Vermont. — McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303.

Wisconsin. — Mann *v.* Aetna Ins. Co., 40 Wis. 49.

Compare. — Turbeville *v.* Ryan, 1 Humph. (Tenn.) 113, 34 Am. Dec. 622.

C. Admissions and Declarations.— The ratification of an unauthorized act, except the execution of a sealed instrument, may be proved by the admissions of the principal, master or partner.[35] Ordinarily, it cannot be proved by the admissions or declarations of the agent who performed the act,[36] nor by the admissions of other agents not made within the scope of their authority.[37]

Where ratification is established by other evidence, the declarations of the agent or servant may become admissible as part of the *res gestae*.[38]

D. Conduct. — a. *In General.* — The conduct or acts of a principal, master or partner, consistent with an intention to adopt an unauthorized contract or act, and inconsistent with a contrary intention, are generally evidence of the ratification of the contract or act. Such conduct or acts have frequently been held either to prove ratification conclusively or to constitute ratification.[39]

35. *Georgia.* — Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738.

Illinois. — Peine *v.* Weber, 47 Ill. 41; Erie & P. Despatch *v.* Cecil, 112 Ill. 180.

Massachusetts. — Merrill *v.* Parker, 112 Mass. 250; Swan *v.* Stedman, 4 Met. 548; Preble *v.* Greenleaf, 180 Mass. 79, 61 N. E. 808 (unauthorized sale by trustee.)

Michigan. — Hutchinson *v.* Smith, 86 Mich. 145, 48 N. W. 1090.

New York. — Thomas, Roberts, Stevenson Co. *v.* Tucker, 14 Misc. 297, 35 N. Y. Supp. 682; Hopkins *v.* Clark, 7 App. Div. 207, 40 N. Y. Supp. 130; Brown *v.* Reiman, 48 App. Div. 295, 62 N. Y. Supp. 663; Lawrence *v.* Taylor, 5 Hill 107.

Ohio. — Mack *v.* Fries, 5 Ohio Dec. 174.

Pennsylvania. — Bond *v.* Aitkin, 6 Watts & S. 165, 40 Am. Dec. 550.

Tennessee. — Johnson *v.* Somers, 1 Humph. 268.

Vermont. — Rutland & B. R. Co. *v.* Lincoln, 29 Vt. 206.

Wisconsin. — Saveland *v.* Green, 40 Wis. 431. See also Gray *v.* Ward, 18 Ill. 32; Hall *v.* Vanness, 49 Pa. St. 457; Guimbillot *v.* Abat, 6 Rob. (La.) 284; Wiley *v.* Mahood, 10 W. Va. 206.

36. Somerville *v.* Wabash R. Co., 109 Mich. 294, 67 N. W. 320; Bohanan *v.* Boston & M. R., 70 N. H. 526, 49 Atl. 103.

37. Wells *v.* Martin, 32 Mich. 478; Danaher *v.* Garlock, 33 Mich. 295; Sword *v.* Reformed Congregation Keneseth Israel, 29 Pa. Super. Ct. 626.

Admission of Corporation Agents. The ratification by a corporation of an unauthorized act may be proved by admissions of an officer made in the discharge of his duties. Merrick *v.* Burlington & W. Plank R. Co., 11 Iowa 74.

Ratification by a corporation of an *ultra vires* contract entered into by its secretary-treasurer cannot be proved by the acts and declarations of its president and secretary-treasurer alone. Broadway Theatre Co. *v.* Dessau Co., 45 App. Div. 475, 61 N. Y. Supp. 335.

The ratification by a corporation of an unauthorized contract cannot be proved by the admissions of individual directors. Peirce *v.* Morse-Oliver Bldg. Co., 94 Me. 406, 47 Atl. 914.

38. Paul *v.* Berry, 78 Ill. 158; Augusta Ins. & Bkg. Co. *v.* Abbott, 12 Md. 348; Beal *v.* Park Fire Ins. Co., 16 Wis. 241, 82 Am. Dec. 719.

39. For acts and conduct of principal held to constitute ratification *per se* of the unauthorized acts of agents, see the following cases:

United States. — Bradley *v.* Richardson, 2 Blackf. 343, 3 Fed. Cas. No. 1,786; Marshall *v.* Williams, 2 Biss. 255, 16 Fed. Cas. No. 9,136; Stowe *v.* United States, 19 Wall. 13.

Alabama. — Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93.

California. — Kendal *v.* Earl, 44 Pac. 791.

Evidence of the ratification of similar acts by a principal or master is sometimes admissible to prove ratification of the act in dispute.[40]

Instances — A promise by the principal to pay or perform an unauthorized debt or contract,[41] the part payment[42] or part performance[43] of such debt or contract by the principal, the entering into possession of property, under an unauthorized lease, or payment of rent thereunder,[44] or the acceptance of rent under such a lease,[45]

Illinois. — Hefner *v.* Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Hefner *v.* Dawson, 63 Ill. 403, 14 Am. Rep. 123.

Iowa. — Ryan *v.* Doyle, 31 Iowa 53; Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

Louisiana. — Howland *v.* Fosdick, 4 La. Ann. 556.

Maryland. — Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760.

Massachusetts. — Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453.

Michigan. — Lockhart *v.* Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

Minnesota. — Bartleson *v.* Vanderhoff, 96 Minn. 184, 104 N. W. 820.

Ohio. — Woodward *v.* Suydam, 11 Ohio 360.

Washington. — McIntosh *v.* Merchant, 40 Wash. 477, 82 Pac. 753.

40. Alabama & T. R. R. Co. *v.* Kidd, 29 Ala. 221; Forsyth *v.* Day, 41 Me. 382; Harrod *v.* McDaniels, 126 Mass. 413; Hawley *v.* Keeler, 53 N. Y. 114, *affirming* 62 Barb. 231; Chicago N. W. R. Co. *v.* James, 24 Wis. 388; Clark's Exrs. *v.* Van Riemsdyk, 9 Cranch (U. S.) 153.

Compare Woods *v.* Francklyn, 19 N. Y. Supp. 377, 46 N. Y. St. Rep. 396. See also Griswold *v.* Gebbie, 126 Pa. St. 353, 17 Atl. 673, 12 Am. St. Rep. 878.

41. McLendon *v.* Shackleford, 32 Ga. 474; Hall *v.* State *ex rel.* Robinson, 39 Ind. 301; Owsley *v.* Philips, 78 Ky. 517, 39 Am. Rep. 258; Bank of Commerce *v.* Bernero, 17 Mo. App. 313; Markham *v.* Washburn, 18 N. Y. Supp. 355, 45 N. Y. St. Rep. 683; Wright *v.* Burbank, 64 Pa. St. 247; Texas & St. L. R. Co. *v.* Myers, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 392.

A promise by a principal to pay a check drawn by his agent without authority "if it went to the store to pay for goods" is not of itself sufficient evidence of ratification. Heath *v.* Paul, 81 Wis. 532, 51 N. W. 876.

A ratification of the unauthorized sale of a principal's property is not sufficiently proved by evidence of his declaration that he would be satisfied to obtain the purchase money received by the absconding agent. Mapp *v.* Phillips, 32 Ga. 72.

Material Alteration. — An agreement to pay interest on a note which did not provide for interest when executed was held sufficient evidence of ratification of the alteration of the note. Proutz *v.* Wilson, 123 Mass. 297.

The acknowledgment of the maker's signature to a note after a material alteration of it was not sufficient evidence of his ratification of the alteration, where it appeared that he did not examine the note at the time. German Bank *v.* Dunn, 62 Mo. 79.

42. Bates' Exrs. *v.* Best, 13 B. Mon. (Ky.) 215; Mayor & Co. *v.* Hunter, 12 Mart. O. S. (La.) 3; Hall *v.* Chicago, M. & St. P. R. Co., 48 Wis. 317, 4 N. W. 325.

43. Erie & Pac. Despatch Co. *v.* Cecil, 112 Ill. 180; Delabigarre *v.* Second Municipality, 3 La. Ann. 239; Eaton *v.* Taylor, 10 Mass. 54; Hamilton Coal Co. *v.* Bernhard, 61 Hun 624, 16 N. Y. Supp. 55.

44. Golding *v.* Brennan, 183 Mass. 286, 67 N. E. 239; Hayden *v.* Wheeler & Tappan Co., 66 Hun 629, 20 N. Y. Supp. 902; Oregon R. Co. *v.* Oregon R. & Nav. Co., 28 Fed. 505.

45. Reynolds *v.* Davison, 34 Md. 662; Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326; Duncan *v.* Hart-

a demand of performance of an unauthorized contract[46] or overseeing performance thereof,[47] a request for an extension of time for payment or performance of an unauthorized contract,[48] or authorizing such an extension,[49] or generally, the acceptance of any payment or benefit by a principal or partner under an unauthorized contract,[50] with knowledge of the material facts, is evidence of ratification of such contract.

man, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570; *s. c.* 149 Pa. St. 114, 24 Atl. 190.

46. Abbott *v.* May, 50 Ala. 97.

The ratification of the unauthorized acceptance of a draft by a clerk in part payment of a debt due his employer is sufficiently proved by the employer's letter showing demand of payment of the endorsers and by his failure to offer to return the draft until after the commencement of an action to recover the principal debt. Jennison *v.* Parker, 7 Mich. 355.

Taking Indemnity. — That the signer of a note which had been filled out and negotiated without authority, had expressed a fear of liability on the note and taken indemnity against liability was held insufficient evidence of ratification of the unauthorized acts. Conklin *v.* Wilson, 5 Ind. 209.

That an attempt by the principal to collect from the agent money paid him on an unauthorized contract is not conclusive evidence of a ratification of the agent's act, see Commercial & Agricultural Bank *v.* Jones, 18 Tex. 811.

47. Burns *v.* Lane, 23 Ill. App. 504.

48. Garrett *v.* Gonter, 42 Pa. St. 143.

49. Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243.

50. *United States.* — Oregon R. Co. *v.* Oregon R. & Nav. Co., 28 Fed. 505.

Alabama. — Alabama & T. R. R. Co. *v.* Kidd, 29 Ala. 221.

Colorado. — Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Georgia. — City Bank *v.* Kent, 57 Ga. 283.

Illinois. — Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513.

Iowa. — Merchants' Union Barb Wire Co. *v.* Rice, 70 Iowa 14, 29 N. W. 784.

Maine. — Gibson *v.* Norway Sav. Bank, 69 Me. 579.

Massachusetts. — Harrod *v.* McDaniels, 126 Mass. 413; Pratt *v.* Putnam, 13 Mass. 361; American Min. & Smelt. Co. *v.* Converse, 175 Mass. 449, 56 N. E. 594.

Michigan. — Dousman *v.* Peters, 85 Mich. 488, 48 N. W. 697.

Mississippi. — Exum *v.* Brister, 35 Miss. 391.

New Hampshire. — Despatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. — Keim *v.* Lindley (N. J. Eq.), 30 Atl. 1063.

New York. — Lee *v.* Pittsburg Coal & Min. Co., 56 How. Pr. 373; Philips *v.* MacKellar, 92 N. Y. 34.

Oklahoma. — Fant *v.* Campbell, 8 Okla. 586, 58 Pac. 741.

Oregon. — Thompson *v.* New York Life Ins. Co., 21 Or. 466, 28 Pac. 628.

Pennsylvania. — Wright *v.* Burbank, 64 Pa. St. 247; Duncan *v.* Hartman, 143 Pa. St. 595, 22 Atl. 1099, 24 Am. St. Rep. 570; *s. c.* 149 Pa. St. 114, 24 Atl. 190.

Tennessee. — City of Memphis *v.* Memphis Gayoso Gas Co., 9 Heisk. 531.

Texas. — International & G. N. R. Co. *v.* Clark, 81 Tex. 48, 16 S. W. 631.

Utah. — Guthie *v.* Gilmar, 27 Utah 496, 76 Pac. 628, 63 Pac. 817.

Vermont. — Rutland & B. R. Co. *v.* Lincoln, 29 Vt. 206.

Wisconsin. — Chicago & N. W. R. Co. *v.* James, 24 Wis. 388.

The acceptance of a written contract by the principal is evidence of his knowledge of unauthorized terms contained therein. Bexar Bldg. & L. Assn. *v.* Newman (Tex. Civ. App.), 25 S. W. 461.

The formal ratification of a con-

b. *Acquiescence.* — The silence of a principal, master or partner and his failure to disavow an unauthorized contract is evidence of ratification of more or less force according to the circumstances of the case.[51] But where there are no elements of estoppel, such evi-

tract is evidence that the principal had knowledge of its terms. Blen *v.* Bear River & Auburn Water & Min. Co., 20 Cal. 602, 81 Am. Dec. 132.

51. *United States.* — Central Trust Co. *v.* Asheville Land Co., 72 Fed. 361, 18 C. C. A. 590, 43 U. S. App. 1; Hansen *v.* Boyd, 161 U. S. 397, *reversing* 41 Fed. 174; Tabb *v.* Gist, 6 Call. 279, 1 Brock 33, 23 Fed. Cas. No. 13,719.

Alabama. — Tyree *v.* Lyon, Murphy & Co., 67 Ala. 1.

California. — Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634, *reversing* 7 Colo. App. 383, 43 Pac. 670.

Georgia. — Mapp *v.* Phillips, 32 Ga. 72.

Illinois. — Wetherbee *v.* Fitch, 117 Ill. 67, 7 N. E. 513; Barsh *v.* Thompson Nat. Bank, 2 Ill. App. 217; Joseph Wolf Co. *v.* Bank of Commerce, 107 Ill. App. 58; Cairo & St. L. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299.

Indiana. — Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888; Terre Haute & I. R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650; City of Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

Kansas. — Taylor *v.* Herron, 72 Kan. 652, 82 Pac. 1104.

Kentucky. — McConnell *v.* Bowdry, 4 T. B. Mon. 392.

Massachusetts. — Sweetser *v.* French, 2 Cush. 309, 48 Am. Dec. 666; Foster *v.* Pockwell, 104 Mass. 167; American Min. & Smelt. Co. *v.* Converse, 175 Mass. 449, 56 N. E. 594.

Minnesota. — Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215.

Missouri. — Peck *v.* Ritchey, 66 Mo. 114.

Nebraska. — German Nat. Bank *v.* First Nat. Bank, 59 Neb. 7, 80 N. W. 48.

New Jersey. — Keim *v.* Lindley (N. J. Eq.), 30 Atl. 1063.

New York. — Cornelius *v.* Rieser, 18 N. Y. Supp. 113, 44 N. Y. St. Rep. 491; Fischer *v.* Jordan, 54 App. Div. 621, 66 N. Y. Supp. 286; Hazard *v.* Spears, 2 Abb. App. Dec. 353; Gillett *v.* Whiting, 141 N. Y. 71, 35 N. E. 939, 38 Am. St. Rep. 762.

Pennsylvania. — Philadelphia W. & B. R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Hall *v.* Vanness, 49 Pa. St. 457; Lindsley *v.* Malone, 23 Pa. St. 24; Kelsey *v.* National Bank, 69 Pa. St. 426; Gordon *v.* Preston, 1 Watts 385, 26 Am. Dec. 75; Bank *v.* Reed, 1 Watts & S. 101; Livingston *v.* Pittsburg & S. R. Co., 2 Grant Cas. 219.

South Carolina. — Bivingsville Cotton Mfg. Co. *v.* Bobo, 11 Rich. L. 386; State *v.* Spartanburg & U. R. Co., 8 Rich. 129.

Tennessee. — Hatton *v.* Stewart, 2 Lea 233; Ferguson *v.* Shepherd, 1 Sneed 254.

Texas. — Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; St. Louis, A. & T. R. Co. *v.* Dutton, 10 S. W. 291; Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486; Myer *v.* Smith, 3 Tex. Civ. App. 37, 21 S. W. 995; Zimpelman *v.* Keating, 72 Tex. 318, 12 S. W. 177; Commercial Bank *v.* Jones, 18 Tex. 811.

Wisconsin. — Saveland *v.* Green, 40 Wis. 431; Cooper *v.* Schwartz, 40 Wis. 54. *Compare* Burns *v.* Kelley, 41 Miss. 339; White *v.* Langdon, 30 Vt. 599; Robinson *v.* Chapline, 9 Iowa 91.

Where the conductor of a train notified the general superintendent of a railroad and its general agent of the injury of a person by the train and of his employment of a physician to attend the injured person, and the railroad company did not repudiate the employment then or later when the physician demanded payment for his services, the jury were authorized in finding that the railroad company had ratified the conductor's act. Terre Haute & I. R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650.

Receipts in full by a principal to an agent are *prima facie* evidence of ratification of all collections, disbursements and appropriations which

dence is not conclusive, especially where the pretended agent is not the agent of the principal for any purpose.[52] The failure of a principal to disavow the unauthorized act of a general agent is sometimes evidence of considerable force.[53]

c. *Retention of Servants.* — The retention of a servant in his employment by the master with knowledge of the tortious character of an act committed by him is evidence of ratification of the act.[54]

E. *Corporations.* — No more formal act is required for the ratification by a private corporation of an unauthorized act of an officer or agent than is required of a natural person under the same circumstances.[55] A municipal corporation may sometimes ratify

had taken place when the receipts were given. City Bank *v.* Kent, 57 Ga. 283.

52. *Alabama.* — Mobile & M. R. Co. *v.* Jay, 65 Ala. 113.

California. — California Bank *v.* Sayre, 85 Cal. 102, 24 Pac. 713.

Colorado. — Union Gold Mining Co. *v.* Rocky Mt. Nat. Bk., 2 Colo. 248; Smyth *v.* Lynch, 7 Colo. App. 383, 43 Pac. 670.

Georgia. — McCalla *v.* American Freehold Land Mtg. Co., 90 Ga. 113, 15 S. E. 687.

Illinois. — DeLand *v.* Dixon Nat. Bk., 111 Ill. 323; Miller *v.* Excelsior Stone Co., 1 Ill. App. 273.

Massachusetts. — Foster *v.* Rockwell, 104 Mass. 167; Harrod *v.* McDaniels, 126 Mass. 413.

Minnesota. — Robbins *v.* Blanding, 87 Minn. 246, 91 N. W. 844; Smith *v.* Fletcher, 75 Minn. 189, 77 N. W. 800.

New York. — Merritt *v.* Bissell, 155 N. Y. 396, 50 N. E. 280, *reversing* 84 Hun 194, 32 N. Y. Supp. 559; Myers *v.* New York Mut. L. Ins. Co., 32 Hun. 321.

Pennsylvania. — Philadelphia W. & B. R. Co. *v.* Cowell, 28 Pa. St. 329, 70 Am. Dec. 128.

Virginia. — Hortons *v.* Townes, 6 Leigh 47.

53. Union Gold Min. Co. *v.* Rocky Mt. Nat. Bk., 2 Colo. 248; Lynch *v.* Smyth, 25 Colo. 103, 54 Pac. 634, *reversing* 7 Colo. App. 383, 43 Pac. 670; Ralphs *v.* Hensler, 97 Cal. 296, 32 Pac. 243; Foster *v.* Rockwell, 104 Mass. 167.

54. Donivan *v.* Manhattan R. Co., 1 Misc. 368, 21 N. Y. Supp. 457; Williams *v.* Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512; Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909; Bass *v.* Chicago & N. W. R. Co., 42 Wis. 654, 24 Am. Rep. 437.

Where the unauthorized act of an agent is promptly repudiated by his principal, a ratification of the act cannot be inferred from the fact that the principal retains the agent in his employment. Deacon *v.* Greenfield, 141 Pa. St. 467, 21 Atl. 650.

It is not evidence of ratification of an injury committed by a servant that the master dislikes the person injured. Arasmith *v.* Temple, 11 Ill. App. 39.

55. Corporation. — *United States.* Union Pac. R. Co. *v.* Chicago, R. I. & P. Co., 2 C. C. A. 174, 10 U. S. App. 98, 5 Fed. 309; Union Pac. R. Co. *v.* Chicago, R. I. & P. Co., 2 C. C. A. 174, 10 U. S. App. 98, 5 Fed. 309.

Alabama. — Taylor *v.* Agricultural and Mech. Assn., 68 Ala. 229.

California. — Pixley *v.* Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623.

Connecticut. — Howe *v.* Keeler, 27 Conn. 538.

Florida. — First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881.

Kentucky. — Maxville W. & L. Turnpike Rd. Co. *v.* Barnes, 14 Ky. L. Rep. 431.

Massachusetts. — Brown *v.* Winnisimmet Co., 11 Allen 326; Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087.

Missouri. — First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Dec. 397.

Nebraska. — German Nat. Bank *v.* First Nat. Bank, 59 Neb. 7, 80 N. W. 48.

New York. — Lee *v.* Pittsburg Coal & Min. Co., 56 How. Pr. 373; Wehr-

the unauthorized act of its officer by accepting the benefits thereof and without any formal act,[56] but where the manner prescribed for the letting of a contract is intended as a limitation on the powers of the corporation, the ratification of a contract not so let must ordinarily be by some act of the corporation of equal formality.[57]

3. Fraud. — See article "FRAUD," Volume VI, p. 79.[58]

ham *v.* Nashville, C. & St. L. R. Co., 4 N. Y. St. 541; Clement *v.* Young-McShea Amusement Co. (N. J. Eq.) 60 Atl. 419.

Pennsylvania. — Bageley *v.* Pittsburgh & L. S. Iron Co., 146 Pa. St. 478, 23 Atl. 837; Kelsey *v.* National Bank, 69 Pa. St. 426; Gordon *v.* Preston, 1 Watts 385.

Tennessee. — Memphis *v.* Memphis Gayosa Gas Co., 9 Heisk. 531.

Texas. — Texas & P. R. Co. *v.* Davis (Tex. Civ. App.). 54 S. W. 381.

Virginia. — West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192, 15 S. E. 524.

Compare Spence *v.* Wilmington Cotton Mills, 115 N. C. 210, 20 S. E. 372; Jenkins *v.* Gastonia Cotton Mfg. Co., 115 N. C. 535, 20 S. E. 724.

Ratification by Corporation. — An unauthorized sealed instrument may be ratified by a vote of the board of directors. Wood *v.* Whelen, 93 Ill. 153.

The approval of the minutes of a former corporate meeting is evidence of the ratification of irregular proceedings at such former meeting. Howard Ins. Co. *v.* Hope, 22 Conn. 394.

56. Gutta Percha & Rubber Mfg. Co. *v.* Ogalalla, 40 Neb. 775, 59 N. W. 513, 42 Am. St. Rep. 696; Chicago *v.* McKelvey, 91 Ill. App. 442.

57. McCracken *v.* San Francisco, 16 Cal. 591; Grogan *v.* San Francisco, 18 Cal. 590; Durango *v.* Pennington, 8 Colo. 357, 7 Pac. 14; Kroffe *v.* Springfield, 86 Mo. App. 530; Chippawa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603.

58. For acts and conduct held to constitute ratification *per se* of contracts voidable for fraud, see the following cases:

United States. — Cummins *v.* Lods, 2 Fed. 661; *In re* Walrup, 1 Fed. 287.

Louisiana. — Pitts *v.* Shubert, 11 La. 286, 30 Am. Dec. 718; Copeland *v.* Mickie, 17 La. 286.

Nebraska. — Sanford *v.* Sornborger, 26 Neb. 295, 41 N. W. 1102.

New York. — Moffat *v.* Winslow, 7 Paige 124.

Pennsylvania. — Haworth *v.* Truby, 138 Pa. St. 222, 20 Atl. 942.

Utah. — Smith *v.* Williamson, 8 Utah 219, 30 Pac. 753.

RAVISH.—See Rape.

REAL ACTION.—See Title.

REAL EVIDENCE.—See Demonstrative Evidence.

REASONABLE CARE.—See Negligence.

REASONABLE DOUBT.

By W. L. Willie.

I. PRESUMPTION OF INNOCENCE DISTINGUISHED.

"Presumption of innocence" is a conclusion drawn by law in favor of a citizen, while "reasonable doubt" is a condition of mind produced by proof resulting from evidence in the case. The former is regarded as evidence introduced by the law to be considered by the jury, while the latter is the result of insufficient proof.[1]

1. See article "Presumptions," Vol. IX. Coffin *v.* United States, 156 U. S. 432; State *v.* Gosnell, 74 Fed. 734; Cochran *v.* United States, 157 U. S. 286. "To say that the one is the equivalent of the other is, therefore, to say that legal evidence can be excluded from the jury, and such exclusion can be cured by instructing them correctly in regard to the

II. NATURE OF THE DOUBT.

While the term is commonly understood, its meaning has been variously defined by the courts. "Reasonable doubt" is said to explain itself.[2]

It is not a vague, fanciful or merely possible doubt,[3] nor one that the jury is able to give a reason for;[4] but such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon careful consideration of all the evidence.[5]

"Beyond reasonable doubt" is synonymous with moral certainty,[6] and it is proof to a moral certainty as distinguished from absolute certainty.[7]

Such a doubt as juror would hesitate to act on in the most important business affairs of his own in the ordinary walks of life is insufficient;[8] but such a degree of certainty as he would regard as sufficient in the important affairs of life is held to be correct.[9]

A condition of mind in which hesitancy arises after having given evidence a fair consideration, one court defines it to be.[10]

Reasonable doubt of guilt may exist, though there may not be probability of innocence.[11]

III. DEGREE OF PROOF APPLIED.

1. In General. — In criminal prosecutions the guilt of the accused must be proved beyond a reasonable doubt.[12]

A. APPLICABLE TO ALL OFFENSES AND DEGREES THEREOF.

method by which they are required to reach their conclusion upon proof actually before them."

In State *v.* Harrison, 23 Mont. 79, 57 Pac. 647, it is held that presumption of innocence has the weight and effect of evidence in defendant's behalf introduced by the law, and the mere definition of a reasonable doubt does not supply lack of instruction upon presumption of innocence.

2. Battle *v.* State, 103 Ga. 53, 29 S. E. 491.

3. State *v.* Truitt (Del.), 62 Atl. 790.

4. Smith *v.* State, 142 Ala. 14, 39 So. 329; State *v.* Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

5. State *v.* Truitt (Del.), 62 Atl. 790.

6. Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; Com. *v.* Costley, 118 Mass. 1; Jones *v.* State, 100 Ala. 88, 14 So. 772.

7. Carlton *v.* People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346. That guilt must be proved to moral certainty is elliptical. Little *v.* State (Ala.), 39 So. 674.

8. Nelms *v.* State, 123 Ga. 575, 51 S. E. 588.

9. United States *v.* Wright, 16 Fed. 112.

10. Com. *v.* Mudgett, 174 Pa. St. 211, 34 Atl. 588.

11. Nordan *v.* State (Ala.), 39 So. 406.

Evidence necessary to raise reasonable doubt of guilt need not be strong enough to establish a reasonable belief of innocence. Wade *v.* State, 71 Ind. 535.

Additional Definitions. — Sherrill *v.* State, 138 Ala. 3, 35 So. 129; Sumner *v.* State, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; James *v.* State, 45 Miss. 572; Regan *v.* State (Miss.), 39 So. 1002.

12. *United States.* — United States *v.* Brown, 4 McLean 142; United States *v.* Wright, 16 Fed. 112.

Alabama. — Howard *v.* State, 108

Proof beyond reasonable doubt is required in all offenses, misdemeanors as well as felonies;[13] also in each degree of the crime,[14]

Ala. 571, 18 So. 813; Lang *v.* State, 84 Ala. 1, 4 So. 193, 5 Am. St. Rep. 324.

Arkansas. — Lovejoy *v.* State, 62 Ark., 478, 36 S. W. 575; Byrd *v.* State, 69 Ark. 537, 64 S. W. 270.

California. — People *v.* Wynn, 133 Cal. 72, 65 Pac. 126; People *v.* Goslaw, 73 Cal. 323, 14 Pac. 788.

Colorado. — Kent *v.* People, 8 Colo. 563, 9 Pac. 852; Boykin *v.* People, 22 Colo. 496, 45 Pac. 419.

Delaware. — State *v.* Reidell, 9 Houst. 470, 14 Atl. 550.

Florida. — Bond *v.* State, 21 Fla. 738; Wallace *v.* State, 41 Fla. 547, 26 So. 713.

Georgia. — Mitchell *v.* State, 110 Ga. 272, 34 S. E. 576; Long *v.* State, 38 Ga. 491; Tarver *v.* State, 95 Ga. 222, 21 S. E. 381.

Illinois. — Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304; Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Reins *v.* People, 30 Ill. 256.

Indiana. — Best *v.* State, 155 Ind. 46, 57 N. E. 534; Polk *v.* State, 19 Ind. 170, 81 Am. Dec. 382.

Iowa. — State *v.* Perigo, 80 Iowa, 37, 45 N. W. 399; State *v.* Trout, 74 Iowa 545, 38 N. W. 405, 7 Am. St. Rep. 499.

Kansas. — State *v.* Tulip, 9 Kan. App. 454; Horne *v.* State, 1 Kan. 47, 81 Am. Dec. 499.

Kentucky. — Calhoon *v.* Com., 23 Ky. L. Rep. 1188, 64 S. W. 965; Holloway *v.* Com., 11 Bush. 344; Payne *v.* Com., 1 Metc. 370.

Michigan. — People *v.* Niles, 44 Mich. 606, 7 N. W. 192.

Mississippi. — Jeffries *v.* State, 77 Miss. 757, 28 So. 948; Blalock *v.* State, 27 So. 642; Riggs *v.* State, 30 Miss. 635.

Missouri. — State *v.* Walker, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743; State *v.* Nueslein, 25 Mo. 111.

Montana. — Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293; Territory *v.* Rehberg, 6 Mont. 467, 13 Pac. 132; Territory *v.* Edmonson, 4 Mont. 141, 1 Pac. 738.

Nebraska. — Binkley *v.* State, 34 Neb. 757, 52 N. W. 708; Morrison *v.* State, 13 Neb. 527, 14 N. W. 475.

Nevada. — State *v.* Hamilton, 13 Nev. 386.

New Jersey. — Brown *v.* State, 62 N. J. L. 666, 42 Atl. 811.

New Mexico. — Chavez *v.* Territory, 6 N. M. 455, 30 Pac. 903.

New York. — People *v.* Lyons, 110 N. Y. 618; People *v.* Willson, 109 N. Y. 345, 16 N. E. 540; People *v.* O'Bryan, 1 Wheeler Cr. 21.

North Carolina. — State *v.* Byrd, 121 N. C. 684, 28 S. E. 353.

Ohio. — State *v.* Gardiner, Wright 392; Bailus *v.* State, 16 Ohio Cir. Ct. 226.

Oregon. — State *v.* Lee, 7 Or. 237.

Pennsylvania. — McLain *v.* Com., 99 Pa. St. 86; Ortwein *v.* Com., 76 Pa. St. 414, 18 Am. Rep. 420.

South Carolina. — State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575.

Tennessee. — Persons *v.* State, 90 Tenn. 291, 16 S. W. 726; Poe *v.* State, 10 Lea 673.

Texas. — Heard *v.* State, 24 Tex. App. 103, 5 S. W. 846; Lane *v.* State, 19 Tex. App. 54; Williams *v.* State, 15 Tex. App. 401; Brown *v.* State, 23 Tex. 214, 4 S. W. 588.

Vermont. — State *v.* Meyer, 58 Vt. 457, 3 Atl. 195.

Virginia. — Tilley *v.* Com., 90 Va. 99, 17 S. E. 895; Hatchett *v.* Com., 76 Va. 1026.

Washington. — Miller *v.* Territory, 3 Wash. Ter. 554, 19 Pac. 50.

West Virginia. — State *v.* Straudder, 11 W. Va. 745, 27 Am. Rep. 606.

Wyoming. — Cornish *v.* Territory, 8 Wyo. 95, 3 Pac. 793.

13. State *v.* Murphy, 6 Ala. 845; State *v.* King, 20 Ark. 166; Stewart *v.* State, 44 Ind. 237; Sowder *v.* Com., 8 Bush (Ky.) 432; Vandeventer *v.* State, 38 Neb. 592, 57 N. W. 397; State *v.* Hicks, 125 N. C. 636, 34 S. E. 247; Fuller *v.* State, 12 Ohio St. 433.

14. People *v.* Chun Heong, 86 Cal. 329; 24 Pac. 1021. Defendant is entitled to reasonable doubt as to degree of crime charged, whether

and jury should acquit of any grade of offense touching which they have any reasonable doubt, and convict of any grade of offense touching which they have none.[15]

B. Individual Juror. — Each juror must be satisfied beyond a reasonable doubt before he can convict,[16] and jury cannot find a defendant not guilty unless every one of them has a reasonable doubt of his guilt.[17]

C. Elements of Offense. — A reasonable doubt as to any material element of a crime, or any essential fact will inure to benefit of accused,[18] as for example, the corpus,[19] intent,[20] identity,[21]

arising in case for prosecution or defense. Payne *v.* Com., 1 Metc. (Ky.) 370.

15. Ramsey *v.* State, 92 Ga. 53, 17 S. E. 613. Where a reasonable doubt is entertained as to two degrees, jury should find lowest. Newport *v.* State, 140 Ind. 299, 39 N. E. 926.

16. People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; Castle *v.* State, 75 Ind. 146; Carter *v.* State, 103 Ala. 93, 15 So. 893; United States *v.* Schneider, 21 D. C. 381.

Concurrent minds of jury of twelve men should be satisfied beyond reasonable doubt to justify conviction. Brown *v.* State, 23 Tex. 214, 4 S. W. 588. If individual juror has a reasonable doubt of defendant's guilt he should not convict, and an instruction that if part of jury believed defendant not guilty there could be no verdict is proper. Fassinow *v.* State, 89 Ind. 235.

Instruction susceptible of being so construed as to require jury to convict, unless each individual juror shares reasonable doubt of defendant's guilt, is error. State *v.* Stewart, 52 Iowa, 284, 3 N. W. 99.

17. Whatley *v.* State (Ala.), 39 So. 1014.

Instruction that if any one of the jury entertains a reasonable doubt of the guilt of accused they should acquit, properly refused. Boyd *v.* State, 33 Fla. 316, 14 So. 836.

It is not a reasonable doubt entertained by one juror that justifies acquittal, but a reasonable doubt entertained by jury. State *v.* Rorabacher, 19 Iowa 154.

18. Henson *v.* State, 112 Ala. 41, 21 So. 79; Lawless *v.* State, 4 Lea (Tenn.) 173; State *v.* Hamilton, 13 Nev. 386; State *v.* Meyer, 58 Vt. 457, 3 Atl. 195; United States *v.* Wright, 16 Fed. 112.

19. Corpus. — A jury ought not to convict of murder unless the dead body be seen and identified, or unless the circumstances be such as to leave no reasonable doubt as to fact. State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137. See Article "Corpus Delicti," Vol. III.

Corpus delicti must be proved beyond reasonable doubt by other than confession of accused. State *v.* Lalyer, 4 Minn. 277, 286.

20. See article "Intent," Vol. VII, State *v.* Seymour, 1 Houst. Cr. (Del.) 508; Guilford *v.* State, 24 Ga. 315; State *v.* Porter, 34 Iowa 131; Roberts *v.* People, 19 Mich. 401; Cherry *v.* State (Miss.), 20 So. 837; Coffee *v.* State, 3 Yerg. (Tenn.) 283, 24 Am. Dec. 570.

Where malice is a necessary ingredient in offense charged, in such case, if jury have reasonable doubt of the malicious intent with which act was done, that doubly must weigh in favor of prisoner.

21. See article "Identity," Vol. VI. Williams *v.* State, 130 Ala. 31, 30 So. 336; Com. *v.* Cunningham, 104 Mass. 545; People *v.* Smith, 7 N. Y. Supp. 841; State *v.* Telfair, 109 N. C. 878, 13 S. E. 726; Garcia *v.* State, 23 Tex. App. 712, 5 S. W. 186; People *v.* Woody, 45 Cal. 289; Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

It is of as much importance to establish that the accused was the perpetrator of the crime as to establish the *corpus delicti*. Glover *v.* State, 114 Ga. 828, 40 S. E. 998.

sanity,[22] age[23] and other facts necessary to establish the charge.[24]

D. Accessory. — If there is a reasonable doubt of the guilt of principal, defendant cannot be held guilty as accessory, and court must charge on reasonable doubt of guilt of principal as well as to that of accessory.[25]

E. Circumstantial Evidence. — a. *In General.* — Circumstantial evidence which is relied upon for conviction must be sufficient to exclude every reasonable hypothesis other than that of the guilt of the accused.[26]

Though positively proved that one of two or more persons committed crime yet if it is uncertain which is guilty party all must be acquitted. Campbell *v.* People, 16 Ill. 17, 61 Am. Dec. 49.

22. Sanity. — See article "Insanity," Vol. VII. Gristig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408. See *contra*, Webb *v.* State, 9 Tex. Crim. 490; King *v.* State, 9 Tex. Crim. 515. Strong dissenting opinion in Texas cases next preceding; intent being essential ingredient of crime, and sanity indispensable to intent, where evidence for the defense has overcome the presumption of sanity state must prove that fact beyond reasonable doubt.

23. Age. — State *v.* Cougot, 121 Mo. 458, 26 S. W. 566; Foltz *v.* State, 33 Ind. 215; Wilcox *v.* State, 32 Tex. Crim. 284, 22 S. W. 1109.

24. Abortion. — In prosecution for death resulting from abortion performed, the pregnancy of deceased must be proved beyond a reasonable doubt. State *v.* Alcorn, 7 Idaho 599, 64 Pac. 1014, 97 Am. St. Rep. 252.

Seduction. — Instruction in seduction case that a reasonable doubt is raised if a single fact is proven which is inconsistent with defendant's guilt is misleading, as tending to lead jury to believe that defendant has the burden of proving that he did not have sexual intercourse with prosecutrix. State *v.* Judiesch, 96 Iowa 249, 65 N. W. 157.

25. Poston *v.* State, 12 Tex. Crim. 408.

See article "Accessories," Vol. I.

26. *Alabama.* — Chisolm *v.* State, 45 Ala. 66.

Delaware. — State *v.* Goldsborough, 1 Houst. Cr. 302.

Florida. — Kennedy *v.* State, 31 Fla. 428, 12 So. 858.

Georgia. — Hamilton *v.* State, 96 Ga. 301, 22 S. E. 528.

Indiana. — Wantland *v.* State, 145 Ind. 38, 43 N. E. 931.

Idaho. — State *v.* Levy, 9 Idaho 75 Pac. 227.

Kansas. — State *v.* Hunter, 50 Kan. 302, 32 Pac. 37.

Kentucky. — Sumner *v.* State, 5 Blackf. 579, 36 Am. Dec. 561.

Louisiana. — State *v.* Vinson, 37 La. Ann. 792.

Michigan. — People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Nebraska. — Morgan *v.* State, 51 Neb. 672, 71 N. W. 788.

Texas. — Williams *v.* State, 41 Tex. 209; Barnes *v.* State, 41 Tex. 342; Black *v.* State, 1 Tex. App. 368.

Circumstances must be absolutely inconsistent with any other hypothesis than that of the guilt of the accused. Cohen *v.* State, 32 Ark. 226; State *v.* Johnson, 19 Iowa 230; State *v.* Collins, 20 Iowa 85.

Though circumstances should tend to exclude every other supposition inconsistent with defendant's guilt, it need not be such as to show it to be impossible that any other person could have committed the crime. James *v.* State, 45 Miss. 572.

It is not sufficient that circumstances proved are consistent with and render probable the hypothesis sought to be established, but they must exclude beyond reasonable doubt every other hypothesis except that one. State *v.* Terrio, 98 Me. 17, 56 Atl. 217.

True test to determine value of circumstantial evidence in respect to its sufficiency to warrant conviction, is

b. *Each Fact or Circumstance.* — **(1.) Essential Fact.** — Each essential fact in chain of circumstance must be found by jury beyond reasonable doubt in order to convict,[27] and all facts must be consistent with each other and with the main fact to be proved;[28] circumstances must be so linked together as to constitute a perfect chain.[29] The decisions are not, however, free from some conflict

not whether the proof establishes circumstances which are consistent or which coincide with hypothesis of guilt, but whether circumstances satisfactorily established are of so conclusive a character and point so surely and unerringly to guilt as to exclude every hypothesis of innocence. Cavender *v.* State, 126 Ind. 47, 25 N. E. 875.

27. *California.* — People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

Florida. — Gavin *v.* State, 42 Fla. 553, 29 So. 405.

Kansas. — State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

Michigan. — People *v.* Stewart, 75 Mich. 21, 42 N. W. 662.

Montana. — State *v.* Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

Nevada. — State *v.* Maher, 25 Nev. 465, 62 Pac. 236.

North Carolina. — State *v.* Crane, 116 N. C. 530, 15 S. E. 231; State *v.* Messimer, 75 N. C. 385.

Oklahoma. — Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077; Mahaffey *v.* Territory, 11 Okla. 213, 66 Pac. 342.

In cases of purely circumstantial evidence, if any of the facts or circumstances established be absolutely inconsistent with hypothesis of guilt, that hypothesis cannot be true. People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

A few or a multitude of facts proved, all consistent with supposition of guilt are not enough to warrant conviction; circumstances must all concur to show that prisoner committed crime, and must all be inconsistent with any other rational conclusion. Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 499.

A distinction is drawn between a circumstance proven and a necessary link, and if jury has any reasonable doubt about any one of the necessary facts or links they should acquit. People *v.* Stewart, 75 Mich. 21, 42 N. W. 662; People *v.* Willett, 105 Mich. 110, 62 N. W. 1115.

Various Independent Circumstances. — Where each circumstance relied upon by state is a necessary link, an instruction that each circumstance must be established beyond a reasonable doubt is proper; but where various independent circumstances are relied upon to establish a fact, jury must be satisfied upon whole evidence of guilt. State *v.* Crane, 110 N. C. 530, 15 S. E. 231.

28. Each fact in chain of facts from which the main fact in issue is to be inferred must be proved by same weight and force of evidence as if that one were the main fact in issue, and all facts must be consistent with each other and main fact to be proved. Harrison *v.* State, 6 Tex. Crim. 42; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

29. Lawless *v.* State, 4 Lea (Tenn.) 173.

Where independent facts and circumstances are relied upon to identify accused as the person who committed the crime, each material independent fact or circumstance necessary to complete the chain or series of independent facts or circumstances tending to establish a presumption of guilt should be established to same degree of certainty as the main fact. People *v.* Ah Chung, 54 Cal. 398.

Every material fact essential to constitute defendant's guilt must be proved beyond a reasonable doubt. But these facts may be proved by evidence or circumstances, some of much and others of little weight, resting on the testimony of different degrees of credibility and intelligence; there may be links when separately considered about which there are reasonable doubts, but where entire evidence is considered, each link

on the principle that every circumstance must be proved beyond reasonable doubt.[30]

(2.) Subsidiary Evidence. — The doctrine of reasonable doubt, as a rule, has no application to mere matters of subsidiary evidence, taken item by item, which may aid in proving essential facts.[31]

2. Defense. — Subject to a few exceptions, mostly among the earlier cases,[32] the doctrine of reasonable doubt applies alone to criminative facts, and exculpatory facts need not be believed be-

strengthens every other link, and thus there may be a complete chain of evidence, satisfying beyond reasonable doubt of guilt. Bressler *v.* People, 117 Ill. 422, 8 N. E. 62.

Facts Arranged Linkwise. — While it is not necessary that each essential fact in chain of circumstance solely relied on when separately considered should be found beyond reasonable doubt, yet if conviction depends entirely upon circumstances arranged linkwise, each and every link must be established beyond a reasonable doubt. State *v.* Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

30. It is sufficient if evidence as a whole satisfies jury beyond reasonable doubt; proof of each link in chain is not necessary. Siebert *v.* People, 143 Ill. 571, 32 N. E. 431.

Jury need not be satisfied of every link in chain necessary to establish guilt; it is a reasonable doubt arising from consideration of whole evidence which entitles defendant to acquittal. State *v.* Hayden, 45 Iowa 11. See also Clare *v.* People, 9 Colo. 122, 10 Pac. 799; Graves *v.* People, 18 Colo. 170, 32 Pac. 63.

31. The doctrine of reasonable doubt is applicable only to the constituent elements of the crime of which the accused is charged, and to facts or group of facts which constitute the entire proof of the material or elementary facts. The subsidiary and evidentiary facts which are not essential elements of the crime when considered as a whole though they tend to prove or disprove the existence of one or more primary facts necessary to make out the offense, need not be proved beyond a reasonable doubt. Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Rains *v.* State, 152 Ind. 69, 52 N. E. 450; Osburn *v.* State, 164 Ind. 262, 73 N. E. 601; Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; Hauk *v.* State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; Wade *v.* State, 71 Ind. 535.

Illustration. — Proof of malice may consist of declarations claimed to have been made at different times and places. Each declaration may be evidence of a single witness. Each witness may be to some extent discredited and a reasonable doubt thrown on his testimony, standing alone, and yet the combined effect of the testimony of all the witnesses may constitute proof beyond a reasonable doubt of alleged ultimate fact of malice or premeditation, which the testimony of each of the witnesses standing by itself is in some degree doubtful, yet, all viewed together, each has reference to a declaration distinct from all the others; they become mutually corroborative and constitute, within the meaning of criminal law, indubitable proof of the final inference.

An illustration is furnished in the question of the presence at, or absence of the accused from the place at time of homicide or other offense charged. A number of witnesses may each testify to having seen the accused, at or near the time of the commission of the crime. Each witness speaks independently of each other, and saw the accused at a different time, near or far from the time when he was seen by the other witnesses, and the testimony of each witness is shown to be in some degree and for some reason doubtful. Now the seeing and recognition of the accused at the place testified to by each witness, are facts to be considered against the accused, but they are not each, nor any of them when considered separately, proven true beyond reasonable doubt. Wade *v.* State, 71 Ind. 535.

32. See note 38.

yond a reasonable doubt in order that defendant may be acquitted.[33]

Mitigation, Excuse or Justification, it is held by some courts, must be established by preponderance of evidence, as in civil cases;[34] others that evidence is sufficient which raises a reasonable doubt as to whether act was justified or not.[35]

Good Character may be sufficient to generate a doubt when considered in connection with other evidence.[36]

Alibi. — If upon the whole evidence, including that offered by prosecution, as well as that adduced in support of plea of alibi, a reasonable doubt is raised as to the guilt of accused he is entitled to acquittal.[37]

33. Dyson *v.* State, 13 Tex. Crim. 402 and following notes.

34. People *v.* Tidwell, 5 Utah 88, 12 Pac. 638; Territory *v.* Edmonson, 4 Mont. 141, 1 Pac. 738; State *v.* Pierce, 8 Nev. 291; State *v.* Bertrand, 3 Or. 61; State *v.* Ballou, 21 R. I. 607, 40 Atl. 861.

Self-Defense Evidence Must Preponderate in Support of Plea. United States *v.* Crow, 3 Dak. 106, 14 N. W. 437; Weaver *v.* State, 24 Ohio St. 584; State *v* Ballou, 20 R. I. 607, 40 Atl. 861; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613.

35. Evidence raising a reasonable doubt as to whether it was justifiable is sufficient. Morgan *v.* State, 16 Tex. App. 593, *overruling* Sharp *v.* State, 6 Tex. App. 650; People *v.* Marshall, 112 Cal. 422, 44 Pac. 718.

Self-Defense. — If evidence raises a reasonable doubt conviction is not justified.

Lewis *v.* State, 120 Ala. 339, 25 So. 43; People *v.* Bushton, 80 Cal. 160, 22 Pac. 127, 549, *overruling* People *v.* Hong Ah Duck, 61 Cal. 387; Lamar *v.* State, 63 Miss. 265; People *v.* Downs, 123 N. Y. 558, 25 N. E. 988; Com. *v.* Drum, 58 Pa. St. 9; State *v.* Hutto, 66 S. C. 449, 45 S. E. 13; State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

36. Pate *v.* State, 94 Ala. 14, 14 So. 665.

37. *Alabama.* — Albritton *v.* State, 94 Ala. 76, 10 So. 426; Pate *v.* State, 94 Ala. 14, 10 So. 665; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28.

Arkansas. — Ware *v.* State, 59 Ark. 379, 27 S. W. 486.

California. — People *v.* Fong Ah Sing, 64 Cal. 253, 28 Pac. 233.

Colorado. — Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519.

Illinois. — Ackerson *v.* People, 124 Ill. 563, 16 N. E. 847.

Indiana. — Fleming *v.* State, 136 Ind. 149, 36 N. E. 154.

Iowa. — State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

Louisiana. — State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678.

Michigan. — People *v.* Pearsall, 50 Mich. 233, 15 N. W. 98.

Mississippi. — Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703.

Montana. — State *v.* McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 450.

Nebraska. — Henry *v.* State, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450.

Nevada. — State *v.* Waterman, 11 Nev. 453.

New Mexico. — Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968.

New York. — People *v.* Stone, 117 N. Y. 480, 23 N. E. 13.

Oklahoma. — Wright *v.* Territory, 5 Okla. 78, 47 Pac. 1069, *following* Shoemaker *v.* Territory, 4 Okla. 118, 43 Pac. 1059.

South Carolina. — State *v.* Jackson, 36 S. C. 487, 15 S. E. 559, 31 Am. St. Rep. 890.

South Dakota. — State *v.* Thornton, 10 S. D. 349, 73 N. W. 196, 41 L. R. A. 530.

Tennessee. — Chappel *v.* State, 47 Tenn. 92.

Vermont. — State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

West Virginia. — State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

Wisconsin. — Emery *v.* State, 101 Wis. 627, 78 N. W. 145.

Insanity, as a defense, by a few courts is required to be established beyond a reasonable doubt,[38] but the overwhelming weight of authority is, that defendant should be acquitted where the evidence raises a reasonable doubt,[39] or where it preponderates in his favor.[40]

3. Civil Actions. — A. In General. — In a few jurisdictions, in certain statutory or other special proceedings of a quasi-criminal nature, that is, such as are civil in form, but criminal in nature and

While as a distinct issue an alibi must be established by preponderance of evidence, yet if evidence offered to show, it falls short of this in weight, nevertheless such evidence is for the consideration of the jury; and if upon the whole case including that part pertaining to alibi, they have a reasonable doubt of guilt he should be acquitted. State *v.* Maher, 74 Iowa 77, 37 N. W. 2.

38. Must be proved beyond reasonable doubt as a defense. State *v.* Brinyea, 5 Ala. 241. See *contra*, Parrish *v.* State (Ala.), 36 So. 1012; State *v.* Marler, 2 Ala. 43, 36 Am. Dec. 398; State *v.* Pratt, 1 Houst. Cr. (Del.) 249. *Contra*, State *v.* Thomas, 1 Houst. Cr. (Del.) 511; State *v.* Rance, 34 La. Ann. 186, 44 Am. Rep. 426; State *v.* Spencer, 21 N. J. L. 196, 46 Am. Rep. 778.

39. *Alabama.* — State *v.* Marler, 2 Ala. 43, 36 Am. Dec. 398.

Colorado. — Jones *v.* People, 23 Colo. 276, 47 Pac. 275.

Delaware. — State *v.* Reidell, 9 Houst. 470, 14 Atl. 550.

Florida. — Armstrong *v.* State, 30 Fla. 120, 11 So. 618, 17 L. R. A. 484.

Georgia. — Anderson *v.* State, 42 Ga. 9.

Illinois. — Lilly *v.* People, 148 Ill. 467, 36 N. E. 95.

Indiana. — Plummer *v.* State, 135 Ind. 308, 34 N. E. 968.

Kansas. — State *v.* Nixon, 32 Kan. 205, 4 Pac. 159.

Michigan. — People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Mississippi. — Ford *v.* State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

Montana. — State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

Nebraska. — Knights *v.* State, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78.

New Hampshire. — State *v.* Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

New Mexico. — Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

New York. — People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275.

South Carolina. — State *v.* Coleman, 20 S. C. 441.

Tennessee. — King *v.* State, 91 Tenn. 617, 20 S. W. 169.

Wisconsin. — Revoir *v.* State, 82 Wis. 295, 52 N. W. 84 (by statute).

40. Insanity May Be Established by Preponderance of Evidence. *Alabama.* — Parrish *v.* State, 36 So. 1012.

Arkansas. — Cavaness *v.* State, 43 Ark. 331.

California. — People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093.

Georgia. — Keener *v.* State, 97 Ga. 388, 24 S. E. 28.

Idaho. — People *v.* Walter, 1 Idaho 386.

Illinois. — Sprague *v.* Dodge, 48 Ill. 142, 95 Am. Dec. 523.

Iowa. — State *v.* Thiele, 119 Iowa 659, 94 N. W. 256.

Kentucky. — Moore *v.* Com., 92 Ky. 630, 18 S. W. 833.

Maine. — State *v.* Lawrence, 57 Me. 574.

Massachusetts. — Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Missouri. — State *v.* Wright, 134 Mo. 404, 35 S. W. 1145.

Nevada. — State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey. — Graves *v.* State, 45 N. J. L. 347, 46 Am. Rep. 778.

North Carolina. — State *v.* Davis, 109 N. C. 780, 14 S. E. 55.

effect,[41] and where a criminal charge is made in a civil proceeding, proof beyond reasonable doubt is required.[42]

B. Penalty and Forfeiture. — In proceedings to recover double damages, and for forfeiture for presenting a false claim against the United States government[43] by impounder to recover penalty under statute against owner of animal for not redeeming or replevying,[44] under satute to recover treble value for property feloniously taken,[45] proof must be beyond a reasonable doubt.

C. Bastardy. — In proceedings under bastardy act, the paternity of the child, being a material issue, must be found on evidence placing it beyond a reasonable doubt.[46]

D. Usury. — Strict proof of usury will be required.[47]

E. Criminal Charge In Civil Proceedings. — Where in a civil suit a criminal offense is charged in the pleadings, such charge must be proved beyond a reasonable doubt.[48] But the charge must be set out in the pleadings and issue joined thereon.[49]

41. *United States.* — Chaffee *v.* United States, 18 Wall. 516; United States *v.* Shapleigh, 54 Fed. 126.

Connecticut. — Munson *v.* Atwood, 30 Conn. 102.

Maine. — Sinclair *v.* Jackson, 47 Me. 102, 74 Am. Dec. 476; Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406.

Missouri. — Town of Glenwood *v.* Roberts, 59 Mo. App. 167.

New Jersey. — Warwick *v.* Marlatt, 25 N. J. Eq. 188.

Vermont. — Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646. *Contra,* Burnett *v.* Ward, 42 Vt. 80.

Wisconsin. — Baker *v.* State, 47 Wis. 111, 2 N. W. 110.

42. See Note 46.

43. United States *v.* Shapleigh, 54 Fed. 126. See Chaffee *v.* United States, 18 Wall. (U. S.) 516.

Penalty for violation of town ordinance requires full proof. Ewbanks *v.* Town of Ashley, 36 Ill. 177; Town of Glenwood *v.* Roberts, 59 Mo. App. 167.

44. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646. See Burnett *v.* Ward, 42 Vt. 80.

45. Munson *v.* Atwood, 30 Conn. 102.

46. Baker *v.* State, 47 Wis. 111, 2 N. W. 110.

47. Warwick *v.* Marlatt, 25 N. J. Eq. 188.

48. Sinclair *v.* Jackson, 47 Me. 102, 74 Am. Dec. 476; Butman *v.* Hobbs, 35 Me. 227; Kane *v.* Hibernia Mut. F. Ins. Co., 9 N. J. L. 441, 20 Am. Rep. 409. To fasten upon a man a heinous act requires stronger proof than to fasten an indifferent one. Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406.

49. Sinclair *v.* Jackson, 48 Me. 10, 74 Am. Dec. 476; Sprague *v.* Dodge, 48 Ill. 142, 95 Am. Dec. 523.

REBUTTAL.

I. THE ORDER OF EVIDENCE IN GENERAL.

1. Usual Rules. — The Original Case. — Upon the trial of a civil or criminal action, it is the usual rule that the complainant (by whom is meant in this article the person or party who has the affirmative of the principal issue or issues involved) shall first introduce all the evidence tending to sustain such issue or issues, and that the defendant shall then put in such evidence as is properly receivable to destroy the force of the complainant's case, together with all such other evidence as may tend to sustain any affirmative issue or issues raised by the defendant in avoidance of the complainant's demand. Such evidence as is put in by the complainant in opening his case constitutes the complainant's original case, or case in chief; that put in by the defendant in opening his case constitutes his original case, or case in chief.[1]

1. *England.* — Braydon *v.* Goulman, 1 Man. 115.

Arkansas. — Sandels & H. Dig. of Stat. 1894, § 5820 (civ. causes), same, §§ 2222 and 2223 (crim. causes).

California. — Code Civ. Proc. § 607 (civ. causes), Penal Code, § 1093 (crim. causes).

Connecticut. — Hathaway *v.* Hemingway, 20 Conn. 191.

Idaho. — Code Civ. Proc. § 3464 (civ. causes), Penal Code § 5448 (crim. causes).

Illinois. — Mueller *v.* Rebhan, 94 Ill. 142 (the court holding that it is not true in Illinois that the party on whom rests the burden of proof is only required to put in sufficient evidence in the first instance to make a *prima facie* case).

In putting in his original case, the complainant is not required to anticipate the defendant's possible affirmative defensive issues by giving evidence in rebuttal thereof,[2] nor is it proper for him

Indiana. — Burns' Anno. Stat. 1901, § 1892 (crim. causes); Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433.

Iowa. — Manning *v.* Burlington C. R. & N. R. Co., 64 Iowa 240, 20 N. W. 169 (thus in an action for personal injuries, the plaintiff is required to introduce all the evidence he has tending to show his injury and the extent of it at the time of giving his evidence in chief).

Louisiana. — State *v.* Pruett, 49 La. Ann. 283, 21 So. 842 (in a criminal cause, the state should at once offer on its side all the evidence which it has, and not reserve its real or main attack until after defendant has closed his case); State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

Massachusetts. — Cushing *v.* Billings, 2 Cush. 158 ("The orderly course of proceeding requires that the party, whose business it is to go forward, should bring out the strength of his proof in the first instance").

Missouri. — Rev. Stat. 1899, § 2627 (crim. causes).

Nebraska. — Cobbey's Anno. Stat. 1903, § 2613 (crim. causes).

Nevada. — McLeod *v.* Lee, 17 Nev. 103, 119, 28 Pac. 124 ("As a general rule, a plaintiff who has introduced witnesses in chief upon any given point, should produce all of his testimony upon that point before he closes his case").

New York. — Code Crim. Proc. § 388 (Rev. Stat. Codes & Gen. L. p. 3841, § 262) (crim. causes); Marshall *v.* Davies, 78 N. Y. 414 ("No rule for the conduct of a trial is more familiar than that the party holding the affirmative is bound to introduce all the evidence on his side before he closes. . . . He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard"); Ford *v.* Niles, 1 Hill 300; Hastings *v.* Palmer, 20 Wend. 225.

North Dakota. — Rev. Codes 1905, § 7020 (civ. causes); same, § 9984 (crim. causes).

Ohio. — Bates' Anno. Stat. (6th ed.) § 7300 (crim. causes); Graham *v.* Davis, 4 Ohio St. 362, 381.

Oklahoma. — Rev. & Anno. Stat. 1903, § 4462 (civ. causes); same, § 5484 (crim. causes).

Oregon. — Code Civ. Proc. 1902, § 132 (civ. causes); State *v.* Hunsaker, 16 Or. 497, 19 Pac. 605 (crim. causes).

Utah. — Rev. Stat. 1898, § 3147 (civ. causes); same, § 4845 (crim. causes).

Vermont. — Stevens *v.* Dudley, 56 Vt. 158. (At an earlier period, in this state, however, the rule prevailed that the plaintiff was entitled to rest upon making a *prima facie* case, and after the defendant had rested, was authorized to introduce further testimony in support of his principal case, as well as evidence in rebuttal of defendant's defenses. The defendant in opening was required to put in all his testimony in answer to plaintiff's principal case, but where in defense the defendant set up affirmative issues in avoidance, it was his right in his case in chief to put in only sufficient evidence in respect to them to make a *prima facie* case, and then after the plaintiff's case in rebuttal had been given, to put in such additional evidence on his affirmative defenses as he should deem expedient.) Kent *v.* Lincoln, 32 Vt. 591; Goss *v.* Turner, 21 Vt. 437. See also Clayes *v.* Ferris, 10 Vt. 112.

Washington. — Codes & Stat. 1897, § 4993 (civ. causes).

Wisconsin. — McGowan *v.* Chicago & N.-W. R. Co., 91 Wis. 147, 64 N. W. 891.

Wyoming. — Rev. Stat. 1899, § 5371 (crim. causes); Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

2. Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556 (crim. cause).

"Strictly, the plaintiff, or party holding the affirmative, is bound, in the first instance, to introduce all the evidence on his side, *except that which operates merely to answer or qualify the case as it is sought to be made out by his adversary's proof.*"

to do so, although the trial court may in its discretion permit it.[3] In England, it appears that a different rule prevails.[4]

Rebuttal. — By evidence in rebuttal is meant such evidence as is introduced by the complainant immediately after the defendant has closed his original case. Evidence tending to explain the complainant's case as already made, to sustain the credibility of his own witnesses, to impeach the credibility of the evidence put in by defendant, or to destroy the force of the affirmative case made by the defendant for the purpose of avoiding the complainant's demand is termed "evidence strictly in rebuttal."[5]

(Italics ours.) Hastings *v.* Palmer, 20 Wend. (N. Y.) 225.

"The plaintiff, or party holding the affirmative, must try his case out when he commences, and is bound to introduce all the evidence on his side, *except that which operates merely to answer, avoid, or qualify the case as made out by his adversary's proof.*" (Italics ours.) McGowan *v.* Chicago & N.-W. R. Co., 91 Wis. 147, 64 N. W. 891.

3. Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289.

4. "When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel may, if they please, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into *any* evidence which goes to destroy the effect of the justifications, by way of anticipating the defence; or they may, if they please, content themselves with proving the fact on the general issue, and then close their case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply, as to the justifications." Pierpont *v.* Shapland, 1 Car. & P. (Eng.) 447.

In actions of libel "the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff in the outset, thinks fit to call any evidence to repel the justification, then, I am of opinion, that he should go through *all* the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply. It is much more convenient for the due administration of justice that this course should be adopted, otherwise there will be no end to evidence on either side, as the defendant would be entitled to call witnesses to answer those last produced by the plaintiff to rebut the justification." Browne *v.* Murray, Ry. & M. (Eng.) 254.

5. That it is proper for complainant to put in further evidence after defendant has rested his original case, see, Braydon *v.* Goulman, 1 Man. (Eng.) 115; Mueller *v.* Rebhan, 94 Ill. 142, Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433; Marshall *v.* Davies, 78 N. Y. 414; Ford *v.* Niles, 1 Hill (N. Y.) 300. See also the statutes cited in note 1, *ante*.

Instances of Evidence in Rebuttal. Where in defense of an action on a partnership liability defendant puts in the declarations of the other defendants that there was no partnership, it is proper to permit plaintiff to put in their counter declarations. Nelson *v.* Lloyd, 9 Watts (Pa.) 22.

In an action for ejectment, where plaintiff claims certain land of a decedent as the representative of the devisees thereof under the decedent's will, and defendant, who was one of the devisees, claimed it in exclusion of the other devisees his rightful tenants in common, and defendant put in evidence in defense that he held it for the benefit of his cotenants as well as his own, it is proper to permit plaintiff to show in rebuttal defendant's declaration that he claimed the land as his own and that the alleged cotenants had no claim to it at all. Gallaher *v.* Collins, 7 Watts (Pa.) 552.

Surrebuttal. — After the evidence in rebuttal has been put in, the defendant may in turn be permitted to again defend against the new subsidiary issues raised by plaintiff, by attacking the credibility of the evidence adduced by complainant in support of such issues, or by raising yet other subsidiary issues calculated to avoid the force of the subsidiary issues raised by the complainant. Evidence given by defendant for this purpose is termed "evidence in surrebuttal."[6]

Subsequent Stages. — It is clear that it is logically possible for this process of "confession and avoidance" to continue without limit, and that thus a trial might be indefinitely prolonged, each party in turn putting in new evidence; it is equally clear, however, that in practice the number of new subsidiary issues that can be raised in avoidance of those already brought in is rapidly exhausted and that it is rarely necessary that a trial should proceed beyond the stage of surrebuttal.[7]

In an action for negligently running down plaintiff's horse with defendant's train, where defendant puts in evidence that the engineer was looking ahead at the time of the accident but did not see the horse in time to avoid the injury, it is competent for plaintiff to show in rebuttal that a horse within twenty-five feet of the track could be seen for 1500 feet before the place of accident was reached. Borneman *v.* Chicago St. P. M. & O. R. Co. (S. D.), 104 N. W. 208.

6. Where the defendant in an action, after the plaintiff has made out a *prima facie* case and rested, does not attempt to disprove, or rebut, any fact which the plaintiff has proved, but introduces evidence under his pleas in bar, to establish an independent, substantive fact, showing a discharge of the claim which the plaintiff had shown against him, on such issue the defendant is obliged to take the affirmative. But in putting in such defense the defendant is not bound to anticipate what answer the plaintiff would or could make to it, but might content himself in the outset by establishing such defense *prima facie*, with the same right to sustain it by rebutting evidence in case it was attacked by the plaintiff, as the plaintiff had as to the issue when the affirmative ground belonged to the defendant. Goss *v.* Turner, 21 Vt. 437.

Instances of Evidence in Surrebuttal. — Where in an action for rent the defense was the abandonment of the lease by defendant with plaintiff's consent, and in support thereof defendant put in evidence that about the time the defendant abandoned the leased premises plaintiff treated with a third person for the lease of the premises to him, and plaintiff in rebuttal gave evidence that the negotiations with the third person were solicited by the third person in collusion with defendant to give color to his defense, the defendant in surrebuttal may properly put in the evidence of the third person that prior to his taking of a lease from plaintiff he had no conversation with defendant. Hill *v.* Robinson, 23 Mich. 24.

Where in an action on a note, the defendant in the course of his evidence in defense put in evidence of the consideration for the note, and plaintiff in rebuttal put in evidence that certain costs of suit were a part of the consideration, it would be proper for defendant in surrebuttal to put in evidence that the costs were not a part of the consideration and also to put in evidence a check which he testified was given in payment of the costs. Matlock *v.* Wheeler, 29 Or. 64, 43 Pac. 867, 40 Pac. 5.

7. Goss *v.* Turner, 21 Vt. 437. Where in his case in chief plaintiff calls the defendant as a witness, and afterwards in rebuttal calls another witness who testifies to an admission

2. Discretion Exercisable in Administration of Rules. — Object and Rigidity of Rules. — The object of the rules governing the order of the introduction of evidence on a trial is to promote the efficient administration of justice,[8] and the convenience of courts,[9] and except as of use in attaining these ends are of comparatively little moment.[10] Thus from their very nature they are subject to modifications and exceptions.[11] For the constantly varying circumstances surrounding different cases, and the haste and confusion frequently prevalent at jury trials, may often cause these rules, if enforced, to lead to unjust results.[12]

of defendant's at variance with his testimony, and defendant in surrebuttal explains such variant statement, it is not an abuse of the discretion of the trial court to refuse to permit the witness who testified in rebuttal to be recalled by plaintiff in rerebuttal to testify to another statement of defendant's. Brown *v.* Marshall, 120 Ind. 323, 22 N. E. 312.

8. State *v.* Pruett, 49 La. Ann. 283, 21 So. 842; King *v.* State, 74 Miss. 576, 21 So. 235; Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686.

9. Braydon *v.* Goulman, 1 Man. (Eng.) 115 (without this rule, confusion, loss of time, and captious and irritable conduct must follow); Jones *v.* Galbraith (Tenn.), 59 S. W. 350 (without this rule, the confusion in the examination of cases before a jury would be intolerable, and the prolixity of investigations interminable).

10. "The order of proof is a slight matter; . . . it is seldom that a case will be presented in which the judgment of the district court will be reversed because of the manner or order in which competent testimony is presented. If the testimony is such that a jury ought to consider it, the time or manner in which it is presented is of comparatively little moment. Only in an extreme case will it be held that the manner or order of presenting competent testimony violates a substantial right of either party." Blake *v.* Powell, 26 Kan. 320.

11. State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

"It certainly ought not to be the law that where evidence, though in chief, is omitted to be introduced in its proper place, it is forever lost to the party; for it is well settled that the order of introducing evidence, the time of its introduction, and whether a party shall introduce further evidence after that of the adverse party has been heard, is a matter within the discretion of the trial court." State *v.* Williams, 49 W. Va. 220, 38 S. E. 495.

"It should require a very strong case of threatened evil to justify a court in preventing a party from giving additional, confirmatory, cumulative, and corroborative evidence, either of facts previously proved, or which tends to strengthen, add force or probability to, such evidence." Walker *v.* Walker, 14 Ga. 242.

12. Goss *v.* Turner, 21 Vt. 437.

"Slight explanations will often explain apparent discrepancies, or exhibit a witness's truthfulness; and a court will not suffer truth to be smothered by form, when a discreet exercise of its power will prevent it." Koenig *v.* Bauer, 57 Pa. St. 168.

"It is sometimes necessary to examine a witness after the evidence is regularly closed; and it is important that a judge should have the power to allow it to be done. Such a proceeding may save the necessity of a new trial." "Suppose a great number of witnesses to be called to prove the genuineness of a signature; and when as many of them have testified as are necessary, in the opinion of the judge, to make a case, the court interferes and stops the further introduction of witnesses; if, then, as great or a greater number is called and introduced on the other side, to testify against the genuineness of the signature, the judge has a discretionary power to admit further witnesses to be called in its support." Cushing *v.* Billings, 2 Cush. (Mass.) 158.

Scope of Discretion. — No rules regulating the circumstances under which the rules relating to the order of evidence may be relaxed, have been formulated,[13] but their application at any stage of any particular trial is in every instance entrusted to the discretion of the trial court,[14] and the exercise of such discretion it is held will

13. "It is impossible to lay down any universal rule upon such a subject. Much must depend upon the posture and circumstances of the particular case." Wood *v.* United States, 16 Pet. (U. S.) 342, 361.

14. *England.* — Braydon *v.* Goulman, 1 Man. 115.

United States. — Atchison T. & S. F. R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314; Johnston *v.* Jones, 1 Black 209, 226; Wood *v.* United States, 16 Pet. 342, 361.

Alabama. — Southern R. Co. *v.* Wilson (Ala.), 35 So. 561.

Arkansas. — Sandels & H. Dig. of Stat. 1894, § 5820 (civ. causes); same § 2224 (crim. causes).

California. — Code Civ. Proc. § 607 (civ. causes); Penal Code § 1093 (crim. causes); Priest *v.* Union Canal Co., 6 Cal. 170.

Georgia. — Milam *v.* State, 108 Ga. 29, 33 S. E. 818; Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

Idaho. — Code Civ. Proc § 3464 (civ. causes); Penal Code §§ 5448 and 5449 (crim. causes).

Indiana. — Burns Anno. Stat. 1901, § 1892 (crim. causes); Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460 (in a prosecution for murder, where after the prosecution had closed its case it discovers some new evidence material to the case, it is not an abuse of discretion for the trial court to permit the introduction thereof in the midst of the presentation of defendant's case, where the court announced to the parties at the time that its introduction would open up the whole case).

Massachusetts. — Com. *v.* Meaney, 151 Mass. 55, 23 N. E. 730 (a court trying a criminal cause has power to permit competent evidence for the commonwealth at any stage of the trial, even after it had once rested its case); Holbrook *v.* McBride, 4 Gray 215; Com. *v.* Moulton, 4 Gray 39; Cushing *v.* Billings, 2 Cush. 158.

Michigan. — People *v.* Wilson, 55 Mich. 506, 515, 21 N. W. 905; Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

Mississippi. — Winterton *v.* Illinois Cent. R. Co., 73 Miss. 831, 20 So. 157.

Missouri. — Rev. Stat. 1899, § 2627 (crim. causes); Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164; Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

Nebraska. — Cobbey's Anno. Stat. 1903, § 2613 (crim. causes); Baer *v.* State, 59 Neb. 655, 81 N. W. 856; Ream *v.* State, 52 Neb. 727, 73 N. W. 227; Davis *v.* State, 70 N. W. 984, 997.

New York. — Code Crim. Proc. § 388 (Rev. Stat. Codes & Gen. L. pp. 3841-2, § 262) (crim. causes); Ford *v.* Niles, 1 Hill 300.

North Dakota. — Rev. Codes N. D. 1905, § 7020 (civ. causes); same §§ 9984 and 9989 (crim. causes).

Ohio. — Bates' Anno. Stat. (6th ed.) § 7300 (crim. causes); Webb *v.* State, 29 Ohio St. 351.

Oklahoma. — Rev. & Anno. Stat. 1903, § 4462 (civ. causes); same, § 5484 (crim. causes).

Oregon. — Code Civ. Proc. 1902, § 132 (civ. causes).

Pennsylvania. — Levers *v.* Van Buskirk, 4 Pa. St. 309, 317.

Tennessee. — Jones *v.* Galbraith, 59 S. W. 350.

Texas. — Burt *v.* State, 38 Tex. Crim. 397, 420, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305 (the trial court has the discretion to receive evidence until the argument has been concluded, whether in rebuttal or not. Thus it is not error to refuse to exclude evidence offered by the prosecution after defendant has rested, although not strictly in rebuttal).

Utah. — Rev. Stat. 1898, § 3147 (civ. causes); same, § 4845 (crim. causes); Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289.

be reviewed by the appellate court only in case of gross abuse.[15]

As Affected by Statutory Law. — Statutory rules regulating the order of evidence substantially as herein explained are to be construed as merely declaratory of the common law rules.[16]

3. In Chancery Proceedings. — In a chancery proceeding, where

Vermont. — State *v.* Magoon, 50 Vt. 333.

Washington. — Codes & Stat. 1897, § 4993 (civ. causes).

West Virginia. — State *v.* Williams, 49 W. Va. 220, 38 S. E. 495; McManus *v.* Mason, 43 W. Va. 196, 27 S. E. 293.

Wyoming. — Rev. Stat. 1899, § 5371 (crim. causes); Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

"This discretion should be exercised in such a manner that neither party shall be taken by surprise and deprived without notice of an opportunity of producing any material proof." Mueller *v.* Rebhan, 94 Ill. 142, 150.

15. *United States.* — Atchison T. & S. F. R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314 (prejudicial error must be made clearly apparent before an appellate court is justified in predicating error thereon).

Alabama. — Southern R. Co. *v.* Wilson (Ala.) 35 So. 561.

California. — Priest *v.* Union Canal Co., 6 Cal. 170.

Georgia. — Milam *v.* State, 108 Ga. 29, 33 S. E. 818 (to warrant a reversal it must appear that from the abuse of the discretion the plaintiff in error has lost some substantial right, which, if allowed, might have affected the verdict); Hunley *v.* State, 104 Ga. 755, 30 S. E. 958 (the mere fact that the trial judge in a criminal cause permitted the prosecution to open the case three times and the defendant twice, is not in itself an abuse of his discretion); Powell *v.* State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

Kansas. — Blake *v.* Powell, 26 Kan. 320.

Massachusetts. — Holbrook *v.* McBride, 4 Gray 215.

Michigan. — Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

Mississippi. — Winterton *v.* Illinois Cent. R. Co., 73 Miss. 831, 20 So. 157 (appellate courts should not interfere to reverse the exercise of this discretion by a trial court unless such exercise appears to have been had arbitrarily, capriciously, or unjustly).

Ohio. — Webb *v.* State, 29 Ohio St. 351 (The remedy for the abuse of such discretion is by a motion for a new trial. If reviewable on error at all, it is only, when taken in connection with all the evidence in the case, it is shown to have prevented the party from having a fair trial).

Pennsylvania. — Wilson *v.* Jamieson, 7 Pa. St. 126; Levers *v.* Van Buskirk, 4 Pa. St. 309, 317 (the exercise of this discretion cannot be made the subject of error in the appellate court).

Tennessee. — Jones *v.* Galbraith, 59 S. W. 350.

Utah. — Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289.

Vermont. — State *v.* Magoon, 50 Vt. 333 (error is not predicable unless it is manifest that the variance has operated to surprise, or in some way worked a legal disadvantage to the excepting party); Kent *v.* Lincoln, 32 Vt. 591 (the discretion cannot be reviewed on appeal); Goss *v.* Turner, 21 Vt. 437.

Virginia. — Reed *v.* Com., 98 Va. 817, 36 S. E. 399.

West Virginia. — State *v.* Williams, 49 W. Va. 220, 38 S. E. 495 (the exercise of the discretion will rarely, if ever, be ground for reversal).

The order of receiving evidence, even in a criminal cause, is a matter resting in the discreton of the trial court, provided the accused has a fair opportunity to meet the evidence produced against him. State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027.

16. Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556, § 388 of the New York Code of Crim. Proc., prescribing the order in which evidence shall be introduced and stating that the court.

the evidence is in the form of depositions and the case is tried without the intervention of a jury, the foregoing rules as to the order of evidence are not of much importance.[17]

II. REBUTTAL.

1. In General. — Kinds of Evidence on Rebuttal. — Two classes of evidence may be received on the stage of rebuttal: (1) evidence strictly in rebuttal, and (2) evidence not strictly in rebuttal, consisting usually of evidence merely cumulative or confirmatory of that put in on the original case. These two classes of evidence must be distinguished in considering the subject of evidence in rebuttal.[18]

The fact that evidence which directly tends to rebut the evidence for the defense also tends incidentally to confirm or sustain the

for good reason in furtherance of justice, may permit either party to offer evidence upon his original case after both sides have rested, was not intended to alter the common law rule, nor to require an affirmative showing of a good reason and that the admission of the evidence was in furtherance of justice to render the admission of the evidence sustainable on appeal. People *v.* Koener, 154 N. Y. 355, 48 N. E. 730; *quoted* with approval in People *v.* Benham, 160 N. Y. 402, 437, 55 N. E. 11.

Under the statute requiring the evidence in a cause to be introduced in a certain order, but providing that the court may for good reason in furtherance of justice, vary the order, it will not be regarded that any departures from the established order is erroneous unless the record shows sufficient reasons for such departure. The presumption is in favor of the correctness of the ruling of the trial court. Webb *v.* State, 29 Ohio St. 351.

Kentucky Rule. — Under § 220 of the Criminal Code requiring the state's counsel in a criminal cause to offer his evidence in chief in support of the indictment at the beginning of the trial, testimony in chief should be put in out of its regular order only where there is good cause therefor. So where a witness for the prosecution was present throughout the trial, but was not put on the stand until after the case for defendant had been closed and then testified to facts merely cumulative of those put in by the Commonwealth in the opening, the admission of his testimony is error. Oldham *v.* Com. (Ky.), 58 S. W. 418.

17. Jones *v.* Galbraith (Tenn.), 59 S. W. 350. The chancellor has all the record before him and can read it at his leisure before determining the cause.

18. See Glenn *v.* Stewart, 167 Mo. 584, 67 S. W. 237.

Evidence Strictly and Not Strictly in Rebuttal Distinguished. — In an action for being run down by a street car, where, after the plaintiff put in his evidence that the accident occurred at a certain place, defendant put in evidence that it occurred at another place, further evidence that the accident occurred at the place plaintiff claimed in the opening is not admissible as being strictly rebutting evidence, for defendant's evidence was merely a practical and vivid way of denying and breaking down plaintiff's statement as to the place of accident, in order to bring down the more material parts of the case with it. Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129.

By strictly rebutting evidence is meant "not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove." Marshall *v.* Davies, 78 N. Y. 414.

complainant's original case does not render it the less evidence strictly in rebuttal.[19]

Relevancy and Competency of Evidence in Rebuttal. — The same rules in general govern in respect to the relevancy and competency of evidence offered on rebuttal as are applicable at any other stage of a trial.[20]

Frequently, however, evidence becomes relevant on rebuttal by reason of the defenses interposed by defendant in his original case, that would not have been relevant on complainant's original case.[21]

19. Com. *v.* Moulton, 4 Gray (Mass.) 39 (where in the opening the commonwealth put in evidence that about the time a crime was committed defendant was seen to run from the building where it was committed, and in defense defendant gave evidence tending to prove an alibi; in rebuttal the state may show by another witness that the defendant so ran out); Ankersmit *v.* Tuch, 114 N. Y. 51, 20 N. E. 819, *reversing* same case under name of Ankersmit *v.* Bluxome, 48 Hun 1 (Daniels, J., *dissenting*), (where on rebuttal plaintiff offered certain declarations of defendant on a material point to impeach him, the fact that they might have been put in as substantive evidence on the opening does not render their exclusion proper); Stetson *v.* Croskey, 52 Pa. St. 230; State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027; McGowan *v.* Chicago & N. W. R. Co., 91 Wis. 147, 64 N. W. 891.

Contra. — Rex *v.* Hilditch, 5 Car. & P. (Eng.) 299 ("Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defense, without being any confirmation of the case on the part of the prosecution); Rex *v.* Stimpson, 2 Car. & P. (Eng.) 415.

20. In order that evidence in rebuttal may be relevant, it need not be essential. It may be cumulative, it may be supererogatory, and still be relevant. The point is not whether the evidence offered is the most convincing or persuasive, but whether it tends to cut down, limit, explain, or obviate the defense in any part of it, or to illustrate some legitimate answer to the defense. Comstock *v.* Smith, 20 Mich. 338, 348.

Where defendant in an action puts in evidence which is so connected with the chief transaction that was the subject of inquiry as not to be a matter wholly foreign to the issue on trial, it is competent for plaintiff to put in other evidence contradicting the same. Harrington *v.* Weselowski, 104 Mass. 184.

Where in an action on an account defendant read in evidence the credits in plaintiff's day-books in his favor, plaintiff is properly permitted to put in evidence the books. Dewey *v.* Hotchkiss, 30 N. Y. 497.

It is proper for the trial court to exclude irrelevant evidence when offered in rebuttal. Sontag *v.* Gooding, 85 Ill. 452.

Where as part of his defense defendant puts in evidence that plaintiff had not done the work well on a certain mill which he had constructed, it is error to permit plaintiff to put in evidence in rebuttal that he was a first-class carpenter and joiner. Maxted *v.* Fowler, 94 Mich. 106, 53 N. W. 921.

21. Illustrations. — In an action for negligently breaking plaintiff's wares, where defendant put in evidence that they belonged to a certain third person, the court permitted plaintiff in rebuttal to show that they did not belong to the third person. Whittingham *v.* Bloxham, 4 Car. & P. (Eng.) 597.

In a prosecution for murder, where defendant puts in evidence that the night was dark as showing the difficulty of identifying defendant, it is proper for the state in rebuttal to put in evidence as to whether the light of the flash of a revolver was sufficient to enable another to identify the person firing it. Fitzpatrick *v.* United States, 178 U. S. 304, 316.

Moreover, if the defendant in making his defense puts in evidence illegal for any cause, the complainant in rebuttal may properly rebut it by other evidence of like illegality;[22] thus if the de-

In a criminal cause, where defendant puts in evidence that he was present at a place distant from the place of crime at such time before its commission that he could not have had time to reach it over the public roads by the time of its commission and that the country was covered with wire fences preventing it from being reached by a more direct route, it is proper rebuttal to show that defendant was in possession of a wire cutter. Goldsby *v.* United States, 160 U. S. 70.

In an action for injuries to plaintiff's horse, caused by defendant negligently permitting his horse to run into plaintiff's, where defendant gives evidence that he loaned plaintiff a horse and paid his veterinary bill after the accident as an act of charity, plaintiff may properly show in rebuttal that defendant had sued him for the hire of his horse and the veterinary services. Bassett *v.* Shares, 63 Conn. 39, 27 Atl. 421.

Where in a prosecution for unlawfully selling intoxicating liquor on a certain occasion, defendant put in evidence of repeated refusals on his part to sell at other times, it is proper to permit the state to rebut said evidence. Barnes *v.* State, 20 Conn. 254.

In an action to recover half the cost of a party wall, where defendant gives evidence of an oral agreement between the parties that plaintiff should pay the entire cost, it is error to exclude, when offered in rebuttal, a writing showing that at the time of, and subsequent to, the alleged oral agreement no such agreement had been entered into. Marcus *v.* Dohany, 89 Iowa 658, 57 N. W. 427.

In an action for damages to plaintiff's person, property, and means of support from liquors sold by defendant to plaintiff's husband in two years last past, where defendant supported his defense with evidence that the husband had been a toper for years and long before defendant went into business, sales to the husband by defendant at times prior to the two years may be shown in rebuttal. Gustafson *v.* Wind, 62 Iowa 281, 17 N. W. 523.

In a prosecution for murder, where defendant's defense is that the fatal shot was fired by another, it is proper in rebuttal to prove that when the other returned the gun he had borrowed and which he had at the time of the homicide it had not been discharged. Gaines *v.* Com., 50 Pa. St. 319, 329.

Where in an action against a Sheriff for converting a mare which he levied on as the property of a third person, plaintiff proved ownership in himself, and defendant thereupon put in evidence of her transfer to a third person, it is error to exclude evidence offered by plaintiff in rebuttal tending to show that the third person had allowed the plaintiff to assert ownership in the mare in himself after the alleged transfer. Roberts *v.* Young, 42 Pa. St. 439.

In an action to recover damages for the taking of plaintiff's property for use by defendant railway, where defendant puts in evidence that the property taken was below low-water mark (and therefore not private property), it is proper to permit plaintiff in rebuttal to prove the contrary. Diedricks *v.* North W. Union R. Co., 47 Wis. 662, 3 N. W. 749.

Where accused in defense put in evidence of his own flushed and unnatural condition at times and that he never drank intoxicants (such evidence being offered to show that he was mentally unbalanced), the state in rebuttal might properly show that he drank intoxicants. Hoover *v.* State, 161 Ind. 348, 68 N. E. 591.

In an action for running a person down with a team, where defendant gives evidence that the teamster was a careful man in the management of teams, it is proper to permit plaintiff to show the teamster's reputation for being frequently intoxicated. Hudson *v.* Houser, 123 Ind. 309, 24 N. E. 243.

22. Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655.

Where in a prosecution for murder

fendant's evidence is irrelevant[23] or incompetent,[24] it is proper to rebut it with evidence of similar irrelevancy or incompetency. In some jurisdictions the introduction of such evidence seems to be a right of the complainant,[25] while in others its admission is discretionary with the trial court.[26] When once put in, the evidence given by either or both sides on such point will not be struck out

defendant puts in evidence of all the particulars of a former difficulty between himself and deceased. it is proper to permit the state to put in its version of the difficulty, although both items of evidence are illegal. Gordon *v.* State (Ala.), 30 So. 30.

Where evidence put in by the prosecution in a criminal cause is directly in rebuttal of that given by the defendant in his testimony in chief in his own behalf, an objection to it on the ground that it was illegal cannot be sustained. Winslow *v.* State, 92 Ala. 78, 9 So. 728.

Where certain facts were erroneously embodied in a hypothetical question put by defendant to its expert witness, the defendant having embodied them in his question cannot be heard to complain that the plaintiff pursued the same course of examination in rebuttal. Endowment Rank K. P. *v.* Steele (Tenn.), 69 S. W. 336.

23. McIntyre *v.* White (Ala.) 26 So. 937; Mobile & B. R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169 (where in an action for running down an ox with a train, defendant put in evidence that the night was very dark, and plaintiff, in rebuttal, evidence that there was a full moon and what was the time of its rising); Gandy *v.* State, 82 Ala. 61, 2 So. 465; Barnes *v.* State, 20 Conn. 254.

Hunt *v.* Lowell Gas Light Co., 3 Allen (Mass.) 418 (Where in an action for personal injury caused by an escape of illuminating gas into plaintiff's house, defendant put in evidence that it did not escape in great or dangerous quantities into houses in the vicinity of plaintiff's, it is proper to permit plaintiff to put in evidence of one of the residents in one of such houses in contradiction. For the evidence having been introduced by defendant for some purpose which it deemed to be of importance, must be considered to be material, and therefore subject to be refuted by showing the witness' contradictory statements or to be disproved by any competent countervailing proof).

Ransom *v.* Bartley, 70 Mich. 379, 38 N. W. 287; Stephens *v.* People, 19 N. Y. 549, 572; State *v.* Armstrong, 37 Wash. 51, 79 Pac. 490; Sisler *v.* Shaffer (W. Va.), 28 S. E. 721.

24. Ingram *v.* Wackernagel, 83 Iowa 82, 48 N. W. 998.

Where in an action for negligence defendant puts in evidence of subsequent repairs, the introduction by plaintiff on rebuttal of further evidence in reference to the matter will not justify interference with the verdict by the appellate court. Atchison T. & S. F. R. Co. *v.* Reesman, 60 Fed. 370, 9 C. C. A. 20.

Where defendant gives his version of a conversation relating to the transaction in suit, which would have been incompetent if offered by plaintiff in his case in chief, plaintiff in rebuttal is properly permitted to give his version of it. Bogk *v.* Gassert, 149 U. S. 17, 25.

Where defendant in a prosecution for assault with intent to kill put in evidence of his reputation for truth (which evidence was incompetent), it is not error for the state in rebuttal to be permitted to prove particular conduct of defendant tending to show low and immoral associations (which evidence is also incompetent). Morgan *v.* State, 88 Ala. 223, 6 So. 761.

See, also, Jefferson Min. Co. *v.* Anchoria-LeLand M. & M. Co. (Colo.), 75 Pac. 1070, 64 L. R. A. 925.

25. Hudson *v.* Houser, 123 Ind. 309, 24 N. E. 243; Stephens *v.* People, 19 N. Y. 549, 572.

26. Treat *v.* Curtis, 124 Mass. 348; Brooks *v.* Acton, 117 Mass. 204 (the admission of such evidence is discretionary; thus its exclusion is not error); Hosmer *v.* Warner, 15 Gray (Mass.) 46.

on defendant's motion.[27] Nor can its admission be assigned as error on appeal.[28] In Iowa, such evidence may only properly be received when the evidence to be rebutted was admitted over complainant's objection, and in the absence of such objection should be excluded.[29]

2. Evidence Strictly in Rebuttal. — Admission as Matter of Right. — A complainant is entitled as of right to put in evidence strictly in rebuttal after the defendant has closed his original case.[30] Thus evidence to impeach the credibility of defendant's witnesses,[31] or to explain the evidence already put in,[32] is admissible on rebuttal

27. Endowment Rank K. P. *v.* Steele (Tenn.), 69 S. W. 336.

28. Trustees of Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474, for "parties are bound in an appellate court by the positions voluntarily assumed by them in the trial court."

29. Manning *v.* Burlington C. R. & N. R. Co., 64 Iowa 240, 20 N. W. 169.

30. And, therefore, the exclusion of such rebuttal is error.

United States. — Throckmorton *v.* Holt, 180 U. S. 552, 563.

Illinois. — Johnson *v.* Breaton, 1 Ill. App. 293.

Massachusetts. — Merritt *v.* New York, N. H. & H. R. Co., 162 Mass. 326, 38 N. E. 447.

Michigan. — Owen *v.* Union Match Co., 48 Mich. 348, 12 N. W. 175.

Missouri. — Glenn *v.* Stewart, 167 Mo. 584, 67 S. W. 237.

Montana. — Anaconda Copper M. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909.

New York. — Ankersmit *v.* Tuch, 114 N. Y. 51, 20 N. E. 819.

Pennsylvania. — Clark *v.* North America Co., 203 Pa. St. 346, 53 Atl. 237; Acklin *v.* McCalmont Oil Co., 201 Pa. St. 257, 50 Atl. 955; Roberts *v.* Young, 42 Pa. St. 439.

Tennessee. — Gage *v.* Louisville N. O. & T. R. Co., 88 Tenn. 724, 14 S. W. 73.

West Virginia. — Perdue *v.* Caswell Creek Coal & Coke Co., 40 W. Va. 372, 21 S. E. 870; Clarke *v.* Ohio R. R. Co., 39 W. Va. 732, 20 S. E. 696.

Wisconsin. — Ward *v.* Bowen, 14 Wis. 439.

31. In a prosecution for murder, where in his evidence in defense defendant admitted doing the killing and claimed justification because of a violent attack upon him by decedent, it is proper to permit the state to recall a witness and cause him to testify that defendant told him he did not see and did not know of the shooting and did not mention to him the attack. Milam *v.* State, 108 Ga. 29, 33 S. E. 818.

Where a material issue was whether plaintiff had paid defendant the purchase price of certain land, and defendant when a witness denied having received payment and having stated to a certain third person that he had received payment, it is error for the court to refuse to permit plaintiff on rebuttal to prove such statement to the third person. Winchell *v.* Winchell, 100 N. Y. 159, 2 N. E. 897.

Where defendant calls a witness who testifies on direct examination to facts not wholly foreign to the issue on trial, it is competent for the plaintiff to show any acts or declarations of his inconsistent with his testimony. Harrington *v.* Weselowski, 104 Mass. 184.

32. Gilpins *v.* Consequa Pet. C. C. (U. S.) 85, 3 Wash. C. C. 184, 10 Fed. Cas. No. 5452; Acklin *v.* McCalmont Oil Co., 201 Pa. St. 257, 50 Atl. 955.

Where in an action for damages caused by an overflow from an insufficient culvert, defendant puts in evidence a diagram of the place made after the overflow, it is proper for plaintiff to show in rebuttal certain alterations made in the culvert between the time of the overflow and that at which the diagram was made. Chicago & E. R. Co. *v.* Barnes, 10 Ind. App. 460, 38 N. E. 428.

Where in an action for personal in-

as matter of right. The fact that the complainant states that his case is closed except for certain cumulative evidence, does not abridge his right subsequent thereto to put in rebutting evidence, nor does the fact that the defendant has discharged his witnesses and has no opportunity of meeting the rebutting evidence offered by complainant.[33]

Where Rebutting Evidence Put in in Opening. — Where, however, the complainant in making his original case anticipates the defendant's defenses and puts in evidence, the paramount purpose of which is to rebut such anticipated defenses, he is not entitled on the stage of rebuttal as of right to put in evidence merely cumulative or confirmatory of the rebutting evidence put in on the original case, but the admission or rejection of such evidence is discretionary with the trial court.[34]

A statute requiring the names of the witnesses to be produced for proving an indictment against an accused person to be delivered to

juries defendant tries to throw discredit upon plaintiff for not having brought the action at the place of his residence, it is error to exclude evidence offered in rebuttal that under the laws of the state of his residence he might have been deprived of a jury trial, such evidence tending to relieve plaintiff from any suspicion of ulterior motives. Merritt *v.* New York N. H. & H. R. Co., 162 Mass. 326, 38 N. E. 447.

In an action for personal injuries, where defendant elicits testimony that plaintiff's injuries were aggravated by returning to work too soon, it is proper to permit evidence that plaintiff was advised by an eminent physician to continue his work to a moderate extent. Gilman *v.* Deerfield, 15 Gray (Mass.) 577.

33. Glenn *v.* Stewart, 167 Mo. 584, 67 S. W. 237, the court holding that the rebutting evidence was not obnoxious on the ground that the defendant had no opportunity of meeting it, because he was not entitled as of right to put in evidence in reply to evidence strictly in rebuttal.

34. Anaconda Copper M. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909.

York *v.* Pease, 2 Gray (Mass.) 282, for "to permit a party thus to divide his case leads to confusion, and gives him an unfair advantage over his adversary:" thus where in an action of slander, plaintiff in his opening case anticipates a possible defense by giving evidence that the words alleged to be slanderous were not spoken under circumstances which would bring them within the rule touching privileged communications, he cannot, after the defense has closed, introduce further evidence on the point as matter of right.

Holbrook *v.* McBride, 4 Gray (Mass.) 215, where an action for breaking and entering plaintiff's close was defended on the ground that defendant broke and entered in performance of official duty and that plaintiff's fence trespassed on the highway, and in his opening case plaintiff gave evidence tending to show that defendant did not remove plaintiff's fence in discharge of his duty, but from malice and hostility toward plaintiff.

Where Matter Only Incidentally Touched on in Chief. — Where in an action for the burning of plaintiff's property by fire indirectly caused by sparks from defendant's railway locomotive, the defense is that the fire was caused by an over-hot cook stove and evidence to that effect is put in, it is proper in rebuttal to permit plaintiff to put in evidence that the stove was cool at the time of the fire, although a witness had incidentally testified to that fact in plaintiff's case in chief. Atchison T. & S. F. R. Co. *v.* Phipps, 125 Fed. 478, 60 C. C. A. 314.

him a certain time before the trial, does not require the names of witnesses strictly in rebuttal to be so delivered.[35]

3. Evidence Not Strictly in Rebuttal. — Admission as Matter of Right. — A complainant is not entitled as of right on the stage of rebuttal to the admission on his behalf of evidence merely cumulative or confirmatory of that already put in by him in his original case.[36] Nor is he entitled to put in at that stage, evidence on an essential point whereon he failed to give evidence in the opening.[37]

Admission as Matter of Discretion. — In every case, however, the admission, and likewise the rejection, on the stage of rebuttal of evidence not strictly in rebuttal is entrusted wholly to the sound discretion of the trial court, and in the exercise of such discretion it is receivable in criminal as well as civil causes,[38] except in a few

35. Goldsby *v.* United States, 160 U. S. 70, holding that this is obvious from the very nature of things, for if such names were required to be so delivered, it would be impossible to conduct any trial.

36. Lamance *v.* Byrnes, 17 Nev. 197, 30 Pac. 700; Acklin *v.* McCalmont Oil Co., 201 Pa. St. 257, 50 Atl. 955; Young *v.* Edwards 72 Pa. St. 257, 265; Stetson *v.* Croskey, 52 Pa. St. 230.

37. George *v.* Radford, 3 Car. & P. (Eng.) 464 (where in his opening in an action for malicious prosecution plaintiff inadvertently failed to prove malice, and the court excluded such proof on rebuttal); Agate *v.* Morrison, 84 N. Y. 672 (where in an action of tort the damage sustained was not proved in the opening, and the court excluded it when offered on rebuttal); Kohler *v.* Wells Fargo & Co., 26 Cal. 606, 613 (where in an action for damages for falsely pretending that plaintiff delivered to defendant a lead bar instead of a gold bar as represented, plaintiff in his original case failed to put in any evidence that the bar delivered was actually a gold bar, and the court excluded such evidence on rebuttal, the court saying: "A plaintiff has no right to keep back all his testimony on a material point until he draws out the testimony of the other party, and then come in with his own."

38. *United States.* — Goldsby *v.* United States, 160 U. S. 70; Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454.

Arkansas. — Blair *v.* State, 69 Ark. 558, 64 S. W. 948 (crim. case—evidence admitted).

California. — Young *v.* Brady, 94 Cal. 128, 29 Pac. 489; Cousins *v.* Partridge, 79 Cal. 224, 21 Pac. 745 (evidence admitted); Kohler *v.* Wells Fargo & Co., 26 Cal. 606; Union Water Co. *v.* Crary, 25 Cal. 504 (evidence excluded); Brooks *v.* Crosby, 22 Cal. 43, 50; Pinkham *v.* McFarland, 5 Cal. 137; Mowry *v.* Starbuck, 4 Cal. 274 (evidence admitted).

Colorado. — Buckingham *v.* Harris, 10 Colo. 455, 463, 15 Pac. 817.

Connecticut. — State *v.* Alford, 31 Conn. 40 (crim. case); Hathaway *v.* Hemingway, 20 Conn. 191.

Florida. — Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33.

Georgia. — Green *v.* State, 45 S. E. 990 (evidence on essential point not touched on in opening admitted); White *v.* State, 100 Ga. 659, 28 S. E. 423 (crim. case).

Illinois. — Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13; First Nat. B. *v.* Lake Erie W. R. Co., 174 Ill. 36, 50 N. E. 1023 (evidence admitted); Washington Ice Co. *v.* Bradley, 171 Ill. 255, 49 N. E. 519; Illinois Cent. R. Co. *v.* Burns, 32 Ill. App. 196.

Indiana. — Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460 (crim case).

Iowa. — Manning *v.* Burlington C. R. & N. R. Co., 64 Iowa 240, 20 N. W. 169 (evidence excluded); Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847.

Kansas. — Rheinhart *v.* State, 14 Kan. 246 (the mere fact that testi-

mony which constitutes part of plaintiff's original case, was admitted in rebuttal after the testimony had once been closed, does not constitute error).

Kentucky. — Wilson *v.* Hays' Exr., 109 Ky. 321, 58 S. W. 773 (evidence admitted).

Good cause must be shown for the admission of evidence not strictly rebutting; otherwise it cannot be received. Oldham *v.* Com. (Ky.). 58 S. W. 418; Williams *v.* Com., 90 Ky. 596, 14 S. W. 595.

Louisiana. — State *v.* Pruett, 49 La. Ann. 283, 21 So. 842.

Massachusetts. — Lansky *v.* West End St. R. Co., 173 Mass. 20, 53 N. E. 129 (evidence excluded); Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770 (crim. case—evidence admitted); Com. *v.* Smith, 162 Mass. 508, 39 N. E. 111 (crim. case—evidence admitted); Com. *v.* Pierce, 138 Mass. 165, 181, 52 Am. Rep. 264 (crim. case); Com. *v.* Brown, 130 Mass. 279 (crim. case); Com. *v.* Blair, 126 Mass. 40 (crim. case—evidence admitted); Huntsman *v.* Nichols, 116 Mass. 521 (evidence admitted); Strong *v.* Connell, 115 Mass. 575 (evidence excluded); Com. *v.* Dam, 107 Mass. 210 (in criminal case, defendant's admission admitted on rebuttal); Com. *v.* Arrance, 5 Allen 517 (crim. case—evidence admitted); Macullar *v.* Wall, 6 Gray 507 (evidence excluded).

Michigan. — People *v.* Wilson, 55 Mich. 506, 515, 21 N. W. 905 (evidence admitted—crim. case); Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728 (evidence admitted); Danielson *v.* Dyckman, 26 Mich. 169 (evidence admitted); Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99, 111 (in admitting such evidence the trial judge need not state that he does so under his discretionary power).

Mississippi. — Winterton *v.* Illinois Cent. R. Co., 73 Miss. 831, 20 So. 157 (evidence excluded).

Missouri. — Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164 (where plaintiff in offering the evidence stated as a reason therefor that while the witness had been subpoenaed but not used by the defendant, he had just learned that the testimony would be favorable for the plaintiff, but the evidence was excluded).

Nebraska. — Ream *v.* State, 52 Neb. 727, 73 N. W. 227 (crim. case—evidence admitted); Omaha Real Estate & Trust Co. *v.* Reiter, 47 Neb. 592, 66 N. W. 658 (evidence excluded).

Nevada. — McLeod *v.* Lee, 17 Nev. 103, 119, 28 Pac. 124; State *v.* Murphy, 9 Nev. 394 (where in a criminal case additional evidence in rebuttal was allowed on a certain point, although the testimony thereon was already redundant).

New York. — Leighton *v.* People, 88 N. Y. 117, 10 Abb. N. C. 261 (crim. case — evidence admitted); Stephens *v.* People, 19 N. Y. 549, 573 (where in a criminal case a witness was allowed to be called in rebuttal notwithstanding the prosecutor had refused to call such witness upon the opening); Hastings *v.* Palmer, 20 Wend. 225 (evidence excluded).

Ohio. — Graham *v.* Davis, 4 Ohio St. 362, 381.

Pennsylvania. — Young *v.* Edwards, 72 Pa. St. 257, 265 (evidence excluded); Gaines *v.* Com., 50 Pa. St. 319, 329 (criminal case).

Rhode Island. — State *v.* Ballou, 20 R. I. 607, 40 Atl. 861 (evidence admitted).

South Carolina. — State *v.* Jacobs, 28 S. C. 29, 37, 4 S. E. 799 (crim. case—evidence admitted). *Compare*, however, State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434, a criminal case where the admission of such evidence was held error.

Utah. — State *v.* Webb, 18 Utah 441, 56 Pac. 159.

Vermont. — State *v.* Magoon, 50 Vt. 333 (crim. case—evidence admitted). *Compare*, however, Stevens *v.* Dudley, 56 Vt. 158, where evidence was excluded, and the appellate court stated that on rebuttal only evidence strictly rebutting was admissible.

Virginia. — Reed *v.* Com., 98 Va. 817, 36 S. E. 399 (where evidence not strictly in rebuttal was admitted, and the court said that it was not error to admit it where it did not appear that the defendant was prejudiced thereby.

West Virginia. — Perdue *v.* Caswell Creek C. & C. Co., 40 W. Va.

jurisdictions where, it seems, it is not proper to admit evidence not strictly rebutting in a criminal cause in behalf of the prosecution.[39]

The admission of such evidence being thus discretionary, it is proper for the trial court, having admitted it, to refuse to strike it out,[40] and in some jurisdictions the action of the trial court in

372, 21 S. E. 870; Clarke *v.* Ohio R. R. Co., 39 W. Va. 732, 20 S. E. 696; Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686 (evidence admitted).

Wisconsin. — Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48; McGowan *v.* Chicago & N. W. R. Co., 91 Wis. 147, 64 N. W. 891.

Wyoming. — Horn *v.* State, 12 Wyo. 80, 73 Pac. 705, 721.

Where in an action for personal injuries caused by defendant's negligence, at defendant's request the court appoints a commission of physicians for the examination of the injured person, and the defendant fails to put such physicians on the stand when putting in his case in chief, it is proper for the court to permit plaintiff to put them on the stand after defendant had rested his case. "By the course adopted, defendants secured the advantage of a cross-examination of witnesses who had ascertained facts under an order of court made at their request, and they have no just ground to complain." Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

Where the sole witness to one of the counts in a declaration absented himself from the courtroom at the time the trial commenced without the consent of the plaintiff, and his attendance was not procured until after the plaintiff and defendant had both rested, it does not furnish ground of exception that the trial court thereupon refused to hear his testimony. "Clearly the judge had discretion in this matter, with which we cannot interfere. A witness chooses of his own head to disobey the process of the court; and on his return after the time at which he can be regularly called, the plaintiff claims to begin his proof *de novo*, on a distinct branch of his case, to be followed, of course, by answering evidence, and other evidence in reply, according to the nature of the issue. Once take away the discretion of the judge in a case like this, and the order of evidence, the time at which it shall be introduced, and the portion which shall be introduced at any given stage, will be put under the control of the witnesses. Where they happen to be numerous, they may drive the judge and jury to the round of evidence mentioned several times, making the labor of trying a single cause, equal to that of many. It will not do for the party to say, his witnesses left him without his consent. Receive that as an excuse, and the discretion is vested in them. At this rate, the trial may, at their pleasure, be protracted to an intolerable extent. Judges and juries will be made the mere waiters upon careless or perverse witnesses; and the business of the circuits can never be done." Ford *v.* Niles, 1 Hill (N. Y.) 300.

39. *Williams v. Com.*, 90 Ky. 596, 14 S. W. 595, for the admission of evidence merely cumulative on rebuttal gives an undue advantage to the commonwealth, the witness giving such testimony having been present and heard the defendant's testimony, and the substantial rights of defendant are thereby prejudiced. *Compare* the statement in Oldham *v.* Com. (Ky.) 58 S. W. 418, that such evidence should be received on rebuttal only where good cause for its admission is shown. In the latter case the admission of such evidence on rebuttal was also held prejudicial error.

King *v.* State, 74 Miss. 576, 21 So. 235, for "The practice encouraged, might become an engine of great oppression, and should be repressed by the courts, which are not organized to convict prisoners, but to see that trials are absolutely impartial and fair."

State *v.* Jaggers, 58 S. C. 41, 36 S. E. 434, holding such evidence incompetent on rebuttal, because the defendant did not have any opportunity to deny or explain it.

40. Brooks *v.* Crosby, 22 Cal. 43.

admitting or rejecting it will not be reviewed by the appellate court at all.[41] In other jurisdictions it will be reviewed only where there is a manifest abuse of the discretion of the trial court.[42] No good can result from reversing a case simply to admit the same evidence in a different order, unless it should clearly appear that the defendant was prejudiced by the order actually observed.[43]

Manner of Exercise of Discretion. — The trial court should keep all the circumstances of the case in view in exercising its discretionary

41. *California.* — Brooks *v.* Crosby, 22 Cal. 43; Pinkham *v.* McFarland, 5 Cal. 137.

Illinois. — Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13; First National Bank *v.* Lake Erie & W. R. Co., 174 Ill. 36, 50 N. E. 1023.

Compare, however, Washington Ice Co. *v.* Bradley, 171 Ill. 255, 49 N. E. 519, where its admission is said not to be subject to review except in cases of gross abuse.

Louisiana. — State *v.* Pruett, 49 La. Ann. 283, 21 So. 842 (for there are so many reasons for departing from the usual rule as to the order of evidence, and so many occasions where the departure would be proper, that the rule cannot be invoked as matter of legal right in the appellate court); State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

Massachusetts. — Com. *v.* Dam, 107 Mass. 210; Com. *v.* Arrance, 5 Allen 517; Macullar *v.* Wall, 6 Gray 507.

Michigan. — Somerville *v.* Richards, 37 Mich. 299.

New York. — Leighton *v.* People, 88 N. Y. 117, 10 Abb. N. C. 261; Ford *v.* Niles, 1 Hill 300.

Ohio. — Graham *v.* Davis, 4 Ohio St. 362, 381.

Pennsylvania. — Young *v.* Edwards, 72 Pa. St. 257, 265; Finlay *v.* Stewart, 56 Pa. St. 183, 192.

42. *United States.* — Goldsby *v.* United States, 160 U. S. 70.

Compare, however, Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, where the discretion is said not to be reviewable in the supreme court.

Arkansas. — See Blair *v.* State, 69 Ark. 558, 64 S. W. 948.

Florida. — Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33.

Indiana. — Kahlenbeck *v.* State, 119 Ind. 118, 21 N. E. 460.

Iowa. — Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847.

Kansas. — Rheinhart *v.* State, 14 Kan. 246.

Missouri. — Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164.

Nebraska. — See Davis *v.* State, 51 Neb. 301, 70 N. W. 984, 997; Omaha R. E. & T. Co. *v.* Reiter, 47 Neb. 592, 66 N. W. 658.

West Virginia. — Perdue *v.* Caswell Creek C. & C. Co., 40 W. Va. 372, 21 S. E. 870; Clarke *v.* Ohio R. R. Co., 39 W. Va. 732, 20 S. E. 696; Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686 (all holding that the manner of exercise of the discretion of the trial court is rarely if ever a ground of reversal).

Wisconsin. — *Compare,* McGowan *v.* Chicago & N.-W. R. Co., 91 Wis. 147, 64 N. W. 891 (holding that in general the manner of exercise of discretion by the trial court cannot be assigned as error).

Where evidence that properly constitutes a part of plaintiff's case in chief is offered in rebuttal, and no circumstances of the witness' unavoidable absence, or subsequent discovery of the witness, are shown to justify the failure to offer him as part of plaintiff's opening case, the action of the trial court in refusing to receive his testimony will be sustained. Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, 24 S. W. 192.

The action of the trial court in exercising its discretion with respect to evidence not strictly rebutting "is not assignable as error, unless it affirmatively appears from the record that the party complaining was, by the exercise of such discretion, placed in a position of disadvantage in the further progress of the trial." State *v.* Webb, 18 Utah 441, 56 Pac. 159.

43. Hess *v.* Wilcox, 58 Iowa 380, 10 N. W. 847.

right to admit on rebuttal evidence not strictly rebutting.[44] As declared by some decisions, the court should, in admitting evidence by virtue of this discretion, use great caution and refrain from letting it in so frequently as to render the general rule with respect to the order of evidence a general rule in name only.[45] Other decisions, however, hold that very few cases can arise in which it would be well to close a case before all the evidence offered in good faith and necessary to the ends of justice has been heard, although offered out of the usual order.[46]

Where, for instance, a complainant through inadvertence or mistake omits to introduce on the opening a piece of evidence that constitutes an essential link in his chain of evidence, the court in its discretion, rather than that his cause should be sacrificed, will permit him to supply the omission.[47] It is also proper for the trial

44. McLeod *v.* Lee, 17 Nev. 103, 118, 28 Pac. 124.

45. Hathaway *v.* Hemingway, 20 Conn. 191.

In Winterton *v.* Ill. Cent. R. Co., 73 Miss. 831, 20 So. 157, an action for negligence, where plaintiff's evidence in chief and likewise defendant's evidence showed contributory evidence, the court held it proper for the trial court to refuse to permit plaintiff to take the stand on rebuttal and testify to his own due care, and stated that the ruling of the trial court "was in strict conformity to long-established rules governing the introduction of evidence, and, in this instance, simply denied to plaintiff an almost unheard-of request to so alter a vital phase of his case as already made out by the evidence of his own witnesses, not only or chiefly so as to meet the case made by his adversary, but also and necessarily to destroy the very case he himself had already deliberately made out."

In King *v.* State, 74 Miss. 576, 21 So. 235, the court said that the rule confining a complainant on rebuttal to matters strictly in rebuttal was wise and proper, and promotive of fair trials.

46. Graham *v.* Davis, 4 Ohio St. 362, 381; McLeod *v.* Lee, 17 Nev. 103, 118, 28 Pac. 124 (holding that where the plaintiff introduced two witnesses to prove a fact in his case in chief, and objected to the defendant's being permitted to traverse this proof on the ground that he was estopped therefrom by a former judgment, but the trial court decided against the contention of estoppel, it is proper to permit the plaintiff to introduce cumulative proof of that fact in rebuttal).

"It is better for the court, whenever the ends of justice require it, to suffer the testimony to go in." Lisman *v.* Early, 15 Cal. 199.

The discretion of the trial court in reopening a cause for the reception of further evidence after both sides have rested "should be given a wide range, and liberally exercised in cases where such action will subserve the due administration of justice between litigants, always with a proper regard, however, to the observance and enforcement of settled rules and laws of procedure, and an orderly course of business. Omaha R. E. & T. Co. *v.* Reiter, 47 Neb. 592, 66 N. W. 658.

47. Hathaway *v.* Hemingway, 20 Conn. 191.

So where in an action for breaking plaintiff's close, plaintiff omitted to prove that he was in possession thereof before resting his case, the court after some hesitation permitted a witness to be recalled to prove it. Brown *v.* Giles, 1 Car. & P. (Eng.) 118.

Where on a trial for murder, the state on the opening proved the killing and attendant circumstances, it is competent for the state on rebuttal to prove express malice. Bird *v.* State, 14 Ga. 43.

In Giles *v.* Powell, 2 Car. & P. (Eng.) 259, the court says that a trial court will always allow a party to adduce fresh evidence after having closed his case, to get rid of objec-

court to permit a witness for complainant to be recalled on rebuttal to correct or even contradict his testimony given in the opening.[48] Nor is it improper to admit evidence not strictly rebutting because it contradicts the defendant's testimony given when himself a witness.[49] Nor is the discretion of the court abused by the admission of such evidence on rebuttal, by reason of the fact that the complainant knew of its existence at the time of putting in his opening case and at that time called as a witness the person who afterwards testified to it.[50] It is not proper, however, for the court to permit a complainant to again go into a matter on rebuttal that was covered in the opening, where nothing in relation to it was put in by defendant.[51]

Prerequisites to Admission Under Discretion. — Where a complainant desires a trial court to receive evidence under this discretionary power, he must, it seems, specially apply to the court for leave to put it in.[52]

tions which are beside the justice of the case and little more than matters of form, but will not allow such evidence to get rid of any difficulty on the merits. So in a case against the drawer of a bill of exchange where, after the plaintiff had closed, the defendant objected that he had not proved that the drawee had made default, the court permitted evidence to be put in that the bill had been dishonored and due notice of dishonor given.

Contra. — Ludden & Bates S. M. H. *v.* Sumter, 47 S. C. 335, 25 S. E. 150, where the court held that it was clearly incompetent for the plaintiff to offer testimony in rebuttal as to a matter which had not been brought out on the testimony in chief, or in the testimony adduced for the defense, for "if it were otherwise, then great injustice might be done defendant, as the plaintiff would thus be allowed the opportunity of laying before the jury the version of the transaction or conversation between Sumter and Gaillard, as given by its own witnesses, without any opportunity for the defendant to lay before the jury the version of the transaction or conversation, as it might have been given by the other party thereto. To prevent such injustice is one of the main objects of the rule restricting the testimony in reply to matters which had been previously referred to in the testimony."

48. De Remer *v.* Parker, 19 Colo. 242, 34 Pac. 980.

49. Leighton *v.* People, 88 N. Y. 117, 10 Abb. N. C. 261.

50. McGowan *v.* Chicago & N.-W. R. Co., 91 Wis. 147, 64 N. W. 891.

51. Gilpins *v.* Consequa Pet. C. C. (U. S.) 85, 3 Wash. C. C. 184, 10 Fed. Cas. No. 5,452.

Similarly the fact that plaintiff expects the defendant will testify in his own behalf and withholds the testimony of a certain witness from his case in chief in order to put it in in contradiction of the defendant, is no sufficient reason for rendering the refusal of the trial court to admit it in rebuttal an abuse of discretion, where the defendant fails to testify in his own behalf. Plaintiff could have called defendant as a witness while putting in his case in chief and cross-examined him in respect to the matter he wished to contradict (under Code Civ. Prac. § 606, subd. 8). Wilson *v.* Hays' Exr., 109 Ky. 321, 58 S. W. 773.

52. Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48.

Thus where the trial court is not asked to permit plaintiff to reopen his case, the court does not err in excluding on rebuttal evidence not strictly rebutting. Young *v.* Brady, 94 Cal. 128, 29 Pac. 489.

The putting in of evidence not strictly rebutting in the guise of rebuttal, without special leave of the trial court, is reversible error. State *v.* Hunsaker, 16 Or. 497, 19 Pac. 605.

III. SURREBUTTAL.

1. In General. — Evidence offered in a trial on the stage of surrebuttal may, like that offered on rebuttal, be divided into two classes: (1) evidence strictly in surrebuttal, and (2) evidence not strictly in surrebuttal.[53]

2. Evidence Strictly in Surrebuttal. — A defendant is entitled as of right to put in evidence strictly in surrebuttal after the complainant has closed his case on rebuttal.[54] Thus, for instance, evi-

53. Distinction Between Evidence Strictly and Not Strictly Surrebutting. — Where in a criminal prosecution defendant to show insanity puts in evidence of peculiarities in his temperament, and in rebuttal the state puts a hypothetical question to an expert witness who answers that in his opinion the defendant was sane, it does not constitute surrebuttal for defendant to put in evidence of another expert witness as to the contrary. For "it was only the *method* of meeting defendant's evidence, and not the matter which was new or different; no new fact was shown, and there was nothing, therefore, which was the proper subject of *rebuttal*." People *v.* Hill, 116 Cal. 562, 48 Pac. 711.

Where in a criminal cause the defendant by way of defense puts in evidence of insanity, and the prosecution in reply thereto put in evidence that the alleged insanity was merely the effect of gross intoxication, it constitutes strict surrebuttal for the defendant to show (1) that the alleged insanity was not the result of intoxication, and (2) that he was not much intoxicated. "We do not think that the evidence offered by the defendant can be regarded other than in rebuttal of that given by the People when seeking to establish the sanity of the defendant, and that the court erred in rejecting it upon the ground that it was reopening the case. It is doubtless true, as suggested by the court, that the defendant had been combating the theory of intoxication 'all the way through.' But that issue was not tendered by the People until the defendant had rested, and, hence, he had no proper opportunity to present his evidence upon that question. Up to that time he could combat the question only by the cross-examination of adverse witnesses. He was not bound to content himself with that, but had a legal right to disprove the claim of the prosecution by witnesses who had not been called to testify against him. Moreover, not until then could he have properly proved by his expert witnesses that the effect of intoxication would not have been as testified to by the experts for the People. When the People rested upon the issue of insanity, was the first time that that class of evidence was properly admissible. Until then the case had been in the hands of the People since that issue was in fact raised." People *v.* Strait, 154 N. Y. 165, 47 N. E. 1090.

54. People *v.* Strait, 154 N. Y. 165, 47 N. E. 1090.

If in the close the plaintiff introduces proof of a new and distinct fact, not fairly notified to the defendant in the opening proof, so as to enable the defendant to answer it in his general evidence, he must be allowed to answer or contradict it afterwards. Kent *v.* Lincoln, 32 Vt. 591.

So where in rebuttal of defensive evidence put in by defendant in a suit for assault and battery, plaintiff gives evidence that defendant's witnesses were not present at the time of the assault, it is error to exclude defendant's testimony offered in surrebuttal that they were present. Wade *v.* Thayer, 40 Cal. 578.

Where in an action on a note, defendant in his case in chief puts in evidence of the payment thereof, and plaintiff in rebuttal puts in evidence that the payments made by defendant applied to another account, it is error to refuse to permit defendant in surrebuttal to show that there was no such account. Lisman *v.* Early, 15 Cal. 199.

Where in an action of ejectment

dence to impeach the credibility of witnesses testifying on rebuttal,[55] or to sustain the credibility of witnesses attacked on rebuttal,[56] is admissible on surrebuttal.

3. Evidence Not Strictly in Surrebuttal. — Admission as Matter of Right. — A defendant, however, is not entitled as of right to put in on the stage of surrebuttal evidence not strictly surrebutting, but merely cumulative or confirmatory.[57] Nor is he entitled to put

plaintiff proves title in one Tracy at a certain time, and defendant in defense proves a subsequent tax sale to one Witherup, and plaintiff in rebuttal offers declarations of Witherup that he held in trust for the heirs of Tracy, it is error to exclude defendant's evidence in surrebuttal that the declarations were made after Witherup had parted with title (for in such case it would not bind his grantee) Sidle *v.* Walters, 5 Watts (Pa.) 389.

Where Plaintiff on Opening Puts in Rebutting Evidence. — Where in a proceeding in bastardy plaintiff in the opening takes up the issue that the child was prematurely born, and defendant in his defense has full opportunity to and does meet the issue, it is proper to refuse to let him put in further evidence thereon on surrebuttal. Thayer *v.* Davis, 38 Vt. 163.

55. Kent *v.* Lincoln, 32 Vt. 591.

Where the prosecution in a criminal cause calls a witness for the first time on rebuttal, it is the right of the defendant to impeach him on surrebuttal, and refusal to permit such proof is error. (It would have been a matter of discretion to exclude such evidence on surrebuttal if the witness to be impeached had been examined on the main issue, instead of on rebuttal only.) State *v.* Staley, 45 W. Va. 792, 32 S. E. 198.

After plaintiff has testified in rebuttal, he also having testified in his case in chief, it is error to exclude evidence of plaintiff's bad reputation for truth and veracity, the same being offered to impeach him. Foster *v.* Newbrough, 58 N. Y. 481, *reversing* (supreme court) 66 Barb. 645.

Contra. — Where in a prosecution for murder defendant attacks the character of deceased in the course of his evidence in defense, and the state in rebuttal gives evidence of his good character, it is within the discretion of the trial court whether or or not to allow in surrebuttal a witness' testimony as to the reputation of the character sustaining witness. This is to prevent an interminable protraction of the trial. State *v.* Sumner, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707 (Pope, J. *dissenting*).

56. City of Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416 (*quoting* 1 Thomp. Trials § 544); State *v.* Jones, 29 S. C. 201, 7 S. E. 296, 311 (holding it is no reason for excluding such testimony that it would protract the trial); State *v.* Staley, 45 W. Va. 792, 32 S. E. 198 (where on rebuttal in a criminal cause the state proves the variant statements of the defendant who had testified in his own behalf, it is error to exclude evidence of defendant's good character for truth offered on surrebuttal to sustain him).

57. *California.* — People *v.* Hill, 116 Cal. 562, 48 Pac. 711.

Illinois. — City of Sandwich *v.* Dolan, 141 Ill. 430, 31 N. E. 416 (where testimony put in in rebuttal does not tend to contradict or to impeach defendant's witnesses, the action of the trial court in excluding testimony offered in surrebuttal will be sustained); Mueller *v.* Rebhan, 94 Ill. 142, 150 (in an action to set aside a will on the ground of the testator's insanity and for another ground, where the court notified defendant at the time of putting in his evidence in defense in chief to then also put in his testimony of decedent's sanity, it is not error to refuse to permit defendant to cumulate his proof on such subject in rebuttal).

Louisiana. — State *v.* Spencer, 45 La. Ann. 1, 12 So. 135.

Missouri. — Glenn *v.* Stewart, 167 Mo. 584, 67 S. W. 237 (for the pur-

in at that stage evidence on an essential point whereon he failed to give evidence on his original case.[58]

Admission as Matter of Discretion.— In every case, however, the admission or rejection of such evidence on the stage of surrebuttal is addressed wholly to the sound discretion of the trial court.[59]

Where Complainant Puts in on Rebuttal Evidence in Chief. — Yet where complainant is permitted on the stage of rebuttal to put in evidence not strictly rebutting, it is the right of the defendant

poses of this rule it is immaterial whether or not the defendant's witnesses were in court at the time the testimony in rebuttal was given).

New York. — Marshall *v.* Davies, 78 N. Y. 414 (where defendant on whom rested the affirmative of the issue put in evidence a conversation between him and plaintiff about a certain time, and plaintiff in rebuttal put in evidence that no conversation of the nature testified to by defendant ever took place, the defendant was not entitled as matter of right to prove in surrebuttal another conversation of the nature shown by him in his case in chief, although it tended to support such case, and the refusal of the trial judge to admit such surrebutting proof is no ground for exception).

Ohio. — Graham *v.* Davis, 4 Ohio St. 362, 380-383 (J. R. Swan and Thurman, J.J., *dissenting*) (in an action against a carrier by water for nondelivery of certain goods shipped, where the defendant in defense puts in evidence of the grounding and sinking of the vessel on which they were laden (defendant being exempted by the bill of lading from liability in case of loss by dangers of river navigation) and that the boat was properly navigated at the time of the accident, and plaintiff in rebuttal puts in evidence that the accident was caused by failure to shut off steam at the proper time, it is not error to refuse to permit defendant on surrebuttal to put in further evidence that it was not the duty of defendant's pilot to stop the engine at the time referred to).

Vermont. — Thayer *v.* Davis, 38 Vt. 163.

Wyoming. — Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556 (in the absence of a showing of an abuse of discretion it will not be presumed that such discretion was abused by the exclusion on surrebuttal of evidence not strictly in surrebuttal).

58. Where in an action of ejectment defendant interposed two defenses: (1) that no title had been acquired by plaintiff, and (2) that what title plaintiff had she had parted with, and in his case in chief only produced evidence on the first defense, it is proper for the trial court to refuse to permit defendant on surrebuttal to put in evidence on its second defense, no reason appearing why it did not put it in with its case in chief. Hathaway *v.* Hemingway, 20 Conn. 191.

59. Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433; State *v.* Spencer, 45 La. Ann. 1, 12 So. 135; *Per* Manning, J., in White *v.* Bailey, 10 Mich. 155; Marshall *v.* Davies, 78 N. Y. 414; Koenig *v.* Bauer, 57 Pa. 168.

Where after a case has been closed, the defendant offers in surrebuttal certain cumulative evidence apparently decisive of the issues, it is in the discretion of the trial court to exclude it. For "the court could not permit it to be heard at that time without reopening the case, and it was improper to do so, unless the evidence was sufficient to justify setting aside the verdict, if one had been found before its discovery. To admit would have been equivalent to granting a new trial, as the plaintiff would have the right to have the case continued on the grounds of surprise." Merely cumulative evidence "is insufficient to sustain a motion for a new trial." Sisler *v.* Shaffer (W. Va.), 28 S. E. 721.

to put in evidence in reply thereto in surrebuttal, although the same is not strictly surrebutting.[60]

60. State *v.* Williams, 49 W. Va. 220, 38 S. E. 495; McGowan *v.* Chicago & N. W. R. Co., 91 Wis. 147, 64 N. W. 891; Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

So where in an action of conversion plaintiff in his case in chief merely shows his possession of the property taken and its taking by defendant, and in defense defendant shows that it was held by plaintiff under a fraudulent trust and that he took it under a writ against the real owner, and in rebuttal plaintiff gives evidence that he was a *bona fide* purchaser for full value, it is error to exclude evidence in surrebuttal that the real value was far in excess of the price paid by plaintiff. Clayes *v.* Ferris, 10 Vt. 112.

"It is always within the sound judicial discretion of the trial court to reopen a case, or to allow testimony in chief to be introduced at a later stage of the trial, *giving the opposite side an opportunity to meet and contradict it, of course.*" (Italics ours.) Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164.

Compare, however, State *v.* Lyons, 44 La. Ann. 106, 10 So. 409, where it was held that defendant was not entitled to insist on the hearing of further testimony as matter of right, after the state in rebuttal had introduced certain cumulative testimony.

RECALL OF WITNESSES.—See Witness.

RECEIPTS.—See Parol Evidence; Payment; Release.

RECEIVERS.

By W. L. Willie.

CROSS-REFERENCES.

Judgments;
Judicial Notice;
Records.

I. THE APPOINTMENT.

1. Actions by Receivers. — A. Presumptions and Burden of Proof. — a. *In General.* — The presumptions relative to public officers do not apply to receivers, and the fact of their having acted as such will raise no presumption of their due appointment;[1] but the appointment must be proved by persons claiming a right as such.[2]

b. *As to Jurisdiction of Court Appointing.* — The appointment under which the right as receiver is claimed must be shown to have come from a court having apparent jurisdiction over the subject-matter at least.[3]

c. *As to Validity of Appointment.* — The presumption is that an appointment by a court having jurisdiction is valid, and it will be so taken in an action by the receiver.[4]

B. Mode of Proof. — a. *Prima Facie Evidence.* — **(1.) In General.** — An order by a court or judge thereof, apparently within his jurisdiction, appointing a receiver, which is regular on its face, is *prima facie* evidence of due appointment.[5]

1. Judgments. — International & G. N. R. Co. *v.* Moore (Tex. Civ. App.), 32 S. W. 379.

2. Hatfield *v.* Cummings, 140 Ind. 547, 40 N. E. 53; Hagerman *v.* Thomas (Neb.), 96 N. W. 631.

3. See article "Judicial Notice." Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610; Kronberg *v.* Elder, 18 Kan. 150.

4. The appointment of receiver and his act in bringing suit by direction of court cannot be collaterally attacked, though the order of court was erroneous. Keokuk N. L. Packet Co. *v.* Davidson, 13 Mo. App. 561.

Where the receiver is appointed in a case where power to appoint exists by a court of competent jurisdiction, his appointment cannot be collaterally attacked. Andrews *v.* Steele City Bk., 57 Neb. 173, 77 N. W. 342; Comer *v.* Bray, 83 Ala. 217, 3 So. 554; Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 266; Carroll *v.* Pacific Nat. Bk., 19 Wash. 639, 54 Pac. 32; Roby *v.* Title G. & T. Co., 166 Ill. 336, 46 N. E. 1110.

5. Edee *v.* Strunk, 35 Neb. 307, 53 N. W. 70.

The order appointing receiver standing in full force must be taken as establishing at least *prima facie*, that all the necessary averments were made and proceedings had to give jurisdiction to the court. Hayes

(2.) As to Jurisdiction of Court. — The recital of jurisdictional facts in order appointing receiver is *prima facie* evidence thereof.[6]

b. *Sufficiency of Proof.* — **(1.) General Rule.** — As to what is sufficient proof of the appointment of a receiver the decisions are not uniform. The decree of court dissolving the corporation and appointing plaintiff receiver has been held sufficient.[7] In some courts the order of court and official bond is required.[8] In New York, under present statute, in addition to the order of court, the commencement of action must be shown.[9]

(2.) Distinction Between Suit Under General and Under Particular Authority. — A distinction has been drawn between actions brought under a general authority to sue and an authority to bring the particular action. In the former case he must produce the bond and show his qualification under the appointment.[10]

C. CHARACTER OF EVIDENCE. — a. *In General.* — The appointment of a receiver being a matter of record, it should be shown by record evidence.[11]

b. *Transcript of Whole Case Not Required.* — Transcript of entire proceedings need not be produced but only the original or certified copies of the order, decree, or other necessary papers.[12]

v. Brotzman, 46 Md. 519; Frank *v.* Morrison, 58 Md. 423; Helme *v.* Littlejohn, 12 La. Ann. 298.

6. Potter *v.* Merchants' Bk., 28 N. Y. 641, 86 Am. Dec. 273; Wright *v.* Nostrand, 94 N. Y. 31; Edee *v.* Strunk, 35 Neb. 307, 53 N. W. 70.

7. Person *v.* Leary, 126 N. C. 504, 36 S. E. 35.

8. Palmer *v.* Clark, 4 Abb. N. C. (N. Y.) 25.

9. Springs *v.* Bowery Nat. Bk., 63 Hun 505, 18 N. Y. Supp. 574.

10. Where the representative capacity of receiver is denied, in order for the plaintiff to sue as receiver, in addition to proof of his appointment, he must show that he qualified thereunder and entered upon the duties of his office. We do not think we ought to presume the bond was given as in Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658, as appellant's answer contains a denial of the allegations of petition that plaintiff is receiver. This case differs from the New York case in the fact that the receiver in that case had obtained an order from the court appointing him to bring that particular action. In this case the order gave him general authority to commence all actions necessary for preservation of property." Hagerman *v.* Thomas (Neb.), 96 N. W. 631. See Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658.

Taking of oath is presumed where record of appointment shows that receiver qualified by giving bond pursuant to order of court. Seymour *v.* C. Aultman & Co., 109 Iowa 297, 80 N. W. 401.

11. See article "RECORDS." Person *v.* Leary, 126 N. C. 504, 36 S. E. 35.

Affidavit averring appointment of receiver by a foreign court is not competent evidence of the appointment of said receiver. Person *v.* Leary, 126 N. C. 504, 36 S. E. 35.

Testimony as to General Jurisdiction of Foreign Court Appointing Receiver. — Testimony of witness that the foreign court appointing the receiver uniformly exercised jurisdiction in such matters, is sufficient in the absence of evidence to the contrary to show its authority to make the appointment. Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610.

12. See article "RECORDS."

Person *v.* Leary, 126 N. C. 504, 36 S. E. 35; Helme *v.* Littlejohn, 12 La. Ann. 298; Hayes *v.* Brotzman, 46 Md. 519; Potter *v.* Merchants'

2. Presumptions in Actions Against Receivers. — A. In General. Where one is sued as a receiver of a railroad it will be presumed, unless denied by the pleadings, that defendant was as such receiver operating the train in which the accident occurred.[13]

B. Admissions. — The petition on file for the removal of the case to federal court, in which defendant alleges his appointment as receiver by such court, is an admission of his receivership of which the court to which it was made could take judicial notice, and avoid the necessity of proof.[14]

II. APPLICATION FOR APPOINTMENT.

1. In General. — On motion for the appointment of a receiver, affidavits which are filed with the bill and served on the opposite party may be read in evidence in support of the bill.[15]

2. Not Competent to Enlarge Case Made by Bill. — Although affidavits may be read in support of the bill, they cannot be read to enlarge the case made by the bill.[16]

3. Affidavits by Defendant. — A. Before Answer. — In a pressing case where the application for receiver is made before the defendant files his answer, the court may hear defendant by affidavit.[17]

B. After Answer. — Where motion for appointment is made after the answer is filed, affidavits furnished by the orator will be considered by the court in connection with answer.[18]

4. Affidavits in Replication. — Where the defendant in an application for the provisional remedy meets the plaintiff's allegation by

Bk., 28 N. Y. 641, 86 Am. Dec. 273.

The record of the order, produced on appeal from the judgment, is sufficient. Rockwell *v.* Merwin, 8 Abb. Pr. N. S. (N. Y.) 330.

13. McNulta *v.* Ensch. 134 Ill. 46, 24 N. E. 631; McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362.

14. McNulta *v.* Lockridge, Admr., 32 Ill. App. 86.

15. Jacobs *v.* Miller, 10 Hun. (N. Y.) 230; Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294; Brundage *v.* Home Sav. & L. Assn., 11 Wash. 277, 39 Pac. 666.

Moving party has no right to read, on motion, affidavits not served on opposite party. Jacobs *v.* Miller, 10 Hun (N. Y.) 230; Brundage *v.* Home Sav. & L. Assn., 11 Wash. 277, 39 Pac. 666.

Affidavits of complainants, made after filing the bill, are not competent to be read upon a motion for the appointment of receiver. They should be filed with the bill. Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

16. Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485, 487; Webb *v.* Allen, 15 Tex. Civ. App. 605, 40 S. W. 342.

17. "It is every day's practice to hear an answer read as an affidavit, against a motion for an injunction. I cannot doubt that the court may hear defendant by affidavit. The complainant gives notice of motion for an injunction in his bill, and says case is pressing, and that he cannot wait for answer. The defendant, then, should be heard in a shorter way than by answer." Kean *v.* Colt, 5 N. J. Eq. 365.

An answer used in opposition to a motion for the appointment of a receiver before the time for replying has expired can only be treated as an affidavit. Rankin *v.* Rotchschild, 78 Mich. 10, 43 N. W. 1077.

18. Ladd *v.* Harvey, 21 N. H. 514.

counter affidavits, it is competent for plaintiff to support his original affidavits by others to the same effect, and reply to those offered by the defendant.[19] But it has been held that affidavits are not admissible to contradict the answer upon a motion for the appointment, though they may be read upon such motion.[20]

5. Affidavits After Argument Begun. — The allowing or refusing of additional affidavits after the argument has begun is a matter of discretion in the presiding judge and not reviewable.[21]

III. POWER OR AUTHORITY.

1. To Sue. — A. Presumptions and Burden of Proof. — a. *In General.* — A regularly appointed receiver of the property of a judgment debtor, unless restricted by special order of court, possesses general powers to sue for and collect debts due in any court having jurisdiction over subject-matter.[22]

b. *When Authority to Sue in His Own Name is Denied,* the receiver must show an order of court vesting in him the property rights of the company and authority to prosecute suits in his own name.[23]

B. Mode of Proof. — Order or Decree. — The decree of court appointing the receiver to collect partnership assets has been held to be *prima facie* evidence of authority to institute a suit against a debtor of the partnership.[24]

C. Character of Evidence. — Decree or certified copy thereof is considered competent evidence to show receiver's authority to

19. Young *v.* Rollins, 85 N. C. 485.

It is proper to permit affidavits to be read on the hearing of a motion for a receiver in a judgment creditor's suit to meet matters set up in avoidance in defendant's answer. Rankin *v.* Rotchschild, 78 Mich. 10, 43 N. W. 1077.

20. Connor *v.* Allen, Harr. Ch. (Mich.) 371.

21. Levenson & Co. *v.* Elson, 88 N. C. 182.

22. Rockwell *v.* Merwin, 8 Abb. Pr. N. S. (N. Y.) 330.

Foreign Receiver. — Order of Court and Subsequent Possession Thereunder by a receiver appointed in Mexico vested in him a special property in car, for which suit is brought, which authorized him to maintain suit in Missouri. Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, *citing* Cagill *v.* Wooldridge, 8 Baxt. (Tenn.) 580; Bank *v.* McLeod, 38 Ohio St. 174; Bagby *v.* Atlantic, M. & O. R. Co., 86 Pa. St. 291; Chicago, M. & St. P. R. Co. *v.* Keokuk N. L. Packet Co., 108 Ill. 317, 48 Am. Rep. 557; McAlpin *v.* Jones, 10 La. Ann. 552; Pond *v.* Cooke, 45 Conn. 126, 29 Am. Rep. 668.

23. Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389. See Battle *v.* Davis, 66 N. C. 252; Gray *v.* Lewis, 94 N. C. 392; Wynne *v.* Heck, 92 N. C. 414; Abrams *v.* Cureton, Admr., 74 N. C. 523.

24. In Davis *v.* Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494, a distinction was attempted between the allegations in an action brought in the name of the company by receiver and one brought in his own name. The court said: "That a receiver when appointed succeeds to rights of the company, and that he alone under the order of court could maintain the action as the rights of the company was suspended as long as there was an acting receiver." See Griffin *v.*

institute suit, and the transcript of entire record need not be produced.[25]

2. Administration. — Oral evidence as to judicial advice in the administration of a receivership matter is not necessarily to be rejected or condemned as false.[26]

Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Curtis *v.* McIlhenny, 58 N. C. (5 Jones Eq.) 290.

25. Helme *v.* Littlejohn, 12 La. Ann. 298; See Person *v.* Leary, 126 N. C. 504, 36 S. E. 35; Hayes *v.* Brotzman, 46 Md. 519; Potter *v.* Merchants' Bk., 28 N. Y. 641, 86 Am. Dec. 273.

26. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

RECEIVING STOLEN GOODS.

By W. L. Willie.

I. BURDEN OF PROOF.

1. Preliminary Statement. — The elements of the offense devolving on the prosecution to prove, vary under the statutes of the several states.

2. Where the Crime Is An Independent Offense. — The general rule, subject to a few exceptions, is, that to sustain a conviction the burden rests upon the prosecution to prove four distinct elements: That the goods or property were previously stolen by some other person; that the accused bought or received them from another person, or aided in concealing them; that at the time he so bought or received, or aided in concealing them, he knew they had been

stolen, and that he so bought or received them or aided in concealing them with a dishonest purpose.[1]

3. Where Offense Is Accessory to Larceny the goods must be shown to have been received from thief.[2]

II. PROOF OF THEFT.

1. In General. — Proof of theft in general is treated elsewhere.[3]

2. Testimony of Owner. — The owner of stolen goods is a competent witness against a party charged with having received the goods knowing them to have been stolen.[4]

3. Testimony of Thief. — In those states where the receiver of stolen goods is regarded as an independent criminal and not an accomplice with the thief, the latter's testimony standing alone, is

1. *Alabama.* — Holt *v.* State, 86 Ala. 599, 5 So. 793; Hester *v.* State, 103 Ala. 83, 15 So. 857.
Arkansas. — Baker *v.* State, 58 Ark. 513, 25 S. W. 603.
California. — People *v.* Tilley, 135 Cal. 61, 67 Pac. 42.
District of Columbia. — United States *v.* Lowenstein, 21 D. C. 515.
Georgia. — Stripland *v.* State, 114 Ga. 843, 40 S. E. 993.
Illinois. — Aldrich *v.* People, 101 Ill. 16.
Indiana. — Pelts *v.* State, 3 Blackf. 28; Semon *v.* State, 158 Ind. 55, 62 N. E. 625.
Kentucky. — Sanderson *v.* Com., 11 Ky. L. Rep. 341, 12 S. W. 136.
Louisiana. — State *v.* Burdon, 38 La. Ann. 357.
Massachusetts. — Com. *v.* Mason, 105 Mass. 163, 7 Am. Rep. 507.
Missouri. — State *v.* Fink, 186 Mo. 50, 84 S. W. 921.
Nebraska. — Levi *v.* State, 14 Neb. 1, 14 N. W. 543; George *v.* State, 57 Neb. 656 N. W. 259.
New York. — People *v.* McClure, 148 N. Y. 95, 42 N. E. 523.
Ohio. — Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826; Berry *v.* State, 31 Ohio St. 219, 27 Am. Rep. 506; State *v.* Pardee, 37 Ohio St. 63.
South Carolina. — State *v.* Crawford, 39 S. C. 343, 17 S. E. 799.
Tennessee. — Rice *v.* State, 3 Heisk. 215.
Texas. — Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685.
Virginia. — Hey *v.* Com., 32 Gratt. 946, 34 Am. Rep. 799.

Intent Is Not an Element of Offense. — State *v.* Smith, 88 Iowa 1, 55 N. W. 16.

2. Foster *v.* State, 106 Ind 272, 6 N. E. 641; State *v.* Ives, 35 N. C. 338.
Where the offense is an independent substantive offense, neither the thief nor the next former possessor is on trial, and his identity is an immaterial matter. Semon *v.* State, 158 Ind. 55, 62 N. E. 625. For a full discussion of subject and collation of cases see State *v.* Fink, 186 Mo. 50, 84 S. W. 921.
It must be proved that the goods were received directly or indirectly from the thief, knowing them to have been stolen. One who receives goods from the person who received them from the thief is not guilty, although he takes wickedly, unless he received under circumstances connecting him with thief. Foster *v.* State, 106 Ind. 272, 6 N. E. 641.

3. See title "Larceny."

4. Gassenheimer *v.* State, 52 Ala. 313; People *v.* Clausen, 120 Cal. 381, 52 Pac. 658; Miller *v.* State, 165 Ind. 566, 76 N. E. 245.
Where the accused is charged with having received stolen cotton, a witness who testified that he had lost cotton from his gin-house is properly permitted to state that he ascertained that fact by a comparison of the weight of cotton when first put in the house with its weight after being ginned out. Gassenheim *v.* State, 52 Ala. 313.

competent evidence of the theft;[5] but the rule is otherwise where the defendant is considered an accomplice.[6]

4. Confession or Admission. — Though the extrajudicial confession of the thief is inadmissible against the receiver of stolen goods,[7] the admission of his guilt by the thief in the presence of the accused, has been held competent evidence against him.[8]

5. Record of Conviction of Thief is admissible against the accused as *prima facie* evidence of the theft.[9]

6. Flight of Persons Implicated in Theft of the property for receiving and concealing that for which the defendant is being tried, is admissible against him as evidence of the theft.[10]

III. PROOF OF RECEIPT OR PURCHASE OF GOODS.

1. Identification. — A. In General. — In order to show the receipt of the stolen goods, the goods found on defendant or received or purchased by him must be identified with those stolen.[11]

Testimony of Owner With That of Thief. — See next note.

5. The Actual Thief, Relatively to the Receiver of Stolen Goods, is an independent criminal, and upon the uncorroborative testimony of the thief the receiver of stolen goods may be convicted. Springer *v.* State, 102 Ga. 447, 30 S. E. 971; Harris *v.* State, 7 Lea (Tenn.) 124; State *v.* Kuhlman, 152 Mo. 100, 53 S. W. 416, 75 Am. St. Rep. 438.

It is not error to charge that jury may convict on uncorroborated testimony of accomplice. Wixson *v.* People, 5 Park. Crim. (N. Y.) 119.

6. Testimony of Owner in Connection With That of Thief. — Testimony of owner that it was stolen from his room, and of the one who sold the property to the defendant that he was the one who stole it from owner is sufficient to show that the property received by defendant had in fact been stolen. People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

Testimony of Principal Must Be Corroborated as to theft. Johnson *v.* State, 42 Tex. Crim. 440, 60 S. W. 667.

Acts and Declarations of Accomplice and Conversation Between Parties Held Competent. — McFadden *v.* State, 28 Tex. App. 241, 14 S. W. 128; Com. *v.* Jenkins, 10 Gray (Mass.) 485.

7. Reilley *v.* State, 14 Ind. 217.

8. Reg. *v.* Cox, 1 F. & F. (Eng.) 90.

While the accused was under arrest, an accomplice or person charged with stealing the goods, who was present, said to him: "It's no use trying to get out of it; they've got us dead; we have all been arrested and you might as well tell the truth," whereupon accused confessed his guilt. *Held,* that the confession was admissible, but the language was a mere suggestion to tell the truth. State *v.* Habib, 18 R. I. 558, 30 Atl. 462.

9. Coxwell *v.* State, 66 Ga. 309; Stripland *v.* State, 114 Ga. 843, 40 S. E. 993; Cooper *v.* State, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712.

The record of the conviction of thief, on his plea of guilty to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft, on the trial of the receiver of that property upon an indictment against him alone, which does not aver that thief has been convicted. Com. *v.* Elisha, 3 Gray (Mass.) 460.

Statute Making Record Conclusive Evidence Held Unconstitutional. Kirby *v.* United States, 174 U. S. 47.

10. State *v.* Hanna, 35 Or. 195, 57 Pac. 629.

11. See following notes:

B. Direct Evidence.— It is permissible for a witness to testify that he knew the goods in possession of defendant were the stolen goods by reason of certain marks on them, which marks he described.[12]

C. Indirect Evidence. — Circumstantial evidence, such as money found on defendant corresponding in a general way with that stolen,[13] similarity of weight, association, relation and other circumstances showing the correspondence between the articles stolen and those received by the accused, or found on his possession, may all go to the jury on the question of identity of property.[14]

2. Proof Otherwise Than by Identification. — A. Direct Evidence. — As to the necessity of corroborating the thief's testimony regarding the receipt of property, the rule is the same as in the case of his testimony concerning the theft or guilty knowledge, *i. e.,* where the thief is regarded as an accomplice, his testimony is

12. Hester *v.* State, 103 Ala. 83, 15 So. 857.

Testimony of owner that one of the razors found in defendant's possession had a rivet similar to that in the one stolen from him, and that he had never seen any other razor with such rivet was sufficient to go to the jury on the question of identity of property. People *v.* Maloney, 113 Mich. 536, 71 N. W. 866.

13. Money taken from the accused at the time of his arrest of the same denomination as that lost by the owner is admissible in evidence against the defendant. Proof of the identification of money found on such third person by rust marks is admissible. Polin *v.* State (Tex. Crim.), 65 S. W. 183.

14. Under indictment alleging the receipt of a sheep and of honey in the comb, evidence that mutton tallow and strained honey were found on premises of defendant is admissible in connection with evidence that a sheep was killed and honey strained there. Com. *v.* Slate, 11 Gray (Mass.) 60.

Papers found in a Closet Accessible to the Accused which appeared to be the wrappings of the stolen goods is proper evidence. Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51.

Receipt of Other Goods by the defendant is competent where such evidence tends to identify the goods covered by the indictment, and it appears that the proof in reference thereto justified the inference by the jury that all the goods were taken from the same place by the same person, at the same time, and were received by the defendant from the same person at the same time. People *v.* McClure, 148 N. Y. 95, 42 N. E. 523.

Where the property stolen consisted of wool and fleeces, it was competent to prove the weight of the fleeces shown to a witness by defendant after the theft, and alleged to have been taken from his own shop, for purpose of comparison, such wool being stored in defendant's house where the stolen wool was proved to have been carried. People *v.* Pitcher, 15 Mich. 397.

Under an indictment for receiving stolen brass, evidence that the brass and a horse and wagon were taken at the same time, that the wagon afterwards found had a broken axle; that accused was seen on the road near by with a broken-down wagon laden with heavy material; that an expressman was employed who conveyed the contents of the wagon, which proved to be brass, to a certain place, where it was sold by the defendant, is sufficient to go to the jury upon the question of identity of property stolen with that found. People *v.* Kiley 107 Mich. 345, 65 N. W. 233.

Under an indictment against A and B for larceny and receiving stolen goods, upon which A alone is tried, a search of B's house and the

insufficient, and when not so regarded his testimony is competent to establish the fact of possession or receipt.[15]

B. Indirect Evidence. — Evidence to show that a party charged with having received stolen property, knowing it to be stolen, received the same from the person who stole it (when such particular proof is required),[16] or from any other person, need not be direct, but such fact may be proved by circumstances.[17]

IV. PROOF OF GUILTY KNOWLEDGE.

1. Testimony of Thief. — A. Uncorroborated. — The rule as to the uncorroborated testimony of thief or accomplice governing the proof of theft and receipt of the goods applies also to the evidence of guilty knowledge.[18]

B. Corroborated by Proof of Possession. — The guilty knowledge may be established upon the testimony of thief when corroborated by proof from other sources of the actual possession of goods by the defendant, whether the accomplice does or does not testify to such possession.[19]

discovery of a large amount of property there, such as is not ordinarily found in a dwelling house, and the comparison of articles found there with other articles found in A's house are facts competent to put in evidence against the latter, in connection with other evidence in case. Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910. A recorded brand is admissible but not conclusive evidence of ownership of calf stolen, and is to be considered with other evidence. Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

15. Testimony of thief must be corroborated as to possession or receipt. Johnson *v.* State, 42 Tex. Crim. 440, 60 S. W. 667; People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

Uncorroborated testimony sufficient. Springer *v.* State, 102 Ga. 447, 30 S. E. 971; Harris *v.* State, 7 Lea (Tenn.) 124; State *v.* Kuhlman, 152 Mo. 100, 53 S. W. 416, 75 Am. St. Rep. 438.

Confession, see State *v.* Habib, 18 R. I. 558, 30 Atl. 462.

16. Gunther *v.* People, 139 Ill. 526, 28 N. E. 1011.

17. People *v.* Solomon, 125 Cal. xix, 58 Pac. 55; State *v.* Goldman, 65 N. J. L. 394, 47 Atl. 641; Com. *v.* Jenkins, 10 Gray (Mass.) 485.

Evidence tending to show habitual occupation and consequent opportunity to commit the offence. Com. *v.* Campbell, 103 Mass. 436. *Contra.* — People *v.* Pierpont, 1 Wheeler Crim. Cas. (N. Y.) 139.

Making Arrangement for Receiving Goods. — Conversation between thief and accused, in which arrangements were made for receiving stolen goods, held admissible. Com. *v.* Jenkins, 10 Gray (Mass.) 485.

18. Corroboration Unnecessary. Springer *v.* State, 102 Ga. 447, 30 S. E. 971; Harris *v.* State, 7 Lea (Tenn.) 124; State *v.* Kuhlman, 152 Mo. 100, 53 S. W. 416, 75 Am. St. Rep. 438; Wixson *v.* People, 5 Park. Crim. (N. Y.) 119.

Testimony of Thief Must be Corroborated. — People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

19. Com. *v.* Savory, 10 Cush. (Mass.) 535.

If a thief may be said to be an accomplice of a person who receives from him stolen goods, knowing them to have been stolen, that fact alone will not justify court in directing a verdict of acquittal against the receiver, even when the evidence of receiving guiltily be solely that of the thief, if the testimony of the thief be corroborated by facts and circumstances. State *v.* Goldman, 65 N. J. L. 394, 47 Atl. 641.

Testimony of thief is sufficiently

2. Conversations Between Defendant and Thief, before the commission of the offense, making arrangements for receiving the goods is competent.[20]

3. Indirect and Presumptive Evidence. — A. In General. Knowledge that goods were stolen need not be shown by direct testimony,[21] nor is it essential that the accused should have that actual or positive knowledge which one acquires from personal observation of the fact, but the guilty knowledge will be implied if the circumstances are such as should have been sufficient to satisfy a man of ordinary intelligence and caution that property was stolen.[22]

B. Possession. — On the question of whether or not possession of goods by the accused is admissible as a circumstance against him and the force and effect of such evidence when held competent, there is much conflict.

a. *Presumption.* — It has been held that possession of the goods may raise a presumption of guilty knowledge casting the burden on the defendant to explain his possession, and when unexplained is sufficient to support conviction.[23]

corroborated by proof that defendant placed goods in a back room of a saloon, saying that he had loaned money on them, and offering no explanation why they were put there. People *v.* Solomon, 125 Cal. xix, 50 Pac. 55.

20. Com. *v.* Jenkins, 10 Gray (Mass.) 485.

21. Delahoyde *v.* People, 212 Ill. 554, 72 N. E. 732; Cobb *v.* State, 76 Ga. 664.

22. Frank *v.* State, 67 Miss. 125, 6 So. 842; Huggins *v.* People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; Murio *v.* State, 31 Tex. Crim. 210, 20 S. W. 356.

The knowledge of the theft need not be that actual or positive knowledge which one acquires from personal observation of the fact. It is sufficient if the circumstances be such accompanying the transaction as to make the accused believe the goods had been stolen. Huggins *v.* People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; Collins *v.* State, 33 Ala. 434.

Though it is necessary to show that defendant knew the goods were stolen, such knowledge need not be personal or actual; he may have knowledge from other sources. State *v.* Goldblat, 50 Mo. App. 186.

23. Sahlinger *v.* People, 102 Ill. 241; People *v.* Weldon, 111 N. Y. 569, 19 N. E. 279.

The presumption of a criminal connection with the theft arising from the recent unexplained possession of stolen goods, applies as well to a person charged with unlawfully receiving them as to one charged with the original taking. People *v.* Weldon, 111 N. Y. 569, 19 N. E. 279.

Possession of property recently stolen which is not satisfactorily explained, is presumptive evidence that the possessor himself stole the same; but if he declares that he received such property from another person whose name is unknown, this may be taken as sufficient evidence that he received it from the thief, rather than that he stole it himself. Gunther *v.* People, 139 Ill. 526, 28 N. E. 1101.

In Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232, defendant was found in possession of money which had been stolen; he had buried in the ground a large part of it. It was shown that he had had nothing to give in exchange for this money. These facts were held sufficient basis for an inference that he had knowingly, and with criminal intent, re-

Contra. — Recent possession is held to raise no presumption against the defendant that he knew the property was stolen.[24]

b. *As a Circumstance.* — The inference arising from the possession of stolen property is said to be one of fact and not of law. It never rises to the dignity of a conclusive presumption, and is strong or weak, according to the character of property, the nature of possession, and its proximity in time with the theft.[25] In other words the fact of possession is a circumstance admissible against the accused.[26]

c. *Possession No Evidence.* — By some courts a distinction is drawn between possession as evidence of larceny and as evidence of the unlawful receiving; in the latter offense the possession is held to be no evidence of the guilt of the person receiving them.[27]

d. *Possession Outside of State Where Stolen.* — Although possession out of the commonwealth of goods stolen in the commonwealth would not of itself warrant conviction for receiving them and aiding in their concealment here, evidence of such possession would be competent against one accused of that offense.[28]

C. ATTENDING FACTS AND CIRCUMSTANCES. — Giving rise to presumption of guilty knowledge are: The inadequacy of price paid for goods;[29] false statements in attempting to explain pos-

ceived the stolen money. In the same case it was held that the word "recent" is a relative term and a time which might be considered recent under one state of facts would not be so under a different state of facts. Such a presumption may arise even though such goods were not found until more than three months after they were stolen, when the circumstances tend to show that they had been in defendant's possession for a considerable time before their discovery. Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

24. State *v.* Bulla, 89 Mo. 595, 1 S. W. 764, *followed* in State *v.* Richmond, 186 Mo. 71, 84 S. W. 880, *overruling* State *v.* Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395. The bare fact that the accused received stolen property is not sufficient standing alone to show that he knew property was stolen when he received it. Castleberry *v.* State, 35 Tex. Crim. 382, 33 S. W. 875; Durant *v.* People, 13 Mich. 351.

25. State *v.* Pomeroy, 30 Or. 16, 46 Pac. 797, *citing* State *v.* Hodge, 50 N. H. 510; State *v.* Graves, 72 N. C. 482.

26. The recent exclusive, unexplained possession of stolen property constitutes a mere circumstance to be considered by the jury with other proof in the case. Cooper *v.* State, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712.

27. Possession itself without evidence tending to show guilty knowledge could have no tendency to establish guilt. Durant *v.* People, 13 Mich. 351.

28. Com. *v.* Phelps (Mass.), 78 N. E. 741.

29. The value of the goods is a material element of fact in the case as bearing on the existence of guilty knowledge in mind of defendant when purchasing the stolen articles. Cohen *v.* State, 50 Ala. 108; People *v.* Hertz, 105 Cal. 660, 39 Pac. 32; State *v.* Houston, 29 S. C. 108.

The owner of property may state what its real value was to him, since that is a circumstance tending to show its real value. Cohen *v.* State, 50 Ala. 108.

Where defendant claims to have taken goods from the thief in payment for services rendered, their value, as compared with these services bears upon issue of guilty

session and how acquired;[30] the irresponsibility or evil character of vendor or depositor;[31] recent possession of large sums of money in connection with the previous poverty of accused;[32] the unusual hour of the night in which goods were received, attended by other suspicious circumstances,[33] and the like.[34]

knowledge. State *v.* Houston, 29 S. C. 108, 6 S. E. 943.

The mere purchase of stolen goods under their value does not create a presumption of knowledge that they were stolen. Sartorious *v.* State, 24 Miss. 602.

30. Where accused makes false statements in attempting to explain his possession, or how he got the property, the presumption will be that he could not truthfully make such explanation without inculpating himself. Gunther *v.* People, 139 Ill. 526, 28 N. E. 1101.

31. Huggins *v.* People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

32. Person may be convicted upon evidence showing his poverty previous to the larceny, and that shortly thereafter he was in the unexplained possession of a large amount of currency, although such currency is not specifically identified with that which was stolen. Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

33. It is proper to take into consideration the circumstances under which the goods were brought into defendant's place and received by him. If the goods are taken there in the daytime, by a regular dealer in such goods, and sold for a fair valuation, the transaction cannot be regarded as suspicious. But where the property is taken to the defendant at an unusual hour of the night, between ten and eleven, in a confused condition,— fine silks tied up in bundles with silk handkerchiefs, and the parties in possession of goods are all strangers to defendant, except F, whom he knows to be a thief, these facts are sufficient to convince a man of ordinary honesty that the goods were stolen. Friedberg *v.* People, 102 Ill. 160.

34. Various Facts From Which Inference May Be Drawn. — Where pawnbrokers are required by law to keep a description of goods purchased, the failure of defendant to make an entry of the goods in question may be considered against him as tending to show guilty knowledge. People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

Though there be no direct evidence that the defendant knew the bonds to have been stolen, or that he received them from any particular person who had stolen them, nor any evidence that he had positive information when he sold them they had been stolen, still the circumstances as to the manner of receiving them, his manner of dealing with them, his knowledge and description of the person from whom he claimed to have received them, his own acts in transferring them, the peculiarities attending such transfers and his method of payments to the claimed owner, added to the facts that stolen bonds were in his possession, may constitute potential evidence that the defendant possessed guilty knowledge. People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536. See further:

Alabama. — Adams *v.* State, 52 Ala. 379.

Georgia. — Cobb *v.* State, 76 Ga. 664.

Illinois. — Delahoyde *v.* People, 212 Ill. 554, 72 N. E. 732.

Indiana. — Goodman *v.* State, 141 Ind. 35, 39 N. E. 939.

Michigan. — Durant *v.* People, 13 Mich. 351.

New York. — People *v.* Rando, 3 Park. Crim. 335; Goldstein *v.* People, 82 N. Y. 231.

Texas. — Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

Where the evidence showed that the property was stolen by another, prior to its reception by the defendant, that it was found in his possession shortly thereafter, and that he was attempting to dispose of it with an intention to secrete it, *held*, that the proof of such facts raised a pre-

D. Other Similar Acts.— a. *In General.* — It is competent for the prosecution to give in evidence a series of acts of the like character in order to show *scienter,* or to rebut any presumption of innocent mistake.[35]

b. *Previous Receipts or Purchases From Same Thief.* — Evidence that other goods known to have been stolen were previously received or bought by the defendant of the same thief is competent to show guilty knowledge.[36]

sumption of guilt on the part of defendant; that he received the property with the knowledge that it was stolen; and that the jury were warranted in so finding in the absence of satisfactory explanation as to how he acquired possession of property. State *v.* Miller, 159 Mo. 113, 60 S. W. 67.

35. People *v.* Rando, 3 Park. Crim. (N. Y.) 335.

Evidence that oth stolen goods were found in possession of defendant is admissible for the purpose of showing guilty knowledge on the part of the accused that the goods for receiving which he is charged were stolen. Devoto *v.* Com., 3 Metc. (Ky.) 417; State *v.* Crawford, 39 S. C. 343, 17 S. E. 799.

Similar transactions between the defendant and his accomplice on several different days, shortly before the date of the offense charged are competent evidence to prove guilty knowledge. State *v.* Habib, 18 R. I. 558, 30 Atl. 462. See Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

Where evidence was admitted to show that defendant was personally implicated in three instances where larceny was attempted or committed, and that he took immediate action to conceal certain goods upon information conveyed to him in relation to a fourth, that one, P., aided in perpetration of each crime, and that between him and the defendant the intercourse was constant and confidential, *held,* that these transactions were not so remote from each other as to be totally distinct, and were competent to show guilty knowledge. Kilrow *v.* Com., 89 Pa. St. 480.

Habitual Occupation. — Evidence of the kind of shop which the defendant kept, and the business which he there carried on, is admissible to inform the jury of his habitual occupation. Com. *v.* Campbell, 103 Mass. 436. *Contra.* — People *v.* Pierpont, 1 Wheeler Crim. Cas. (N. Y.) 139.

36. Shriedly *v.* State, 23 Ohio St. 130.

It is competent to show that defendant had, prior to the time in question, received property which he knew to be stolen, from the person from whom he received the property in question, as bearing upon his knowledge that it was stolen. State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299. It is not necessary that goods before received should have been stolen from the same person, nor be of the same character. State *v.* Ward, 49 Conn. 429; People *v.* Doty, 175 N. Y. 164, 67 N. E. 303.

Proof that accused has frequently received similar articles under like circumstances from the same thief, stolen from same person or place, knowing that they were stolen, is proper. Copperman *v.* People, 56 N. Y. 591. Such evidence is not inadmissible because it establishes that the accused was also guilty of violating another statute, or an ordinance prohibiting licensed pawnbrokers from buying property.

Stealing of Similar Goods from the Same Owner by the Same Person from whom the defendant, through a third person, received the goods, is proper to prove the scienter. People *v.* Grossman, 168 N. Y. 47, 60 N. E. 1050.

Subsequent Dealings Inadmissible. Where the information alleged that the property was received by defendant on or about a certain date, the prosecution cannot, for the purpose of showing that the property was received by defendant with a guilty knowledge that it had been stolen, introduce evidence that a large number of other articles, found in a house

c. *Possession of Other Stolen Goods of Same Owner.* — Testimony tending to show that defendant had in his possession about the same time other stolen goods of same owner, even without showing defendant's guilty knowledge as to such other goods,[37] or acts of receiving goods stolen from same person other than those mentioned in indictment, is proper evidence.[38]

E. Conversation Between Parties On Former Occasion. Evidence of the conversation between the parties upon former occasion is competent to show that the former receipts were with knowledge.[39]

V. INTENT TO DEFRAUD.

1. In General. — Where it is proven that the accused knew the goods were stolen when he received them, the intent to defraud the owner may be gathered from circumstances surrounding the case; and it follows as an inevitable presumption in the absence of any proof to the contrary that he received them with intent to defraud the owner.[40]

2. Proof of Receipt of Other Stolen Goods. — Proof of the receipt of other stolen cattle by the defendant is competent, although it has not been shown that the accused received such other cattle at same time and place, and from same parties as alleged in indictment.[41]

3. Offering To Sell Property, knowing it to have been stolen, shows the intent to deprive the true owner thereof.[42]

VI. DEFENSE.

1. Former Acquittal. — A. Evidence Not Competent To Sup-

occupied by defendant and the thief some three months thereafter had been stolen by means of burglaries committed subsequent to the date complained of. People *v.* Willard, 92 Cal. 482, 28 Pac. 585.

The state cannot introduce testimony tending to show that the person of whom the defendant had received the property, had stolen other property of same kind at a different time. McIntire *v.* State, 10 Ind. 26.

37. State *v.* Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

38. Com. *v.* Johnson, 133 Pa. St. 293, 19 Atl. 402.

39. Copperman *v.* State, 56 N. Y. 591.

40. United States *v.* Lowenstein, 21 D. C. 515. See Rex. *v.* Davis, 6 Car. & P. 177, 5 E. C. L. 341; Rex *v.* Richardson, 6 Car. & P. 335, 25 E. C. L. 427.

41. Such evidence is primarily competent as tending to prove the fraudulent intent of defendant in respect to the animal named in indictment, and also as tending to show a systematic plan on defendant's part to commit the crime charged. Morgan *v.* State, 31 Tex. Crim. 1, 18 S. W. 647.

Evidence that when the defendant received the animal mentioned in indictment from one, J., he received in connection with one, G., two other animals, and that he and G. sold the three animals at the same time, is admissible for purpose of showing defendant's fraudulent intent with respect to the yearling named in the indictment. Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

42. People *v.* Fletcher, 44 App. Div. 199, 60 N. Y. Supp. 777.

PORT PLEA. — Proof of an acquittal for burglary will not support a plea of *autre fois acquit* to an indictment for receiving stolen goods, knowing them to have been stolen,[43] though the same evidence might be competent on both charges.[44]

B. EVIDENCE COMPETENT TO SUPPORT PLEA. — If goods stolen from different persons are received at the same time, the offense is single, and evidence of acquittal of a charge of receiving stolen goods from one of such persons is competent to sustain the plea to a charge of receiving any other stolen goods at the same time.[45]

2. Good Character of Accused. — A. IN GENERAL. — Proof of the good character of the accused is competent.[46]

B. AS REBUTTING INFERENCE ARISING FROM POSSESSION. — The better opinion is said to be that the inference arising from the possession alone is completely removed by the good character of the accused,[47] though there is authority that such proof is admissible as a mere mitigating circumstance.[48]

3. Reputation of Vendor. — On the question of guilty knowledge, evidence of vendor's reputation in the community, and among those by whom he was known as being a regular and honest dealer in goods such as were stolen, is competent on the trial of the person charged with purchasing or receiving them.[49]

4. Intention of Defendant in Receiving Goods. — Of course the honesty of defendant's purpose in receiving the goods is competent in defense.[50]

5. Testimony of Defendant. — In General. — Defendant has the right to testify from whom he received the goods, and under what circumstances, and what conversation took place at that time, in reference to goods between himself and party from whom he received them.[51]

6. Explanation of Possession. — Explanation made by a person contemporaneously with, or when first required by circumstances

43. Pat *v.* State, 116 Ga. 92, 42 S. E. 389.

44. Com. *v.* Bragg, 104 Ky. 306.

45. People *v.* Willard, 92 Cal. 482, 28 Pac. 585.

46. Hey *v.* Com., 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

47. People *v.* Hurley, 60 Cal. 74, 44 Am. Rep. 55.

48. Proof of good character is admissible for defendant as tending to have a mitigating influence in some respect favorable to him, but the relative value of such proof must depend on the circumstances of each case. Wagner *v.* State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79. But see Clackner *v.* State, 33 Ind. 412.

49. Com. *v.* Gazzolo, 123 Mass. 220, 25 Am. Rep. 79.

50. Where defendant on behalf of the owner receives the stolen goods from the thief for the honest purpose of restoring them to the owner without fee or reward or expectation of any pecuniary compensation, and in fact immediately after obtaining them restores all he received to the owner, and is not acting in concert with party stealing to make a profit out of transaction, he would not be guilty. Aldrich *v.* People, 101 Ill. 16.

51. State *v.* Bethel, 97 N. C. 459, 1 S. E. 551.

to account for his recent possession, is admissible to rebut any inference arising therefrom.[52]

7. Rebuttal of Inference Drawn From Inadequacy of Price. Evidence that according to usage second-hand dealers do not pay full price for clothing is admissible to rebut the presumption of guilty knowledge arising from inadequacy of price.[53]

52. Payne *v.* State, 57 Miss. 348.

Where it was proved by a witness that he found the stolen property, and that two of the defendants went with him to the place where it was found, it was held that defendants had a right, when called as witnesses, to state what they said, and as to how they came by the property. It was error to refuse such testimony. Bennett *v.* People, 96 Ill. 602.

When Burden Shifted to State. When a party in possession of recently stolen property gives an exculpatory explanation of his possession that is reasonable and probable, then the burden devolves upon the state to prove the falsity; otherwise the accused is entitled to acquittal. Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737.

When stolen goods are found in the possession of a party who has denied that they were in his possession, proof that the denial was in consequence of a misunderstanding, rebuts the presumption of guilt created by such denial. Sortorious *v.* State, 24 Miss. 602; Hey *v.* Cain, 32 Gratt. (Va.) 946, 34 Am. Rep. 799.

53. Where a second-hand retailer of clothing was indicted for receiving stolen goods and, as tending to prove guilty knowledge, evidence was introduced that he had only paid for the clothing about one-third of its value, it was held error to refuse to permit accused to prove that, according to usage, dealers in second-hand clothing do not generally pay full price for clothing, but purchase it at a reduction, and that from the character of the business they are compelled to sell new clothing for the price of second-hand goods, and hence must purchase out of season and at reduced price. Andrews *v.* People, 60 Ill. 354.

RECITALS.—See Admissions; Ancient Documents; Deeds; Depositions; Fraudulent Conveyances; Mortgages.

RECOGNIZANCES.

By A. P. Rittenhouse.

I. BURDEN OF PROOF AND PRESUMPTIONS.

1. Bail-Bond and Judgment Nisi. — To entitle the state to recover in a proceeding upon a forfeited bail-bond or recognizance, where the defendant interposes a general denial, the state must introduce in evidence the bond or recognizance, and the judgment of forfeiture.[1]

2. Burden on Defendant. — In a proceeding by *scire facias* on a forfeited recognizance, the burden is upon the defendant to prove everything upon which he relies to prevent the judgment of forfeiture from being made absolute.[2]

3. Presumption as to Execution and Recitals. — Where a recognizance is in proper form and appears on its face to have been taken and approved by the proper court or officer, the law presumes that it was duly executed, and that the recitals in it are true.[3]

4. Presumption of Validity. — The law presumes that a recognizance taken before a court of general jurisdiction is valid, and

1. Eubank *v.* People, 50 Ill. 496; Farris *v.* People, 58 Ill. 26; People *v.* Meacham, 74 Ill 292; Goodwin *v.* State, 14 Tex. App. 443; Houston *v.* State, 13 Tex. App. 560; Hester *v.* State, 15 Tex. App. 418; Baker *v.* State, 21 Tex. App. 359, 17 S. W. 256.

The forfeiture of a bond in a criminal prosecution is a judicial act, and must appear of record; it cannot be supplied by parol evidence. State *v.* Doyle, 42 La. Ann. 640, 7 So. 699.

2. "In proceedings against bail on a *scire facias* the defendant is to show cause why the recognizance shall not be estreated, or, in other words, why the conditional judgment of record against him shall not be made absolute, and execution issued thereon. The burden of proof is on the defendant, when judgment in default of appearance has been entered against the principal. The evidence on which the plaintiff relies is of record, and is presumed to be within the knowledge of the court, and the defendant must show and allege everything that he relies upon to establish the insufficiency or irregularity of the proceedings." State *v.* Carr, 4 Iowa 289.

3. Gresham *v.* State, 48 Ala. 625; Chumasero *v.* People, 18 Ill. 405; Lindsay *v.* State, 39 Tex. Crim. 468, 46 S. W. 1045.

In a proceeding by *scire facias* on a recognizance taken by a justice of the peace, the court held that although it did not appear that the recognizance was required to be given by the justice of the peace, it would be presumed that it was entered into by his order. Adams *v.* State, 48 Ind. 212.

A bail-bond is *prima facie* evidence that the things recited in it took place. It is not incumbent on the state in the first instance to offer in evidence the docket of the justice of the peace before whom the bond was taken, or the minutes of his examination, or a transcript thereof, for the purpose of showing that he took the necessary proceedings to demanding or taking a recognizance. The fact that a bond with the required recitals and conditions was executed, duly acknowledged, delivered to and accepted by the justice, is presumptive evidence that it was taken and received in the place of the body of the accused. State *v.* Patterson, 23 Iowa 575.

A recognizance in possession of the clerk of the court, which shows on its face that it has been taken and approved by the judge of the court is of itself sufficient evidence to establish its authenticity and validity, although it does not show that it has been filed by the clerk. State *v.* Ballentine, 106 Mo. App. 190, 80 S. W. 317.

"It is not necessary where the recognizance is taken in open court

that all the steps leading up to its taking were regular, unless there appears of record a want of authority in the judge of the court to take it.[4]

5. Alteration. — Where a recognizance appears on its face to have been altered as to the amount of penalty therein named, the burden is upon the plaintiff to satisfactorily explain such alteration.[5]

II. EXECUTION OF RECOGNIZANCE.

1. Nature of Proof Generally. — The weight of authority seems to sustain the proposition that generally the execution of a recognizance can be proved only by the record.[6] Of course, this proof is only *prima facie,* and may be contradicted.[7]

2. Lost Recognizance. — Parol evidence is admissible to prove the contents of an appearance bond which has been lost.[8]

to prove that the court required the principal to enter into it." Grinestaff *v.* State, 53 Ind. 238.

4. State *v.* Eyermann, 172 Mo. 294, 303, 72 S. W. 539; State *v.* Rogers, 36 Mo. 138.

5. State *v.* Roberts, 37 Kan. 437, 15 Pac. 593.

6. Longley *v.* Vose, 27 Me. 179; Beech *v.* Rich, 13 Vt. 595; Owen *v.* State, 55 Vt. 47; Wood *v.* Com., 4 Rand. (Va.) 329.

In Treasurer of Vermont *v.* Merrill, 14 Vt. 64, the court said: "A recognizance is a debt of record. . . . It must be proved by the record. The record cannot be contradicted, nor varied, nor its defects supplied by parol."

7. Com. *v.* Clark Greene, 13 Allen (Mass.) 251, was a suit on a recognizance. The record showed that the defendant entered into the recognizance before the police court of the city of New Bedford as surety for Isaac Marshall, who had been ordered to recognize with surety for his appearance at the superior court to answer to a charge of larceny. The parties agreed upon a statement of facts by which it appeared, among other things, that the clerk of the police court took the recognizance at the jail after the adjournment of the court, and in the absence of the justice of the court. *Held,* that the record was not conclusive as against this agreed statement of facts.

In an action on a recognizance, the execution of it was denied. The trial court instructed the jury that the recognizance taken and acknowledged before the county clerk was *prima facie* evidence against the defendant; and that the burden of proof was upon him to show that the clerk's certificate thereon was false; and that, notwithstanding, the defendant swore that the instrument was a forgery, the certificate of the county clerk, being in due form and by the proper officer, in the absence of fraud and conspiracy, was entitled to more weight than the unsupported oath of the defendant. *Held,* error, the court saying: "The recognizance and certificate of the clerk thereto did not impart absolute verity, and could not be considered as a record made in open court. Under the issue in this case the defendant was at liberty to impeach it, and having introduced testimony having that tendency, it became a question of fact for the jury. . . . They might have considered the official certificate of the clerk the better evidence, but the court could not properly instruct them that it was such as matter of law." Spencer *v.* Fish, 43 Mich. 226, 5 N. W. 95.

8. State *v.* Burdick, 84 Iowa 626, 51 N. W. 67, was an action on an appearance bond. The bond was lost. The sheriff who arrested the accused testified that he was with him when the surety signed the bond; that he took the bond to the mayor who approved it; that he examined the bond, and that to his best recollection there was a day fixed in it, and an hour. He was

III. DEFAULT OF THE PRINCIPAL.

Proved by the Record — As a general rule the default of the principal in a recognizance can be proved only by the record,[9] and the record is conclusive of the fact.[10] But this rule is in some states changed by statute.[11]

IV. RECORDS AND FILES.

1. Original Action. — In a suit against the sureties on a bail-bond or recognizance, the files and records in the case in which the recognizance was given, and the judgment therein, are competent evidence.[12]

2. Indictment of Principal. — In an action upon a forfeited

then asked: "State whether on the day and hour fixed you appeared before the magistrate." This was objected to because of incompetency, and calling for a conclusion, and the objection was sustained. *Held*, error. The court said: "The witness had testified that he was present when the proceedings were had forfeiting the bond. The purpose of this question was to fix the time of the forfeiture the same as that named in the bond, and for that purpose the question was surely proper. It is true the witness had said that he did not then remember the day and hour fixed in the bond, but his testimony shows that at the time of the appearance he did know, and it was competent for him to state whether or not his appearance was at the time fixed."

9. Com. *v.* Slocum, 14 Gray (Mass.) 395; Com. *v.* Bail of Gordon, 15 Pick. (Mass.) 193; Clifford *v.* Marston, 14 Or. 426, 13 Pac. 62; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

10. State *v.* Gorley and Cloud, 2 Iowa 52; State *v.* Cobb, 71 Me. 198, 207.

In a proceeding by *scire facias* on a bail-bond, it appeared that the recognizance was returned to the proper court at a term thereof, when and where the principal conusor had engaged to appear, and that he did not so appear, but made default, and that his default, and the default of his sureties to then and there have him present, as they had engaged to do, were entered of record. *Held*, that the record of the default was conclusive evidence of the fact, and not subject to be impeached, controverted or affected by extrinsic evidence. State *v.* Gilmore, 81 Me. 405, 411, 17 Atl. 316.

An entry on the records of the court, merely stating that a recognizance was forfeited on a certain day, is conclusive evidence that the defendant and his bail were called and did not appear. Com. *v.* Basendorf, 153 Pa. St. 459, 25 Atl. 779.

Sheriff's Return. — In an action against sureties on a bail-bond the return "not found," made by the sheriff as to the principal, is conclusive and cannot be questioned except as specially authorized by statute. Garofalo *v.* Prividi, 87 N. Y. Supp. 467.

11. In Hesselgrave *v.* State, 63 Neb. 807, 89 N. W. 295, the court said: "At common law the default of a defendant could only be shown by an entry made on the records of the court." But the statute of Nebraska has changed this rule and permits the state to prove the default of a defendant by oral testimony when in consequence of the neglect of the clerk of the court, or for any other reason, such default was not made a matter of record.

12. Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226.

Wilcox *v.* Ismon, 34 Mich. 268, was a suit against sureties on a bail-bond on a *capias* issued in an action of trespass on the case. *Held*, that the judgment in the original suit was admissible as fixing the amount of damages.

recognizance, the indictment of the principal is admissible;[13] but it is not indispensable, and it need not even be proved that an indictment was found.[14]

3. Scire Facias. — A *scire facias* is admissible in evidence.[15]

4. Transcript of Justice. — In a proceeding by *scire facias* on a recognizance taken by a justice of the peace, the affidavit filed in the justice court and the transcript of the justice are admissible.[16]

5. Indorsement, Filing and Record. — The indorsement by the clerk of the court upon a recognizance as to the return, filing and record of the same, is competent evidence of such facts as against the sureties on the recognizance.[17]

6. Return of Sheriff. — It has been held that the return of a sheriff as to the arrest is only *prima facie* evidence of the fact, and may be contradicted by parol evidence.[18]

13. Mooney *v.* People, 81 Ill. 134. In Sims *v.* State, 41 Tex. Crim. 440, 55 S. W. 179, an action on a defaulted bail-bond, the appellant objected to the introduction of the indictment in evidence because it did not show that it was for the same offense as that for which appellant was tried before the justice of the peace sitting as an examining magistrate. *Held,* properly admitted for the reason that it is not necessary that the indictment should show on its face that the principal was indicted for the offense tried by the examining court.

14. O'Brien *v.* People, 41 Ill. 456; State *v.* Coppock, 79 Iowa 482; 44 N. W. 714.

In Kepley *v.* People, 123 Ill. 367, 380, 13 N. E. 512, the court said: "It is not necessary to prove that an indictment was ever found, in order to render recognizers liable on a default of their principal to appear to a criminal charge."

15. Lewis *v.* State (Tex. Crim.), 39 S. W. 570, was a proceeding by *scire facias* on a bail-bond. The *scire facias* was admitted against the objection of the appellant. *Held,* proper. The court said: "There was no error in the court admitting in evidence the *scire facias.* If there was a variance between the bond and the recitation in the *scire facias,* appellant should have objected to the introduction of the bond in evidence."

16. Adams *v.* State, 48 Ind. 212; Gacheinheimer *v.* State, 28 Ind. 91; Friedline *v.* State, 93 Ind. 366, 370.

17. Com. *v.* Merriam, 7 Allen, (Mass.) 356.

"The certificate of the clerk upon the back of the recognizance contains a distinct statement, and is sufficient evidence of the fact, that it had been duly returned and entered of record in the court of common pleas. Upon the default of the principal recognizor, a writ of *scire facias* might properly issue from that court against him and his sureties." Com. *v.* Slocum, 14 Gray (Mass.) 395.

18. In Gary *v.* State, 11 Tex. App. 527, 533, among other defenses, the defendant alleged that the principal, one Baker, was arrested upon a *capias* issued upon an indictment for the same offense at the next term of the court. By the return of the sheriff upon this *capias* it appeared that the principal had been re-arrested. The court said: "The question is presented for decision; was it permissible in *this* case to allow the state to contradict this return, and prove that in fact Baker was never arrested? . . . If Baker was arrested upon the same charge, then the defense was complete; if not arrested, then no defense. Is the return conclusive of this fact? The common law will not permit returns to be contradicted. In this state this question is not settled. . . . We are of the opinion that when no rights have vested, no rights of *bona fide* parties intervened, that the return is only *prima facie* proof. . . . The arrest operates the release; it must be proved. Nor will

V. VARIANCE.

1. Between Recognizance and Scire Facias. — A recognizance is not admissible where there is a substantial variance between it and the *scire facias* as to the date of the recognizance,[19] or as to the court or officer before whom it was taken.[20]

2. Between the Scire Facias and Judgment Nisi. — Where there is a substantial variance between the *scire facias* and the judgment of forfeiture, the record of the judgment of forfeiture is not admissible.[21]

3. As to Name of Principal. — Where there is a variance between the order of commitment and the recognizance, as to the name of the principal, parol evidence may be received to establish his identity.[22]

any return of the officer conclude this fact and thereby deprive the state of the right of showing the truth of the matter."

19. Hedrick *v.* State, 3 Tex. App. 570; Avant *v.* State, 33 Tex. Crim. 312, 26 S. W. 411.

In a proceeding by *scire facias* on a forfeited recognizance, it was stated in the *scire facias* that the recognizance was entered into of date of April 26. The recognizance offered in evidence was not dated, and over the objection of the defendant, on account of the variance, it was admitted in evidence. *Held,* error. Bailey *v.* State (Tex. Crim.), 22 S. W. 40.

In Moseley *v.* State, 37 Tex. Crim. 18, 38 S. W. 800, the *scire facias* alleged that the bond was executed on a certain day. Without further explanation the state introduced the bond, which bore another date. *Held,* not admissible. Also *held,* that parol evidence was not admissible to show another date than that alleged in the *scire facias.* The court said: "If there is a mistake in the date of the bond, this can be explained by proper allegations in the *scire facias,* and parol proof can be received to correct such mistakes."

20. In Frost *v.* State, 33 Tex. Crim. 347, 26 S. W. 412, the *scire facias* recited that the bond had been entered into before the district court. The bond was introduced in evidence, and it showed that it was taken and approved by a justice of the peace. *Held,* erroneously admitted.

In Smith *v.* State, 7 Tex. App. 160, the judgment *nisi* and the *scire facias* described the bond as designating the court in which the principal was bound to appear, as the "criminal court of Waco." The bail-bond was conditioned for the appearance of the principal before the criminal court of McLellan county. The bond was admitted in evidence against defendant's objection. *Held,* error.

In Arrington *v.* State, 13 Tex. App. 554, the court said: "We are of the opinion that the court erred on admitting in evidence, over the objections of the defendants, the bail-bond upon which the judgment in this case is based. This bond shows upon its face that it was taken and approved by L. S. Collins, a constable of Gonzales county, while the bond declared upon in the *scire facias* is described as one taken by the *sheriff* of Gonzales county. A *scire facias* performs the double function of a petition and a citation, and in establishing the essential matters therein alleged the *allegata* and *probata* must substantially correspond."

21. In Farris *v.* People, 58 Ill. 26, it was averred in the *scire facias* that the conditional judgment was rendered against the principal, George W. Farris, and five sureties. The record offered in evidence, and objected to, only recited a judgment of forfeiture against the principal and three sureties. *Held,* a fatal variance.

22. State *v.* Ballentine, 106 Mo. App. 190, 80 S. W. 317, was an action on a forfeited recognizance. It appeared that George Ballentine was

VI. PAROL EVIDENCE.

1. When Competent. — In an action against sureties upon a recognizance, parol evidence is competent to prove the manner of the arrest of the principal and the circumstances attending it;[23] to show the identity of the principal,[24] and that he was called in court;[25] also to show that the recognizance was approved by a justice of the peace;[26] to explain ambiguous words in it,[27] and variance between it and other documents in the case,[28] and that two indictments are for the same offense;[29] to show the consideration for the signing of a recognizance;[30] to supply omissions in the record not contra-

committed to the holdover, under the name of George Vallentine; that he gave a recognizance with sureties, for his appearance as Ballentine. The evidence of the officer who arrested Ballentine was admitted to show that Ballentine was the person arrested, and against whom the criminal charges were preferred, that the accused gave his name at the police office as Vallentine, and that it was for this reason the proceeding appeared as against Vallentine, instead of Ballentine. This evidence was held competent, the court saying: "We think the evidence is sufficient to show that Ballentine was the person arrested and subsequently charged by information with unlawfully carrying concealed weapons; that he gave his name to the officer who arrested him as Vallentine and thus misled the officer into the error of proceeding against him under the name of George Vallentine, can not avail to relieve the defendants of their obligation on the recognizance."

23. In Ayres *v.* People, 3 Colo. App. 117, 32 Pac. 77, the sureties claimed that they caused the principal to be seized and surrendered to the sheriff of the proper county, and received from him a written receipt acknowledging such surrender. It was shown by evidence that the sheriff went to Ohio at the instigation of the defendants and brought the principal back to Colorado. The people introduced evidence that the sheriff's trip to Ohio for the principal was not the result of a contract between him and the sureties, but an execution of the law under an arrangement with the governing body of the county, and afterwards ratified and made legal by legitimate and proper official action. *Held,* that this evidence was competent, and properly admitted.

24. O'Brien *v.* People, 41 Ill. 456, 460.

In a proceeding by *scire facias* on a forfeited recognizance, the *scire facias* contained the full name of the principal bound to appear, while in the recognizance his surname, and the initials of his given name, were given. *Held,* that parol evidence was admissible to prove that the two names designated the same person. Allen *v.* People, 29 Ill. App. 555.

25. State *v.* Cornell, 70 S. C. 409, 50 S. E. 22.

26. In Ozeley *v.* State, 59 Ala. 94, 97, the undertaking conformed substantially to the statutory form, except that the magistrate did not indorse on it the word "approved" and sign such indorsement. *Held,* that it was competent to show by parol evidence that the undertaking was signed in the presence of the magistrate, and that on its execution he took possession of it, and discharged the principal from arrest.

27. Ambiguous words in a bail-bond may be explained by proof of surrounding circumstances. Colquitt, Governor, *v.* Bond, 69 Ga. 351.

28. Welch *v.* State, 36 Ala. 277; State *v.* Eldred, 31 Ala. 393; Vasser *v.* State, 32 Ala. 586.

29. State *v.* Clemons, 9 Iowa 534.

30. State *v.* Russell, 24 Tex. 505.

Where a surety testified that he signed the recognizance only upon the condition that another person should sign it as co-surety, proof

dicting it,[31] and even to contradict the certificate of a magistrate.[32]

2. When Incompetent. — Parol evidence is not admissible to contradict the record as to the taking and approval of a recognizance;[33] or as to the forfeiture of it;[34] or to supply a deficiency in it;[35] or to prove the discharge of a defendant;[36] or to show an agreement of parties contrary to the record.[37]

that he was led to sign it by other consideration, such as indemnity furnished, or property turned over to him by the prisoner, was held competent. Madden *v.* State, 35 Kan. 146, 10 Pac. 469.

31. In an action on a bail-bond, the statute of limitations was pleaded in defense. *Held,* that evidence other than the record was competent to show the day on which judgment was actually entered. Danford Clark *v.* John Ely, 2 Root (Conn.) 380.

32. Gregory *v.* Sherman, 44 Conn. 466, 469, was an action on a recognizance. The defendants denied having entered into it. The official certificate of the magistrate who issued the writ, that the recognizance was given, was offered in evidence and rejected. *Held,* error. Also *held,* that the defendants might introduce parol evidence to contradict the certificate. See also Kirkland *v.* Candler, 114 Ga. 739, 40 S. E. 734.

33. Welborn *v.* People, 76 Ill. 516; Clark *v.* M'Comman, 7 Watts & S. (Pa.) 469; McMicken *v.* Com., 58 Pa. St. 213.

34. State *v.* Clemons, 9 Iowa 534; State *v.* Coppock, 79 Iowa 482, 44 N. W. 714; Calvin *v.* State, 12 Ohio St. 60, 68.

United States *v.* Ambrose, 7 Fed. 554, was a proceeding by *scire facias* upon a recognizance conditioned for the appearance of Thomas Ambrose. The United States introduced a record of the court showing that on a certain day during that term the necessary steps were taken for the purpose of working and declaring a forfeiture of the recognizance. To this the defendant offered testimony to prove that the facts stated in that record showing the forfeiture were not true; that in point of fact Thomas Ambrose was not called as therein recited; and that in point of fact Henry T. Ambrose, his surety, was not called upon to produce his body as therein declared. *Held,* that this evidence was incompetent.

35. A recognizance must on its face show the cause of taking it. Parol evidence cannot be admitted to aid it in this respect. Nicholson *v.* State, 2 Ga. 363, 365.

Where a recognizance is deficient in any of the essential parts of the obligation or condition, parol evidence is not competent to supply such deficiency. State *v.* Crippen, 1 Ohio St. 399.

36. State *v.* Hays, 2 Or. 314.

37. State *v.* Stewart, 74 Iowa 336, 37 N. W. 400, was an action against sureties on an appearance bond for failure of the principal to appear in satisfaction of judgment. Defendants offered to prove that immediately after the trial of the criminal case, and the rendition of the judgment, the attorney for the accused agreed with the district attorney that the accused should not be arrested, nor the judgment against him be in any manner enforced until after the April meeting of the board of supervisors. *Held,* that the rejection of this evidence on the ground that it was incompetent, irrelevant, and immaterial was not error. The defendants also offered to prove that a warrant for the arrest and commitment to jail of the accused was issued and placed in the hands of the sheriff for service during the term of the district court at which the accused was convicted, and while he was present; that after he received such warrant the sheriff was instructed in writing by the district attorney to hold the same until after the April session of the board of supervisors, and that the sheriff acted according to the instruction so received, and made no attempt to serve the warrant until after the April

VII. SUFFICIENCY OF EVIDENCE.

Recognizance and Judgment of Forfeiture. — As a general rule the recognizance of record and a judgment of forfeiture thereon constitute sufficient evidence to authorize a judgment for the state in a proceeding by *scire facias,* or an action of debt on a forfeited recognizance.[38]

VIII. EVIDENCE IN DEFENSE.

1. Execution of Recognizance. — In a proceeding upon a forfeited recognizance, the defendant may prove that he signed it upon a condition which was not complied with;[39] or that it was altered after he signed it;[40] or that another person, and not he, became surety on the recognizance.[41]

session of said board. *Held,* properly excluded.

38. Peacock *v.* People, 83 Ill. 331; People *v.* Witt, 19 Ill. 169; Kepley *v.* People, 123 Ill. 367, 13 N. E. 512; Burrall *v.* People, 103 Ill. App. 81; Martin *v.* State, 16 Tex. App. 265.

In State *v.* Coppock, 79 Iowa 482, 44 N. W. 714, the plaintiff introduced in evidence the information filed before the justice of the peace, the warrant issued thereon, and the return thereof showing the arrest of the accused; the record of the justice showing an order requiring him to give bail to answer the charge before the district court, and the bail-bond in suit, executed and given in pursuance of the order, and for the appearance of the accused before the district court, and an undertaking that he would abide the orders and judgments of the district court; and a record of that court showing a default upon the bond, on account of the failure of the accused to appear for arraignment. *Held,* that this evidence was sufficient to authorize judgment against the defendants, without proof of an indictment.

39. In a proceeding by *scire facias* upon a forfeited bond, a surety may show in defense that he signed the recognizance with the express understanding and agreement between himself, his co-sureties, and the officer who took such recognizance, that it should not be accepted or approved by said officer, nor be used nor held to bind said surety, until it was signed by another person, whose name was inserted therein as an obligor, but who in fact never signed it. People *v.* Cleaver, 74 Ill. 210.

40. In a proceeding by *scire facias* upon a criminal bond, on which plaintiff in error was surety, he answered that he signed the bond when there was no obligee or penalty set forth in it, and that the name of the obligee, and the amount of the penalty therein, were inserted in his absence. *Held,* that the plea was sufficient, but the burden was upon him to sustain it by proofs. Brown *v.* Colquitt, Governor, 73 Ga. 59, 54 Am. Rep. 867.

41. In an action by *scire facias* on a recognizance the defendant was described as "Elnathan Noble of the town of Pittsfield, yeoman." The defendant pleaded that another person of the same name and description became bail, and traversed that defendant was the same person. At the trial the defendant admitted his name and addition to be as described in the recognizance of bail, and that there was no other person of that name and addition in the town where the defendant resided, to his knowledge. The defendant then proved that the defendant in the original suit employed an attorney, who, in the autumn of 1798, made out a bail-piece, as of the term of October, 1798, which the original defendant took, and went out with his bail, and returned on the same day, with the bail-piece, certified by a judge, and in company with one Stephen Norton. The attorney did not recol-

2. Excuse for Non-Appearance of Principal. — To relieve sureties from liability on a forfeited recognizance, they must show some intervening act of God, or of the law of the state, or of the obligee, which renders the appearance of the principal impossible.[42]

A. Act of God. — The authorities are in conflict as to whether sickness constitutes an act of God and whether or not a defendant on a forfeited recognizance may prove that the principal was prevented from appearing at the time conditioned in the recognizance, by sickness. Some authorities hold such evidence admissible;[43] others hold to the contrary, on the ground that sickness is not an act of God.[44] Sickness or disability of the principal can-

lect the bail, whether he was the present defendant or the said Stephen Norton; but it appeared that the name of the bail in the bail-piece was in the hand-writing of the attorney, and that Norton resided in a different town from that in which the defendant resided. The bail-piece was dated January 11, 1798. It further appeared, by the testimony of Stephen Norton, that he came to Cooperstown (where the judge who took the bail resided) to be special bail for the defendant in the original suit. The original defendant went to the attorney to get the bail-piece drawn, and then he and Norton went together to the judge, who signed his name to the bail-piece, but did not ask Norton to acknowledge himself bail, and no words passed between him and the judge. This was on January 11, 1798, and the present defendant was not in Cooperstown on that or the preceding day. Norton supposed himself bail, till after a trial in the original suit, and the original defendant had gone off. *Held,* that this evidence was admissible and sufficient to establish the defendant's plea. Renoard *v.* Noble, 2 Johns. Cas. (N. Y.) 293.

42. Taylor *v.* Taintor, 83 U. S. 366; People *v.* Bartlett, 3 Hill (N. Y.) 570; Ringeman *v.* State, 136 Ala. 131, 34 So. 351.

43. People *v.* Tubbs, 37 N. Y. 586.

In Scully *v.* Kirkpatrick, 79 Pa. St. 324, 331, 21 Am. Rep. 62, the defendant offered to prove that a few days before June 18, 1873, the day on which the principal was bound to appear, he was stricken down by sickness at his home in Evansville, Indiana, and was thereby prevented from appearing at the day fixed,—to be followed by evidence, that as soon as he was able to leave home, *to wit,* on the thirtieth day of June, 1893, he hastened to Pittsburg, and appeared before the judge to answer the complaint against him, the said day of June being the earliest day he was able to appear at Pittsburg after his recovery from his illness. The offer was rejected. This was held to be error.

Baker *v.* State, 23 Tex. App. 657, 5 S. W. 130, was an action on a forfeited bail-bond. The defense was that the principal was prevented by sickness from making his appearance, and further, that before entry of final judgment, he appeared and stood trial upon the charge. Testimony of the members of his family and of another person was to the effect that he was confined to his room and bed by sickness during the entire term at which the forfeiture was taken. *Held,* properly admitted.

44. Piercy *v.* People, 10 Ill. App. 219.

"No act of the law nor of the obligee is pleaded to the *scire facias* in this case, nor, indeed, is any act of God pleaded, as we shall see; but it is pleaded that the principal after the bail piece had been entered into was so ill of consumption that it became necessary to the preservation or prolongation of his life for him to go to and remain in the state of Colorado, that he went there and remained there upon the advice of skillful and competent physicians under the necessity stated. . . . This plea does not aver impossibility of appearance by the principal resulting from an act of God. His death

not be proved by the mere certificate of a physician or surgeon.[45]

The death of the principal may be shown in defense.[46] It may be shown that sickness of the judge prevented the appearance of the principal.[47]

B. LAW OF THE STATE. — In an action on a forfeited recognizance the defendant may show that the non-appearance of the principal was caused by his being restrained of his liberty by the state;[48] or because the constituted authorities, after being called up-

in such case would have been the act of God in legal contemplation, but illness, however severe and critical, is not." Ringeman *v.* State, 136 Ala. 131, 34 So. 351.

45. In Price *v.* State, 4 Tex. App. 73, the surety on the appearance bond answered that at the date of the forfeiture of the bond the principal was sick and confined to his room, under the care of a physician, and was wholly unable to attend the court at the time the forfeiture was taken. On the trial the appellant offered in evidence the certificate of a physician as to the physical condition of the principal at the time the forfeiture was taken, which was admitted over the objections of the district attorney. The court held this error, and said: "We have no knowledge of any rule of law which would permit the introduction of this character of evidence."

46. In proceedings by *scire facias* on a forfeited recognizance, the defendant may prove, in discharge of the bail the death of their principal, at any time after the return of *non est inventus*, and before final judgment. Griffin *v.* Moore, 2 Ga. 331.

In an action on a forfeited bail-bond the defense was that the accused was dead before the forfeiture was taken. *Held*, that evidence tending to show that the accused was insane, and that he had twice attempted to commit suicide, was wholly immaterial and incompetent, the court saying: "No such remote and unsupported circumstances as these can be allowed for the purpose of relieving the bondsmen of their burden." State *v.* Lagonia, 39 Mont. 472, 76 Pac. 1044.

47. Neal *v.* State, 61 Ark. 282, 286, 32 S. W. 1069, was a proceeding on the forfeiture of a bail-bond taken by a justice of the peace. The defendant offered to prove that the party bound by the recognizance to appear could and would have been present for examination if the justice had been ready to hear the same, but that the justice was on that day sick, and did not attend his office during the day; that the cause was not called for examination in said justice court; that said court was never opened for the transaction of business on that or any other day for the hearing of said cause; that the defendant was never called, or given an opportunity to produce the body of the principal in said court, which he was at all times willing to do; that defendant never made any effort to have the forfeiture set aside, because he was not informed of it until by the service of summons, and that the forfeiture was taken less than twenty days from the filing of the bond by the justice of the peace, or on the last day set for the hearing of the case before him. All of this evidence was rejected. *Held*, fatal error.

48. Belding *v.* State, 25 Ark. 315, 4 Am. Rep. 26, was a proceeding by *scire facias* upon a recognizance entered into by one Kelly Caruthers and the appellant for the appearance of Caruthers. He failed to appear and forfeiture was ordered. *Held*, that appellant might show to the court by proof that Caruthers was duly arrested and imprisoned, and beyond the reach of his power at the time of the forfeiture.

In Allee *v.* State, 28 Tex. App. 531, 13 S. W. 991, the defense was that prior to the forfeiture the principal was incarcerated in the penitentiary upon a conviction for felony. *Held*, that it devolved upon the sureties to make good such defense by proof of conviction and incarceration.

on, were unable or unwilling to afford him the protection necessary to enable him to appear.[49]

C. Default by Permission. — In an action on a forfeited recognizance, the sureties may prove that the non-appearance of their principal was by permission of the court and the sheriff.[50]

3. Surrender of Principal. — In an application to discharge a judgment on a forfeited recognizance on account of the surrender of the principal by his sureties, they must show that the prisoner was surrendered into the proper custody.[51]

Proof of Harmless Delay. — They must prove such facts as will satisfy the court that the prosecution has not suffered by the delay occasioned by the non-appearance of their principal.[52]

Also *held,* that the state might prove in rebuttal that at the time of the forfeiture the principal had escaped from custody, and was not restrained of his liberty by the state.

49. In Weddington *v.* Com., 79 Ky. 582, the evidence showed that at the time the accused was required by his bond to appear, the county where the proceedings were had was overrun by a band of so-called regulators, that they had killed several persons, and had shot and seriously wounded the accused, and had threatened to take his life whenever they might find him, and that by reason of these threats the accused was compelled to abscond. *Held,* insufficient to exonerate the bail. The court said: "It is contended by counsel, that as it is the duty of the commonwealth to protect the lives of her citizens, that it ought not to require the citizen to discharge any duty, or to comply with any obligation to the commonwealth, when such protection is not extended, and that the bail should be exonerated, as in case of sickness of the accused, which renders it physically impossible for him to attend in response to his bond. This ought unquestionably to be true when the constituted authorities are unable or indisposed, when properly called upon, to protect the citizen in discharge of the duty; but in this case appellants made no application for protection to the accused, and do not in any way show that the authorities were either unable or unwilling to extend the protection necessary to enable the accused to appear."

50. In Moorehead *v.* State, 38 Kan. 489, 16 Pac. 957, the evidence of the state showed that the accused was present at the trial of the case in which he was charged with larceny, up to the time of the rendition of the verdict; that the court rendered judgment that he pay a fine of $50, with costs, and be committed until the fine and costs were paid. The surety offered to prove that the accused was personally present at the time sentence was pronounced upon him, and that thereupon he was committed to the custody of the sheriff, and that the sheriff actually took him into custody under the judgment of the court, but that subsequently, on the day of sentence he was permitted to depart with leave of the court and the sheriff. *Held,* competent evidence.

51. In an application to vacate a judgment on a forfeited recognizance because of the surrender of the prisoner by his bail, if the sureties do not comply with the statute which prescribes a formal proceeding and indisputable evidence, they assume the burden of establishing by other evidence that the prisoner was surrendered into the custody of an officer properly authorized to receive him. People *v.* Mohoney, 89 N. Y. Supp. 424.

52. People *v.* Tietjen, 7 N. Y. Supp. 642; People *v.* Samuels, 7 N. Y. Supp. 659; People *v.* Devine, 7 N. Y. Supp. 660; People *v.* Williams, 6 Daly (N. Y.) 409.

In People *v.* Carey, 5 Daly (N. Y.) 533, the court said: "Where it is attempted to be shown that the people have not suffered by the delay in-

tervening between the failure of the prisoner to appear when called for trial, and his subsequent surrender by his bail, it should be made to appear to the court that the prosecutor or the witnesses for the people had notice of the subsequent arraignment and proceedings in court when the *nolle prosequi* was entered, or the prisoner acquitted for want of proof. A copy of the evidence upon which the indictment was found should be produced to the court and the principal witness or witnesses for the people, or the complainant at least, should be examined as to whether they or he were subpoenaed to appear in court when the prisoner was arraigned. The certificate of the district attorney that the prosecution has not suffered by the delay," is not competent evidence of that fact.

RECORDS.

CROSS-REFERENCES:

Ancient Documents;
Appeal Bonds;
Attachment;
Bankruptcy;
Best and Secondary Evidence;
Bonds;
Certificates;
Coroner's Inquest;
Documentary Evidence;
Elections;
Foreign Laws;
Former Conviction;
Highways;
Impeachment of Witnesses;
Insolvency;
Judgments;
Judicial Notice;
Maps;
Marriage;
Mechanics' Liens;
Municipal Corporations;
Officers;
Presumptions;
Public Lands;
Seals;
Statutes;
Taxation;
Wills;
Written Instruments.

I. OFFICIAL REGISTERS AND DOCUMENTS.

1. Generally. — Records and documents required or authorized to be kept by public officers in the course of their official duty, or by persons acting in the public service,[1] and records kept by private individuals in their own business in compliance with the requirements of law[2] are, generally speaking, competent evidence to prove the facts properly recited therein. Such records come within the general designation "official registers."

2. Of What Facts Competent. — Books and records which come within the designation of "official registers" are competent evidence of the facts properly recorded therein,[3] although they relate to matters not within the personal knowledge of the officer making them.[4]

3. Record Need Not Be One Expressly Authorized or Required by Law. — Although a book kept by a public officer is not required to be kept by any statute, yet if it is necessary or proper and convenient to the adequate discharge of his duties it is an official book and admissible as such to prove the facts therein stated.[5] So entries or endorsements which are necessary to a proper discharge of

1. *United States.* — Evanston *v.* Gunn, 99 U. S. 660.

Connecticut. — Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818.

Louisiana. — Short's Succession, 45 La. Ann. 1485, 14 So. 184.

Maryland. — Tyson *v.* Comrs. of Baltimore, 28 Md. 510.

Massachusetts. — Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270.

New Hampshire. — Pembroke *v.* Allenstown, 41 N. H. 365 (record of surveyor of highways as to payment of taxes).

New York. — Bissell *v.* Hamblin, 6 Duer 512, 13 Abb. Pr. 22.

North Carolina. — Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545; Cheatham *v.* Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617.

Pennsylvania. — Allegheny *v.* Nelson, 25 Pa. St. 332.

For Additional Authorities, see *infra*, "Certified Copies" where the same rule is applied in the use of copies of such records and documents.

2. State *v.* Donovan, 10 N. D. 203, 86 N. W. 709. See *infra*, "Druggist's Record of Liquor Sales."

3. Little *v.* Downing, 37 N. H. 355.

4. Worcester *v* Northborough, 140 Mass. 397, 5 N. E. 270; Murray *v.* Supreme Lodge N. E. O. of P., 74 Conn. 715, 52 Atl. 722; Barclay *v.* Bates, 2 Mo. App. 139.

Record of Measurement of Criminal Defendant. — The record of measurement of the defendant taken after conviction on the first trial was admitted at the new trial over the objection of its being hearsay because it appeared that the person making the entries had not taken the measurements himself, but had only written down what was called out to him by person taking them. United States *v.* Cross, 20 App. D. C. 365.

5. *United States.* — Evanston *v.* Gunn, 99 U. S. 660.

California. — Kyburg *v.* Perkins, 6 Cal. 674.

Florida. — Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

Kentucky. — Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1.

Missouri. — Moore *v.* H. Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Hampshire. — Pembroke *v.* Allenstown, 41 N. H. 365; Little *v.* Downing, 37 N. H. 355.

New Jersey. — State *v.* Van Winkle, 25 N. J. L. 73.

North Carolina. — Knott *v.* Raleigh & G. R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

official duty are competent though not expressly authorized or required by law.[6]

So also the repeated legislative recognition of an unauthorized record may render it competent evidence.[7]

4. Records Made From Memoranda or Transcribed From Other Books. — A. GENERALLY. — The fact that records are subsequently made from informal minutes and memoranda taken by the recording officer or his predecessor, or some one temporarily filling his place, does not render them incompetent.[8] The record consists of the

Tennessee. — Bryan *v.* Glass Securities, 2 Humph. 390.

6. Trustees of Kentucky Seminary *v.* Payne, 3 Mon. (Ky.) 161; Kyberg *v.* Perkins, 6 Cal. 674; Groesbeck *v.* Seeley, 13 Mich. 329, in which a book kept by a county treasurer containing statements of the various tax sales, the names of the purchasers and other items connected therewith, was held admissible. "Before such a book is received it must appear to have been kept in the office as one of the regular office books for making such entries, but the fact that no statute distinctly requires such a book to be kept does not exclude it. The duties of the county treasurer could not be adequately performed without his keeping a permanent record of these transactions; and such record, therefore, if kept must be considered as an official book and must be receivable in evidence on that basis."

In Rollins *v.* Board of Comrs., 90 Fed. 575, 33 C. C. A. 181, *quoting* from Underh. Ev. §142c, the court says: "To give an official character to a public record or register it is not essential that it should have been authorized or ordered to be kept by statute. It is the duty, if not the right, of every official to keep a record of his public transactions whenever such a practice is a common and appropriate mode of evidencing them. This record, whether required to be kept by statute or not, is a public record."

Where a book of original entry was kept by the clerk of a federal district court, in which he made regular entries of the nature of articles presented for copyright and the time of the application and the deposit, it was held that an entry therein was, in the absence of contrary evidence, sufficient evidence of such a deposit, although no statute required such an entry, but it was made under the direction of superior officers and the rules and practice of the office. Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10. See also Cooper *v.* People, 28 Colo. 87, 63 Pac. 314; White *v.* United States, 164 U. S. 100.

A criminal docket kept by a justice of the peace as a record of his proceedings in criminal cases is competent evidence even though no statute requires such a docket to be kept. Chapman *v.* Dodd, 10 Minn. 350; Cole *v.* Curtis, 16 Minn. 182.

Entries in a book regularly kept by a postmaster in his office of advices received and money orders drawn are competent evidence of facts therein stated though there is no statute or postal regulation requiring the keeping of said book, under the laws of the state making official entries evidence. State *v.* Hall, 16 S. D. 6, 91 N. W. 325.

7. Board of Comrs. *v.* May, 67 Ind. 562 (adjutant general's record of muster rolls of volunteers furnished by state during civil war).

8. Board of Education *v.* Moore, 17 Minn. 412; Brandon *v.* Loftus, 4 How. (U. S.) 127.

Moses *v.* Penquit, 72 Iowa 611, 34 N. W. 443, in which the record of the official action of township trustees made by the township clerk from his predecessor's loose memoranda was held properly admitted on behalf of the former clerk. "The record was written by the proper officer and it was immaterial when it was made."

A certified copy of the proceedings of a town meeting as kept and reported by a clerk *pro tem.* to the town clerk is admissible for the purpose of showing the vote of the meet-

formal writing and not the memorandum from which it is made up.[9]

B. Transcribed Record. — Although a book is not the original record but is a transcript thereof if it has taken the place of the original and been long recognized as a public record, it is competent as such, at least where the original is lost or destroyed.[10]

5. When No Particular Book Is Named. — Where a statute requiring a record to be kept fails to specify any book or place where it is to be made, the book adopted by the officer whose duty it is to make the record is competent as a public record.[11]

ing, although at the end of the record before the signature of the town clerk is the statement "a true record as sent to me of the adjourned meeting by Robert J. White, clerk *pro tem.* Hickok *v.* Shelburne, 41 Vt. 409.

9. A transcript from the journal record of either house of the legislature, of its proceedings, properly certified, is admissible in evidence to prove the facts therein recorded. It is not necessary to produce the original minutes made by the officers of the respective houses, or copies thereof. The statute provides that the secretary of state shall furnish a well-bound book in which the journals of the assembly shall be copied, plainly showing that the minutes were not regarded as the journal records, but minutes merely to be transcribed into such records. Miller *v.* Goodwin, 70 Ill. 659.

10. Where a copy of a vote passed by a town meeting in 1739 was sought to be proved by offering in evidence a certified copy by the city clerk of an extract from a book entitled "Copied Land Evidence," Vol I. There was evidence that the book was copied from the original records in 1857 under supervision of the town clerk, since deceased. The remains of the original records contained no record of the town meeting in question. *Held*, that as the record has been used for fifty years as the only available record of the proceedings to which it related the certified copy was admitted as being taken from a recognized public record. New York, N. H. & H. R. R. Co. *v.* Horgan, 26 R. I. 448, 59 Atl. 310.

A justice court under statute by which it was established being a succession of courts of magistrates, the clerk thereof is the proper person to certify the records and papers of a court of magistrates to which a justice court succeeded; therefore copies of records of the court of magistrates certified by a clerk of a justice court are entitled to be received in evidence the same as if they were copies of records of a justice court. Clarke *v.* Rice, 15 R. I. 132, 23 Atl. 301.

Where under the supervision of the proper officer the records of a county were transcribed from a temporary book, wherein they had been originally recorded, into another which was thereafter recognized as a part of the public records and it was shown that the original book had been lost or destroyed, it was held that the transcribed records were propertly admitted in evidence. Belk *v.* Meagher, 104 U. S. 279.

11. Where plats are required to be recorded though no special book is required therefor, if the recorder has provided a special plat-book a certified copy of such record is competent where the record itself would be admissible. "While the law not only authorizes, but absolutely requires, that plats of towns and cities, and additions thereto, shall be recorded, it seems to be silent as to the name of records in which they shall be so recorded. We must take notice, however, of the fact as part of the current history of the public business of the state, that books known as *plat-books* are, and have been for many years, kept by the county recorders in the various counties of the state, in which are recorded the plats of the towns and cities and the additions thereto, and that such books are kept as public records. In procuring such records the county recorders no doubt acted upon the correct presumption that where the law required that a

6. Form of Record. — The record of official proceedings to be competent must recite the proceedings taken and not consist merely of the recording officer's conclusions as to what action was taken.[12]

7. Entries By Whom Made. — Entries in public records must have been made by a person authorized to make them;[13] but entries made by a properly authorized deputy are competent.[14]

8. Character of Book or Paper Containing the Record. — A. Records on Loose Sheets of Paper. — The fact that a record has been made on loose sheets of paper does not warrant its exclusion where the law does not require it to be made in a book.[15]

B. Letter-Press Record. — Where a record is kept in the form of a letter-press book, the book and not the instruments from which it is made constitutes the record.[16]

particular class of instruments should be recorded, and made no provision for any specific book in which they should be so recorded, it was their duty to procure suitable records for that purpose. Indeed, frequent reference is made to such records in the statutes of the state, and they have frequently been recognized by legislative enactment as legal public records. . . . We are of the opinion that the certified copy of the plat before us was properly admitted in evidence, provided there was an issue in the cause under which it was admissible." Miller *v.* City of Indianapolis, 123 Ind. 196, 24 N. E. 228.

12. Where the law makes the auditor's record of certain proceedings evidence, the record must show the proceedings taken and not consist merely in the auditor's statement that certain things were done. Dunn *v.* Games, 1 McLean 321, 8 Fed. Cas. No. 4, 176.

13. Gray *v.* Waterman, 40 Ill. 522; Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298; Wooster *v.* Butler, 13 Conn. 309; Illinois Cent. R. Co. *v.* Barrett, 23 Ky. L. Rep. 1755, 66 S. W. 9; Maples *v.* Haggard, 58 Ga. 315; Ross *v.* Davis, 30 Ga. 823.

Where a collector of tolls under the revenue laws is required by law to make in a book a certificate as to the cargo of passing vessels, which certificate shall be signed by the master of the vessel, who shall attest its correctness on oath, such certificate-book is not admissible in evidence as a public record, but stands on the same footing as the books of a trader or merchant, and its admissibility must be determined by the rules which govern the admissibility of entries in the regular course of business; and attested by that rule they are not admissible because not made by one having personal knowledge of the facts. Chaffee & Co. *v.* United States, 18 Wall. (U. S.) 516, 540.

14. Passin *v.* Hubbard, 61 Barb. (N. Y.) 548; Evanston *v.* Gunn, 99 U. S. 660; Galt *v.* Galloway, 4 Pet. (U. S.) 332.

Where by law notaries public are required to keep a book containing a record of protests made by them and other matters connected therewith, and are authorized to appoint one or more deputies to assist them in making protests and delivering notices, an entry in such book in the handwriting of such a deputy is competent evidence. Passin *v.* Hubbard, 61 Barb. (N. Y.) 548.

15. The minutes of a regular meeting of the common council of a city, written down at the time by the city clerk, and approved by council, when verified by the clerk, are evidence of proceedings, though not taken down in a book nor subsequently copied into a bound volume, there being nothing in the charter requiring them to be so written or copied. O'Mally *v.* McGinn, 53 Wis. 353, 10 N. W. 15.

16. Where the record of a local weather bureau is made by first writing the weather conditions on a loose blank, which is afterwards sent to Washington, and making a letter-press copy of such blank in a book

C. Designation of Book Immaterial. — The designation on the outside of the book from which the copy is made is not material and cannot be shown.[17]

9. When Made. — A record is admissible although not made at the time of the transaction which it evidences.[18]

10. Records and Documents Made Without Authority of Law. A. Generally. — Records made without authority of law, express or implied, are not competent primary evidence of the facts shown thereby.[19] So also an unauthorized publication by an officer is

kept for that purpose, the letter-press book is the original record and primary evidence without accounting for the loose original blank "The mere fact the data were first placed upon the loose sheet or paper or blank form does not necessarily establish that it constituted the record. It was not prepared for the purpose of constituting the record, but for the purpose of serving as a copy of the record. The record consisted of what appeared in the book." Chicago & E. I. R. Co. *v.* Zapp, 209 Ill. 339, 70 N. E. 623, *affirming* 110 Ill. App. 553.

17. Where the law simply requires an officer to copy certain records in a book, and a copy of the contents of the book is offered in evidence, the fact that the book was not designated on the outside as a book of such records is not material and cannot be shown. Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

18. Brandon *v.* Loftus, 4 How. (U. S.) 127. See *supra*, "Records Made from Memoranda." But see Doe *v.* Bray, 8 B. & C. 813, 15 E. C. L. 339, and Birmingham *v.* Pettit, 21 D. C. 209.

The roll and the orderly book of a militia company kept by its clerk as required by law are competent and the best evidence of the facts required to be recorded therein, and the orderly book is admissible although it was not made up until the day of the trial since the clerk is "entitled to the same indulgence in making and amending his records which is allowed to other similar recording officers." Spaulding *v.* Bancroft, 23 Pick. (Mass.) 54.

19. *California.* — Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106.

Georgia. — White *v.* Clements, 39 Ga. 232.

Iowa. — Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

Kansas. — State *v.* Krause, 58 Kan. 651, 50 Pac. 882.

Maryland. — Tyson *v.* Baltimore Co. Comrs., 28 Md. 510.

Massachusetts. — Com. *v.* McGarry, 135 Mass. 553 (minutes of proceedings of selectmen not competent where no record is authorized by law).

Michigan. — Newell *v.* McLarney, 49 Mich. 232, 13 N. W. 529.

Mississippi. — Coopwood *v.* Prewett, 30 Miss. 206.

Missouri. — Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893.

Pennsylvania. — Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000.

Vermont. — Wheeler *v.* Barre School Dist., 64 Vt. 184, 26 Atl. 1094.

For additional authorities, see *infra*, "Certified Copies—Unauthorized Records," etc.

The town clerk's record of the minutes of a meeting of a town board is not required to be kept or filed by him in his office and is therefore not competent evidence, where the statute makes papers duly filed, as required by law, in his office, competent evidence. "The powers and duties of town clerks are prescribed by statute, and minutes and records kept by them are only competent evidence of matters and proceedings which they are bound by law to record or file." Jackson *v.* Collins, 62 Hun 618, 16 N. Y. Supp. 651.

Letters and memoranda written by officers of a municipal corporation for which there is no statutory provision making them competent evidence, are not admissible on behalf of the city, for the purpose of showing against a third person the amount and cost of work done in filling on lots,

not admissible as evidence of the matters which are stated therein.[20]

B. Unauthorized Entries. — a. *Generally.* — Entries in a public record which were made without authority of law are not competent evidence.[21]

b. *Memoranda on Books.* — **(1.) Generally.** — An unauthorized memorandum made upon a book of public records is not competent evidence.[22]

(2.) Explanatory Memoranda Entered by Recorder. — Unauthorized explanatory memoranda or statements entered by the recorder upon

either together or separately. City of Hannibal *v.* Richards, 35 Mo. App. 15.

A book kept by a draughtsman in one of the city government departments, in absence of law requiring the keeping of such book or a showing that it was kept by authority of a public officer or under sanction of an official oath, or in performance of public duty, is not competent. St. Louis Gas-Light Co. *v.* St. Louis, 12 Mo. App. 572.

Plat Book Not Required by Law To Be Kept. — A plat book found in the county recorder's office, but which is not required by law to be kept is not admissible to show title in persons whose names are marked upon certain tracts. Smith *v.* Lawrence, 12 Mich. 431.

The Record of an Inspection of a Railroad Engine is not a public record and is therefore not admissible. Illinois Cent. R. Co. *v.* Barrett, 23 Ky. L. Rep. 1755, 66 S. W. 9.

A Log Book is not ordinarily competent evidence in favor of the persons concerned in making it, except in a few cases relating to seamen provided for by statute. Worrall *v.* Davis Coal & Coke Co., 113 Fed. 549.

"Blotters" found in the land office are not records of any public transaction, but private memoranda kept for convenience of officers, and not being of as high grade as the oath of a living witness are only received *ex necessitate rei*, after all other evidence is supposed to be extinct. Fox *v.* Lyon, 27 Pa. St. 9; Strimpfler *v.* Roberts, 18 Pa. St. 283, 57 Am. Dec. 606.

20. Unauthorized Publication. Under act providing that a certified list of corporations organized in a state, required to be bound and published with session laws, shall be legal evidence of the existence of a corporation, the existence of foreign corporations is not provable by certified lists of same published in same manner. State *v.* Missio, 105 Tenn. 218, 58 S. W. 216.

21. Tripler *v.* Mayor, etc., of New York, 125 N. Y. 617, 26 N. E. 721; Coxe *v.* Deringer, 78 Pa. St. 271; Fox *v.* Peninsular W. L. & C. Wks., 92 Mich. 243, 52 N. W. 623; Urket *v.* Coryell, 5 Watts & S. (Pa.) 60. See also Prigg *v.* Lunsburg, 3 App. Cas. (D. C.) 30; Graham *v.* Hartnett, 10 Neb. 517, 7 N. W. 280; Goggans *v.* Myrick, 131 Ala. 286, 31 So. 22; Rollins *v.* Board of Comrs., 90 Fed. 575, 33 C. C. A. 181.

The fact that the register of voters has placed a "C" to indicate "colored" after the name of a particular voter is not competent evidence on the question of such voter's color or race since the entry is not one required by law to be made. White *v.* Clements, 39 Ga. 232.

The record of a survey signed by a deputy county surveyor without the name of his principal, is not an official act entitled to record and is properly executed. Carter *v.* Hornbach, 139 Mo. 238, 40 S. W. 893.

An Entry of the Satisfaction of a Mortgage made upon the public record is not competent evidence of the facts recited, unless made in the manner and under the circumstances prescribed by the statute authorizing the mortgagor to require the mortgagee to make such an entry upon the payment of the mortgage. Williams *v.* Doe, 7 Blackf. (Ind.) 12.

22. Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527. See Salmon *v.* Rance, 3 Serg. & R. (Pa.) 311.

the record when recording deeds or other instruments are not competent evidence of the facts therein stated, nor is a certified copy thereof or a certificate by the custodian of the records as to the existence of such entries.[23]

c. *When Incompetent Matter is Included in Record.* — Where an offered record contains incompetent matter the latter should be separated in the offer from the competent portion, or the whole may be excluded.[24]

C. Documents Filed or Recorded Without Authority of Law. — Documents filed or recorded in a public office without authority of law do not become public records or archives of that office and are not admissible as such.[25] It has been held, however, that such a record is competent secondary evidence of the original after a proper foundation has been laid.[26]

11. Records Kept for Officer's Convenience and Not for Public Use. A record which is kept merely for the officer's convenience and not for public use is not competent as a public record,[27] even though

23. Farmers' & Mechanics' Bank *v.* Bronson, 14 Mich. 361, in which a certified copy of the record of a mortgage was offered in evidence. The copy showed no seals opposite the names of the mortgagors, and the certificate of the recorder containing the statement with the words "not sealed" was entered in the record opposite the names in the handwriting of his predecessor. "This certificate is not legal evidence. The register was bound to record all instruments properly executed by spreading a true copy upon the record, but he had no authority of law for entering statements of fact to make them evidence against other parties. The original entry being unauthorized would not be evidence and the copy would be equally incompetent."

24. Pike *v.* Crehore, 40 Me. 503; Moore *v.* Leftwitch, 1 Stew. & P. (Ala.) 254.

25. Board of Commissioners *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Hammatt *v.* Emerson, 27 Me. 308; Simmons *v.* Spratt, 20 Fla. 495. See *infra*, "Certified Copies," and "Private Writings."

Where no law requires a school commissioner's bond to be recorded, neither the record itself nor a certified copy is competent primary evidence. Frazier *v.* Laughlin, 6 Ill. 347.

Where a power of attorney has been recorded in the wrong county and a certified copy of such record filed in the land office, a certified copy of the latter is not admissible in evidence because if the original record were unauthorized "the mere filing or a copy of it in the land office would not give to such copy so filed any validity. The unauthorized paper filed in the land office does not become an archive." Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

26. Frazier *v.* Laughlin, 6 Ill. 347. See *infra*, "Certified Copies."

27. See Cushing *v.* Nantasket Beach R. Co., 143 Mass. 77, 9 N. E. 22; Saetelle *v.* Metropolitan L. Ins. Co., 81 Mo. App. 509; Hegler *v.* Faulkner, 153 U. S. 109; Sturla *v.* Freccia, 5 App. Cas. (Eng.) 623, 43 L. T. N. S. 209, 50 L. J. Ch. 86; Goggans *v.* Myrick, 131 Ala. 286, 31 So. 22.

A "blotter" of the police department is not competent evidence of the facts therein recorded, and hence entries purporting to be the report of a police officer respecting a street car accident are not admissible in an action by an injured person against the railway company. "It was at best but a record required for specific purposes, and not a public record in such sense as to make its contents evidence of the facts between private parties." Kerr *v.* Metropolitan

there is a statute which requires that such a record shall be kept.[28]

12. Private Minutes or Memoranda Kept by An Officer. — Minutes or a memorandum book kept by an officer for his own convenience without authority of law are not competent evidence as public records.[29]

13. In Behalf of Public or Officers Making or Certifying Records. Official registers or records otherwise competent are admissible in behalf of both the public[30] and the officer who made them.[31] An officer's return is competent evidence in his own behalf.[32] A cer-

St. R. Co., 27 Misc. 190, 57 N. Y. Supp. 794; *reversing* 55 N. Y. Supp. 1142.

Grantors' and Grantees' Reception Book, kept in the office of the register of deeds, is inadmissible to show to whom certain instruments had been delivered, as they are merely kept for the convenience of the register and are not made evidence of the delivery by the statute. Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903. But see Winona & St. P. R. Co. *v.* Huff, 11 Minn. 114, and *infra,* "Recorders Reception Book."

28. Sovereign Camp W. O. W. *v.* Grandon, 64 Neb. 39, 89 N. W. 448; Beglin *v.* Metropolitan L. Ins. Co., 173 N. Y. 374, 66 N. E. 102. See also Connor *v.* Insurance Co., 78 Mo. App. 131. And see *supra,* "Vital Statistics."

Where a statute providing for the filing by property owners of a statement of their assessable property and its value with the assessor, also provides that such statement shall not be used for any other purpose except the making of an assessment or enforcing the provisions of the act, and provision is made for their custody and the inviolability of their contents only during the limited time that they are expected to be preserved, they are not to be considered a public record in the ordinary sense of the term. Such a statement is not competent evidence on behalf of strangers to it for the purpose of defeating the act and avoiding assessments against them. "Whether it could be used in any case in a court of justice we need not now inquire." Bowman *v.* Montcalm Circuit Judge, 129 Mich. 608, 89 N. W. 334.

29. Hand *v.* Grant, 5 Smed. & M. (Miss.) 508; State *v.* Vick, 25 N. C. 488.

30. Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 764; South School Dist. *v.* Blakeslee, 13 Conn. 227; Schumacher *v.* Pima County, 7 Ariz. 269, 64 Pac. 490; Cabot *v.* Walden, 46 Vt. 11; Board of Commissioners *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Rollins *v.* Board of Commissioners, 90 Fed. 575, 33 C. C. A. 181.

In an action by a gas company to recover from the city the contract price for gas supplied to the public lamps, and for services rendered in lighting lamps, the record kept by the city engineer, and the register kept by the gas inspector, are competent evidence. St. Louis Gaslight Co. *v.* City of St. Louis, 86 Mo. 495.

31. Ross *v.* Davis, 30 Ga. 823. See also Merriam *v.* Mitchell, 13 Me. 439, 22 Am. Dec. 514.

32. Hand *v.* Grant, 5 Smed. & M. (Miss.) 508; Angier *v.* Ash, 26 N. H. 99; Bissell *v.* Hamblin, 6 Duer (N. Y.) 512, 13 Abb. Pr. 22; Lowry *v.* Cady, 4 Vt. 504 (*disapproving* Merrill *v.* Sawyer, 8 Pick. (Mass.) 397).

Where a field-driver impounds beasts for being at large in the highway it is his duty to leave with the pound-keeper a memorandum or certificate of the cost of impounding and of his fees and expenses, and such certificate is an official act, and in an action of trespass against him for taking the beasts is *prima facie* evidence in his favor of the facts stated in it. "Where officers are parties either claiming or justifying under their own official acts their returns must be received as evidence" and their verity cannot be collaterally attacked, and even when the truth of the return is directly in issue it is

tified copy of a judicial record is not inadmissible merely because it is offered in behalf of the certifying officer.[33]

14. Books Found Among Papers of Deceased Officer. — Books found among the effects of a deceased officer and which he was authorized to keep in the course of his official duty are competent evidence when relevant.[34]

15. Stub-Book. — A book of stubs containing copies of or data with reference to receipts, certificates, licenses, etc., torn therefrom and issued by a public officer are not competent record evidence of the facts shown thereby,[35] unless they constitute public records,[36] or are made competent by statute.[37]

prima facie true. Bruce *v.* Holden, 21 Pick. (Mass.) 187.

Return on Warrant for Collection of Taxes competent for officer making it. Lothrop *v.* Ide, 13 Gray (Mass.) 93; Taylor *v.* Moore, 63 Vt. 60, 21 Atl. 919.

33. Such evidence is not open to the objection that a party shall not make evidence for himself. "The official character of the act, the duty and responsibilities of the clerk, the publicity and notoriety of the proceedings appearing of record, and certified by him, the penal consequence of a false certificate, and facility of detection and exposure, are considerations which preclude the application of the rule to a record certified by him, and it may be used as evidence by him as well as by any other person." Ratcliff *v.* Trimble, 12 B. Mon. (Ky.) 32.

34. Books, kept by one appointed and shown to have acted as commissioner of sales for lots under act providing for selling several reserved tracts of land for purposes therein mentioned, found among his papers after his decease, are evidence of a sale of a lot, and to whom it was sold, as therein mentioned, in an action between strangers. Struthers *v.* Reese, 4 Pa. St. 129.

In order to show the location of unseated land, in ejectment, manuscript books containing memoranda of return of surveys of unimproved lands surveyed by different deputy surveyors, which were found in the office of a deceased deputy surveyor, were admissible in evidence. Though not made evidence by act, yet being found in office of deceased officers who were bound to make such lists they were evidence on the same principle that field notes and memoranda of official acts and instructions found in the office of deceased deputy surveyors have been held to be evidence. Russel *v.* Werntz, 24 Pa. St. 337. See also Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

35. In Earl *v.* State, 44 Tex. Crim. 493, 72 S. W. 376, a stub-book from which the county clerk issued liquor licenses containing data with reference to the issuance of each license issued, was held inadmissible because there was no statute requiring such a book to be kept and because it was not "brought within any of the rules authorizing the introduction of papers or records."

36. The "stub" of a redemption certificate kept in the county auditor's office is a "record" belonging to that office within the meaning of § 905 of the code making such records competent evidence of the matters therein appearing, but an entry therein purporting to cancel the redemption because unadvertently allowed after the time therefor had expired is not binding upon the redemptioner without his acquiescence. Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450.

Stub Duplicates of Tax Receipts made by the county treasurer as required by law are evidence of the receipt of the tax represented thereby, though never returned by him to the auditor as required by law. State *v.* Ring, 29 Minn. 78, 11 N. W. 233. See Overseers of Lewisburg *v.* Overseers of Augusta, 2 Watts & S. (Pa.) 65.

37. McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976 (duplicate stub tax receipts required by law to be made and compared with

16. Public Corporations. — A. GENERALLY. — The records of public corporations kept pursuant to law are competent evidence of the facts properly recorded therein.[38]

B. MUNICIPAL RECORDS. — The public records of municipalities are competent as official registers.[39] This rule applies to the records of the city council[40] and the ordinances passed by them.[41]

C. TOWN AND TOWNSHIP RECORDS. — The public records of towns and townships[42] as well as the public records of their offi-

original and made evidence the same as the original), *distinguishing* Pier *v.* Prouty, 67 Wis. 218, 30 N. W. 232.

38. Weith *v.* City of Wilmington, 68 N. C. 24.

Corporation books concerning the government of a city, town or village, when publicly kept, and entries made by the proper officer, as well as duly authenticated copies therefrom are competent evidence of facts witnessed in them. Town of Parsons *v.* Miller, 46 W. Va. 334, 32 S. E. 1017.

39. See article "Municipal Corporations," Vol. VIII; and also the following:

Colorado. — Greely *v.* Hamman, 17 Colo. 30, 28 Pac. 460.

Connecticut. — Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

Indiana. — Green *v.* Indianapolis, 25 Ind. 490.

Massachusetts. — Com. *v.* Shaw, 7 Metc. 52.

Missouri. — St. Louis Gaslight Co. *v.* St. Louis, 86 Mo. 495.

Nebraska. — Clarke *v.* Williams, 29 Neb. 691, 46 N. W. 82.

New York. — Shaw *v.* New York Cent. & H. R. R. Co., 85 App. Div. 139, 83 N. Y. Supp. 91.

North Carolina. — Cheatham *v.* Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617.

Washington. — Bardsley *v.* Sternberg, 18 Wash. 612, 52 Pac. 251, 524.

West Virginia. — Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767.

Wisconsin. — O'Mally *v.* McGinn, 53 Wis. 353, 10 N. W. 515.

The original minutes of a municipal corporation are competent evidence of its acts. Denning *v.* Roome, 6 Wend. (N. Y.) 651.

The public records of a city relating to the alteration of a street are competent to prove at what time same was made. Barker *v.* Fogg, 34 Me. 392.

In order to show the precise terms of a resolution passed by the board of surveys of a city in accordance with provisions of act recommending to city councils the passage of an ordinance authorizing construction of a branch sewer, the original minutes of a meeting of the board at which the subject was referred to a subcommittee, the original report of that sub-committee and the original draft of the final resolution of the board, duly authenticated, may be offered in evidence. Waln *v.* Philadelphia, 99 Pa. St. 330.

Records of the board of public improvements kept under implied requirements of the city charter. Fruin-Bambrick Construction Co. *v.* Geist, 37 Mo. App. 509.

40. In order to show that a claim has been filed with the city council, the recorded proceedings of the city council reciting that such a claim was before that body for consideration about the time it was alleged to be filed, is admissible. City of South Omaha *v.* Wrzesinski, 66 Neb. 790, 92 N. W. 1045.

41. Ordinances of municipal corporations are public records. Florida Cent. & P. R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424.

But an ordinance of a city is not a public record in the sense that would make it competent evidence for all purposes. Saetelli *v.* Life Ins. Co., 81 Mo. App. 509.

42. Bishop *v.* Cone, 3 N. H. 513; Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Bucksport *v.* Spofford, 12 Me. 487; Lowe *v.* Aroma, 21 Ill. App. 598.

A copy of the record of a town meeting is the proper evidence to

cers[43] are competent evidence of the facts properly recited therein. The same rule applies to the records of a village.[44]

D. Schools and School Districts. — The records of school districts[45] and school officers[46] are public records and as such competent evidence of the facts properly recorded therein.

prove what proposition was submitted to it by certain land owners. Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101.

In Hubbard *v.* Austin, 11 Vt. 129, a book purporting to be the records of the proprietors of a town are held competent to show a division of the lands made by the proprietors before they were legally incorporated and subsequently recognized and acquiesced in by them, although it was not evidence of a legal division.

Where books are shown to contain ancient records of a town, the recent entries therein are admissible if it is shown that they were made by one acting as clerk. Goulding *v.* Clark, 34 N. H. 148.

To Show Incorporation. — Where no charter or act of incorporation of a town can be found its incorporation may be proved by reputation, and for this purpose the records of the town in question are admissible whether they show acts which a town only can do or such as unincorporated towns may also do, as showing the character in which the town assumed to act; so also the books of account of the selectmen are admissible for the same purpose, whether the acts recorded therein were done in a legal manner or not, and regardless of whether they are certified by the town clerk. Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

The records of the official action of the township trustees made by the township clerk are competent evidence. Moses *v.* Penquit, 72 Iowa 611, 34 N. W. 443.

43. The books of a town treasurer required by law to be kept are public records and competent evidence of the facts properly entered therein. Nye *v.* Kellam, 18 Vt. 594.

Where the oath of office is administered to a town officer in open town meeting by a justice of the peace in the presence of the town clerk, the clerk's record of the fact is competent evidence of the administration of the oath. Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

Books Kept by Selectmen containing accounts of the finances and expenses of the town are competent evidence. "These books fall clearly within the rules which admit books and writings of this public nature to be given in evidence. . . . The law, which is in this particular the mere expression of the common sense of mankind, recognizes such records as among the most authentic instruments of evidence, and they are, to the common apprehension, as satisfactory as any that exist. They are made for public inspection, while the events are recent which they record; they are made in the midst of those who can at once attest their verity or detect an inaccuracy, if there be any, and by the public servants of those who have access to the records at all times." Thornton *v.* Campton, 18 N. H. 20; Pittsfield *v.* Barnstead, 40 N. H. 477 (*prima facie* evidence of the fact of the assessment).

44. Town of Fox Lake *v.* Village of Fox Lake, 62 Wis. 486, 22 N. W. 584 (record of village board).

45. South School Dist. *v.* Blakeslee, 13 Conn. 227; Sanborn *v.* School Dist. No. 10, 12 Minn. 17; Peck *v.* Smith, 41 Conn. 442; Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271; Hedrick *v.* Hughes, 15 Wall. (U. S.) 123.

The books of the secretary of a school district required to be kept by law, containing a record of the orders drawn upon a district treasurer, are competent evidence. Wormley *v.* District Twp. of Carroll, 45 Iowa 666.

46. The record of sales of school lands required to be kept by the school commissioner is admissible in evidence. Frazier *v.* Laughlin, 6 Ill. 347.

Books of Minutes Kept by School

17. County Records. — A. GENERALLY. — The records of county officers are official registers and competent evidence as such.[47] A county treasurer's books are competent as official registers,[48] as are those of a county auditor.[49]

B. COUNTY SUPERVISORS OR COMMISSIONERS. — The minutes of a county board of supervisors or commissioners are admissible as registers of official actions to show the acts and proceedings of such boards.[50]

C. SHERIFF'S BOOKS. — The various books which the sheriff is by law authorized or required to keep showing his official action, and facts connected therewith, are competent as official registers.[51]

D. TAX RECORDS. — a. *Generally.* — Public tax records are com-

Trustees are evidence of their acts, but not conclusive and may be overcome by parol. State *v.* Van Winkle, 25 N. J. L. 73.

Public School Attendance Roll. As evidence of a particular pupil's attendance at school the school rolls are competent. And while not conclusive in themselves "as against all other evidence, yet when shown to have been made in the ordinary course of duty in the absence of any testimony that they have been tampered with they are entitled to very great weight." Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103.

Record of Board of Education. The secretary being required to keep a register of bonds issued, such register is the record of proceedings of the board of education and competent evidence. Board of Education *v.* Moore, 17 Minn. 412.

47. Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385; State *v.* Ring, 29 Minn. 78, 11 N. W. 233; Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690; Carroll County *v.* O'Conner, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Trentham *v.* Waldrop, 119 Ga. 152, 45 S. E. 988.

The Book of Tax Sales and Redemptions which the county clerk is required to keep and in which he is required to enter all sales for taxes, the quantity sold, the name of the purchaser, etc., and the name of the person redeeming, the date and amount of the redemption money, is competent evidence of the facts therein entered and of a redemption appearing therein. Gage *v.* Parker, 103 Ill. 528. See also Battin *v.* Wood, 27 W. Va. 58.

48. Herendeen *v.* Dewitt, 49 Hun 53, 1 N. Y. Supp. 467.

A County Treasurer's Books are admissible in evidence in an action involving the amount turned over to his successor; and alterations in the entries cannot be presumed unless they are manifest or presumed to be wrongful. Van Ness *v.* Hadsell, 54 Mich. 560, 20 N. W. 585.

49. Lessee of Sheldon *v.* Coates, 10 Ohio 278. See also Boggs *v.* Miles, 8 Serg. & R. (Pa.) 407.

Record Book of the Auditor of Public Accounts, made in accordance with law, showing that the state had abandoned all interest in lands in litigation before the execution of the auditor's deed under which plaintiff claims, is only *prima facie* evidence of the correctness of the facts recited therein. Hart *v.* Picard, 75 Miss. 651, 23 So. 450.

50. Blackman *v.* Town of Dunkirk, 19 Wis. 198; Johnson *v.* Wakula County, 28 Fla. 720, 9. So. 690.

Minutes of Board of Supervisors are admissible to establish an indebtedness of a county judge to county in an action brought by county for recovery of same. Schumacher *v.* Pima County, 7 Ariz. 269, 64 Pac. 490.

A minute entry in the record of proceedings of board of supervisors, — "On motion it was ordered that sheriff be allowed mileage to subpoena witness in Utah," is sufficient evidence of such employment. Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

51. Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547; Bailly *v.* Percy, 14 La. 14; Barclay *v.* Bates, 2 Mo. App. 139.

petent evidence to prove the facts which they show relating to taxes and taxations.[52]

b. *Assessor's Books and Records.* — The books of an assessor are competent evidence of the matters shown therein relating to the assessment and collection of taxes[53] and of the assessed valuation of the property in the jurisdiction,[54] and whether any return of taxable property was made by a particular person.[55] Such records, however, are not competent in actions between third persons

A contemporaneous entry of the issuance of a liquor license in a book kept for such entries by the sheriff, whose duty it is to issue such licenses, is competent original evidence of the issuance of the license in question. Albrecht *v.* State, 62 Miss. 516.

A Sheriff's Docket in which he is required by law to enter all executions delivered to him and the date of such delivery is competent evidence in his favor (*dictum*). Ross *v.* Davis, 30 Ga. 823. But see Fleming *v.* Williams & Co., 53 Ga. 556.

Entries made by the sheriff in the usual course of official business in a book kept in his office, showing a brief memorandum of the receipt of writs of attachment, the dates of return and proceedings thereon, are admissible in evidence to show matters not contained in the writs or returns. Hesser *v.* Rowley, 139 Cal. 410, 73 Pac. 156.

Entries in sheriff's book of sale of land under execution against husband is admissible as a circumstance tending to show seizin of land by husband in dower proceeding. *Ex parte* Steen, 59 S. C. 220, 37 S. E. 829.

52. *Alabama.*— Dudley *v.* Chilton County, 66 Ala. 593.

Illinois. — Bush *v.* Stanley, 122 Ill. 406, 13 N. E. 249.

Indiana. — McKeen *v.* Haskell, 108 Ind. 97, 8 N. E. 901; Standard Oil Co. *v.* Bretz, 98 Ind. 231.

Missouri. — Seibert *v.* Allen, 61 Mo. 482.

Nebraska. — National L. Ins. Co. *v.* Butler, 61 Neb. 449, 85 N. W. 437, 87 Am. St. Rep. 462.

Nevada. — State *v.* Nevada Cent. R. Co., 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042.

Pennsylvania. — Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Fager *v.* Campbell, 5 Watts (Pa.) 287.

Tax books of a county are competent to show that certain tract of land on the border was not taxed within that county. Gratz *v.* Hoover, 16 Pa. St. 232.

Entry "Paid" in Tax Books. Tax books showing assessments upon a certain party which were marked "paid" by the collector is *prima facie* evidence of payment, in a question as to the legal settlement of the party assessed. Scranton Poor School Dist. *v.* Directors, 106 Pa. St. 446. See also Overseers of Lewisburg *v.* Overseers of Augusta, 2 Watts & S. (Pa.) 65; McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976.

53. Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433; Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249; Pittsfield *v.* Barnstead, 40 N. H. 477; Clark v. Fairley, 30 Mo. App. 335; Scranton Poor Dist. *v.* Directors of Poor, 106 Pa. St. 446; Mitchell *v.* Pillsbury, 5 Wis. 407; Milo *v.* Gardiner, 41 Me. 549. See also Hughes *v.* June, 2 Md. Ch. 178.

54. State *v.* Cook, 14 Mont. 201, 36 Pac. 44.

55. The tax receiver's books of the return of taxable property made out and returned as required by law are competent evidence to show that a certain person failed to make any return of taxable property. McCrory *v.* Manes, 47 Ga. 90; *citing* Lynch *v.* Lively, 32 Ga. 575; Tolleson *v.* Posey, 32 Ga. 372, holding such books to be competent evidence of the amount of property returned for taxes by a particular person. See also Vankirk *v.* Clark, 16 Rawle (Pa.) 286; Buchanan *v.* Moore, 10 Serg. & R. (Pa.) 275.

as evidence of the value,[56] title[57] or location[58] of the property or the domicil of the person[59] assessed, but only of the facts relating to the assessment and collection of the tax,[60] though the contrary has been held[61] on the ground either that they are official registers[62] or that they are competent circumstantial evidence.[63]

An assessment roll[64] is competent evidence, as also is a tax

56. Dudley *v.* Minnesota & N. W. R. Co., 77 Iowa 408, 42 N. W. 359; Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21.

57. Urket *v.* Coryell, 5 Watts & S. (Pa.) 60. But see Van Kirk *v.* Clark, 16 Rawle (Pa.) 286.

58. The records, not ancient, of assessors are inadmissible in suits between third parties to prove the locality of real estate. The book of assessments of taxes, made and kept by the assessors in the performance of their official duty, in accordance with law, is doubtless competent evidence of the facts therein stated in all cases relating to the assessment or collection of the tax. But in other cases it is not admissible except when it comes within some well recognized rule of evidence, such as that relating to ancient documents, declarations against interest, etc. Com. *v.* Heffron, 102 Mass. 148, citing and discussing the cases dealing with the competency of assessors' books.

59. The tax list of a town with a memorandum of "paid" against the name of the defendant in an adverse suit is not admissible in his behalf to show that his domicil was in that town. "The tax list was not competent evidence by reason of its having been made by public officers, for any purpose except the assessment and collection of the tax." See Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299.

60. Kenerson *v.* Henry, 101 Mass. 152; Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615. See Syme *v.* Sanders, 4 Strobh. (S. C.) 341; Bowman *v.* Montcalm Cir. Judge, 129 Mich. 608, 89 N. W. 334.

61. See White *v.* Beal & F. G. Co., 65 Ark. 178, 45 S. W. 1060; Gratz *v.* Hoover, 16 Pa. St. 232; Sutton *v.* Floyd, 7 T. B. Mon. (Ky.) 3, Van Kirk *v.* Clark, 2 Rawle (Pa.) 286.

The official assessment lists on which defendants paid their taxes, unsworn to, whilst not conclusive and not even entitled to as much weight as they would have been if sworn to by defendants themselves, were still lists to which they as taxpayers had given their assent, either actual or implied, and were legitimate evidence as to value of property. Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076.

62. Assessment lists, made out and arranged under the direction of a public officer, in pursuance of a duty enjoined by law, are, upon general principles, competent evidence as tending to show the amount of property owned by the assessed. They are also "instruments kept in a public office," of which under § 283 of the practice act certified copies are admissible in evidence. Painter *v.* Hall, 75 Ind. 208.

An abstract from a book containing returns of a tax assessment for year of trial of cause is admissible in action for slander, malicious prosecution and false imprisonment, to show wealth and influence of defendant, where there is no objection to form of abstract or that they did not truly state what they purported. Womack *v.* Circle, 29 Gratt. (Va.) 192.

63. Tax lists are not admissible for the purpose of proving the truth of facts therein set out, but as an independent fact are admissible as evidence of such fact; and in repelling a charge of fraud vesting among other circumstances an allegation that pretended price paid for tract exceeded greatly its value, it is competent to prove that it was entered as a certain value on the tax lists. Cardwell *v.* Mebane, 68 N. C. 485.

64. Where the board of supervisors of a county has made an order under §3738 of the Political Code dispensing with the making or use of a duplicate assessment book, the original assessment roll is *prima facie* evi-

list,[65] of all the facts properly shown thereby relating to the assessment and collection of the tax.

E. Clerks of Courts. — The official records of the clerk of a court are competent evidence of his acts and the facts properly recorded in such records.[66]

F. Recorder's Reception Book. — A book kept by the recorder of deeds, pursuant to law, for the purpose of showing the facts relating to the receipt and delivery of papers filed for record is competent evidence of the facts properly entered therein,[67] though the contrary has been held.[68]

18. Account Books and Accounts. — The books and records of public officers containing the accounts and public financial transactions of themselves or other officers, kept under authority or requirement of law, are competent evidence of the facts shown

dence of the right of the county to recover in an action to collect a tax. Lake County *v.* Sulphur Bank Q. M. Co., 66 Cal. 17, 4 Pac. 876.

Where the law requires a duplicate of the assessment roll to be verified by the certificate of the clerk of the circuit court, a duplicate not so verified is not admissible. Robinoe *v.* Doe, 6 Blackf. (Ind.) 85.

65. The original tax list filed by the tax receiver with the auditor is *prima facie* evidence of the assessment, property assessed, amount of taxes due, the delinquency and that all the requirements of the law have been duly complied with. State *v.* Nevada Cent. R. Co., 26 Nev. 357, 68 Pac. 294, rehearing *denied* 69 Pac. 1042.

The fact that the oaths of listers of taxes have not been recorded as required by law does not render the grand list incompetent. Day *v.* Peasley, 54 Vt. 310.

66. Browning *v.* Flanagin, 22 N. J. L. 567; Lawrence Co. *v.* Dunkle, 35 Mo. 395; Bryan *v.* Glass, 2 Humph. (Tenn.) 390; Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385; Briggs *v.* Taylor, 35 Vt. 57.

A record of indentures required to be kept by a clerk of a court is competent evidence. Williams *v.* Jarrot, 6 Ill. 120.

The Register of Actions, required to be kept by clerks of district courts, showing receipt of fees, is admissible in an action on the clerk's bond for failure to turn over fees received, to show receipt by him of the fees. Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

The Clerk's Execution Docket made out by himself or deputy is admissible in behalf of himself or his representative to show the amount of cash due him on cost *fi. fas.*, and that the *fi. fas.* were delivered to the sheriff. "These dockets are public books deposited in the clerk's office, subject to the daily inspection of the sheriff and everybody else. They are in no sense the private memoranda of the clerk, but the permanent as well as public monuments of his official transactions." Ross *v.* Davis, 30 Ga. 823.

Book of Attachments. — An attachment of real estate may be proved by the entry thereof in the clerk's book of attachments kept under authority of law. Metcalf *v.* Munson, 10 Allen (Mass.) 491.

The Fee Book of the Clerk of the circuit court is a public record which he is required by law to keep, and his entries therein are competent evidence of the amount of costs due the judgment plaintiff in an action on his judgment. Palmer *v.* Glover, 73 Ind. 529.

67. Musser *v.* Hyde, 2 Watts & S. (Pa.) 314 (holding that an entry in such a book was more cogent than the certificate endorsed on the recorded instrument). City of Winona *v.* Huff, 11 Minn. 119.

68. Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903, holding that a grantors' and grantees' reception book was inadmissible to show the delivery of deeds filed for record, since this book

thereby.[69] But an account kept or filed without lawful authority although in accordance with custom is not competent as a public record.[70] Yet such an account though not strictly a public record may be competent against the public.[71]

Books or records containing merely the result or conclusion derived from other records may not be competent.[72]

19. Weather Records. — A. GENERALLY. — Records of weather conditions kept by public officers or public institutions are compe-

was kept merely for the convenience of the recording officers and was not made evidence by statute.

69. *Iowa.* — Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241.

Louisiana. — State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522 (auditor's accounts).

Massachusetts. — City of Boston *v.* Weymouth, 4 Cush. 538.

New Hampshire. — Thornton *v.* Campton, 18 N. H. 20 (selectmen's books of the finances and expenses of town); Rindge *v.* Walker, 61 N. H. 58 (books of town treasurer).

Vermont. — Cabot *v.* Walden, 46 Vt. 11 (books of overseers of poor).

Virginia. — Baker *v.* Gilmer, Gilm. 235. But see Williamson *v.* Doe, 7 Blackf. (Ind.) 12.

The statement of the account of a county treasurer kept in the office of the state treasurer and certified to by him as correct is competent evidence as an archive of the treasurer's office. Harper *v.* Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044.

A Bank Pass-Book, regularly and accurately kept by the state treasurer in connection with the discharge of his duties, is properly admitted as part of his official transactions in an action upon his bond. Com. *v.* Tate, 89 Ky. 587, 12 Ky. L. Rep. 1, 13 S. W. 113.

A comptroller's statement of the amount due from a delinquent tax collector is *prima facie* evidence of amount due from him to the state. Anderson *v.* State, 8 Heisk. (Tenn.) 13.

Statement of fees collected filed by clerks of circuit court with county clerk. Lycett *v.* Wolff, 45 Mo. App. 489.

United States Treasury Department. — As to the competency thereof, see *infra*, "Records of Federal Government."

70. Highsmith *v.* State, 25 Tex. Supp. 137.

A county clerk's account book which is not required by law to be kept, and which is not a record of daily transactions, but a mere statement of conclusions which the clerk at the end of each six months drew from an examination of other records and writings, is not admissible. Board of Comrs. *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

71. A book kept in the county clerk's office under the direction of the county commissioners, containing accounts of the treasurer, though not strictly admissible as a public record because there is no law requiring it to be kept, is admissible against the county. County of La Salle *v.* Simmons, 10 Ill. 513.

72. See Board of Comrs. *v.* Keene Five-Cent Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

A county ledger is not competent evidence against a sheriff and tax collector in an action to recover taxes collected by him, since it contains merely the footings of the reports made by the collector. Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781; *citing* King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

Under a statute making copies of public records admissible in place of the originals, a certified copy of the report of an insurance company to the insurance commissioner was held properly admitted on behalf of the plaintiff in an action against the company, the original being a public record and being a report required by law to be made. Provident Sav. L. A. Soc. *v.* Bailey, 118 Ky. 36, 25 Ky. L. Rep. 2251, 80 S. W. 452.

tent evidence of the state of the weather at the time to which they relate.[73]

Records of Rainfall kept in a university have been held competent in actions between third persons.[74]

B. Records of Weather Bureau. — The records of the United States weather bureau showing the weather conditions as observed by the signal service at a particular time and place are official registers and competent evidence of the state of the weather at that time and place[75] or within a reasonable distance thereof.[76]

20. Vital Statistics. — A. Generally. — A public record of vital

73. A record of the weather kept for a number of years at the State Insane Asylum is competent evidence to prove the temperature on a given day included in such record (DeArmond *v.* Neasmith, 32 Mich. 231), and the conditions of the weather at a place twelve miles distant (Hart *v.* Walker, 100 Mich. 406, 59 N. W. 174). See also People *v.* Dow, 64 Mich. 717, 31 N. W. 597.

74. In City of St. Louis *v.* Arnot, 94 Mo. 275, 7 S. W. 15, the records of rainfall during several years kept by Washington University were held admissible to show the rainfall during those years, on the ground that the records of public institutions are competent evidence. There is nothing in the case to show whether this university is a public or a private school, but the court cites De Armond *v.* Neasmith, 32 Mich. 231, which involved the competency of the records of a state insane asylum.

75. Anderson *v.* Hilker, 38 Wash. 632, 80 Pac. 848; Chicago & N. W. R. Co. *v.* Trayes, 17 Ill. App. 136; Scott *v.* Astoria R. Co., 43 Or. 26, 72 Pac. 594; Moore *v.* Gans & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975; Knott *v.* Railway Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

The record kept by a person employed in the signal service of the United States whose public duty it is to record truly the facts therein stated is competent evidence of such facts, although there is no statute expressly authorizing the use of such record as evidence. Such records are "of a public character kept for public purposes and so immediately before the eyes of the community that inaccuracies, if they should exist, would hardly escape exposure. They come, therefore, within the rule which admits in evidence 'official registers or records kept by persons in public office in which they are required either by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties or under their personal observation.'" Evanston *v.* Gunn, 99 U. S. 660.

The record of the weather kept by an officer of the United States signal service is more reliable evidence than the oral testimony of witnesses from memory. Lindsay, Gracie & Co. *v.* Cusimano, 12 Fed. 504.

Statute. — Under the provisions of the Act of 1876, ch. 299, to enable the records of the signal service department to be received in evidence, where the officer in charge produces a book containing a copy of the record attested by his signature, and he verifies its correctness as a witness, this is sufficient certification "under oath" to authorize the reception of the copy as evidence. Schile *v.* Brokhahus, 80 N. Y. 614.

76. Huston *v.* Council Bluffs, 101 Iowa 33, 69 N. W. 1130, 36 L. R. A. 211 (four and a half miles distant).

In Mears *v.* New York, N. H. & H. R. Co., 75 Conn. 171, 52 Atl. 610, the records kept by the nearest United States weather bureau, ten miles distant from a certain place, were held competent to show the condition of the weather at the latter point where there was no weather bureau, there being expert testimony that the United States weather records at any particular place would as a general rule be the true record for the surrounding country. "The objection of remoteness went merely to their weight."

statistics is competent evidence of the facts properly recorded therein. Thus a public record of births, deaths and marriages kept in pursuance of law is competent.[77]

In some jurisdictions, however, it is held that such records are not competent in controversies between private parties because they are intended only for the convenience of public officers, and not for the use of the public generally.[78] And it has been so held even though the statute providing for such records makes them *prima facie* evidence.[79]

B. Physician's Report or Certificate. — The report or certificate as to births and deaths which physicians are required by law to make and file with the board of health or other public of-

77. Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97.

"On account of the credit due to the officials empowered to record the facts in the public interest, such registers are evidence of the fact without the usual tests of truth." Howard *v.* Illinois Trust & Sav. Bank, 189 Ill. 568, 59 N. E. 1106.

A certified copy of the record of the registrar of births, marriages and deaths is competent evidence to prove the age of a married woman and mother, where the statutes require applicants for marriage licenses to state their ages and require the attending physician to report the age of the mother at the birth of a child, and that the registrar keep a record of these facts. "The record thus made was a public record made by a public officer of a fact which the law required him to find and record," and was therefore admissible although hearsay in character. Murray *v.* Supreme Lodge N. E. O. of P., 74 Conn. 715, 52 Atl. 722. But this rule has been changed by statute (Acts of 1902, p. 49, No. 44,) providing that such record shall be competent evidence to prove only the fact of birth, marriage or death. McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985.

A Foreign Record of vital statistics is not competent unless shown to have been kept pursuant to a statute, or a custom of a church or locality, and such a statute must be proved in the manner provided by law. Pirrung *v.* Supreme Council, 104 App. Div. 571, 93 N. Y. Supp. 575.

Church Record. — See *infra*, "Church and Parish Records."

78. Sovereign Camp W. O. W. *v.* Grandon, 64 Neb. 39, 89 N. W. 448.

79. Belgin *v.* Metropolitan L. Ins. Co., 173 N. Y. 374, 66 N. E. 102, *reversing* 57 App. Div. 629, 68 N. Y. Supp. 1133. This was an action upon a life insurance policy. The admission of the record of a board of health, kept under a statute requiring a registration of births, marriages and deaths and the cause of death, and making such record *prima facie* evidence of the facts therein set forth, and offered for the purpose of showing the cause of death of the plaintiff's mother, was held error. The court says: "This statute was a police regulation, required for public purposes and became *prima facie* evidence so far as concerns questions arising under its provisions which involve public rights. But we think it was not the intention of the legislature to change the common law rule of evidence in controversies of private parties growing out of contract, and that the provisions of the statute should not be construed as applicable to such cases. This in effect was what we held in the case of Davis *v.* Supreme Lodge, Knights of Honor (165 N. Y. 159); also in Buffalo Loan, Trust and Safe Deposit Co. *v.* Knights Templar and Masonic Mutual Aid Association (126 N. Y. 450). The question here presented was elaborately discussed in the Davis case and we regard it as controlling upon the question now presented." To the same effect, Buffalo L., T. & S. D. Co. *v.* Knights Templar & M. M. A. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839. But see Markowitz *v.* Dry

ficer is competent evidence of the facts required to be reported or certified[80] that are presumptively within his personal knowledge,[81] but in some jurisdictions such a certificate is not competent evidence of the cause of death in an action on an insurance policy.[82]

21. Records of Public Institutions. — The records of public institutions which are kept pursuant to law are competent evidence whenever material.[83] Records which do not appear to have been made in the regular course of official duty are not admissible.[84] And it has been held that the records of such an institution required to be kept for certain local and specific purposes are not admissible in actions between third persons.[85]

Dock, E. B. & B. R. Co., 12 Misc. 412, 33 N. Y. Supp. 702; McKinley *v.* Insurance Co., 6 Misc. 9, 26 N. Y. Supp. 63.

80. National Council *v.* O'Brien, 112 Ill. App. 40; Ohmeyer *v.* Supreme Forest W. C., 91 Mo. App. 189; Reynolds *v.* Prudential Ins. Co., 88 Mo. App. 679; Nolan *v.* Nolan, 35 App. Div. 339, 54 N. Y. Supp. 975 (fact of death); *citing* Jackson *v.* King, 5 Cow. (N. Y.) 237.

Cause of Death. — In an action on a life insurance policy, a copy from the public records of the registrar of births, marriages and deaths for the city of New Haven of the "death record" of the father of the assured, which consisted of a certificate by his attending physician as to the cause of death, was held admissible not only in corroboration of the testimony of the physician, but as independent evidence of the facts recorded. Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490 (*citing* Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818). But this rule has been changed by statute. McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985.

81. McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

Where the statute provides that physicians shall report within a specified time all births which come under their supervision, with such correlative facts as the board of health may require, the return of a physician is not evidence of matters of mere hearsay included therein of which he knows nothing. Howard *v.* Illinois T. & S. B., 189 Ill. 568, 59 N. E. 1106.

82. Metropolitan L. Ins. Co. *v.* Anderson, 79 Md. 375, 29 Atl. 606; Buffalo L. T. & S. D. Co. *v.* Knights Templar & M. M. A. Assn., 56 Hun 303, 9 N. Y. Supp. 346, *affirmed* in 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839.

83. A record kept by the clerk of the house of correction in accordance with the requirement of law is a public record and may be introduced in evidence whenever its contents are material to the issue. And under §7504, How. St., a certified copy thereof is admissible. People *v.* Kemp, 76 Mich. 410, 43 N. W. 439.

84. The records of a state hospital for the insane relating to a particular patient, in the handwriting of an assistant physician, not shown to have been kept pursuant to any authority by officers in the performance of any duty, are not admissible. Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

Insane Asylum. — To show insanity and incarceration of certain relation, defendant on trial for murder offered copies of entries in books of insane asylum authenticated under §906 R. S. N. S., and they were held insufficient to prove particular facts stated unless it be so expressly provided by statute, or be shown that entries were made in due course of official duty. Snell *v.* United States, 16 App. Cas. (D. C.) 501.

85. The Records of a City Hospital kept in pursuance of an ordinance, for local and specific purposes, are not public records in the sense that makes them competent evidence for all purposes. They are not admissible in a suit between two citizens to show that one had been treated at said hospital at time he applied for insurance. Connor *v.* Insurance Co., 78 Mo. App. 131, *fol-*

The record of the registration of persons entering public institutions, such as the poorhouse, is not ordinarily evidence of any facts not required to be recorded therein and which did not occur in the presence of the registering officer.[86]

22. Internal Revenue Collector. — The records of internal revenue collectors come within the designation of official registers.[87]

23. Records of Post-Office. — The records properly kept in a post-office are official registers and competent as such.[88]

24. Military Records. — Military records kept by authority of law come within the rule relating to official registers.[89]

lowing Buffalo Co. *v.* Knights Templar Assn., 126 N. Y. 450, 27 N. E. 942.

86. Fox *v.* Peninsular W. L. & C. Wks., 92 Mich. 243, 52 N. W. 623.

The questions and answers appended to the physician's return, forming part of the admission papers of a patient at a state hospital for the insane, are mere hearsay and not admissible to show insanity at a previous date, since the Code provides that the physician shall endeavor to obtain answers to the interrogatories from the patient's relations or others who know the facts. Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

87. State *v.* Hall, 79 Me. 501, 11 Atl. 181; State *ex rel.* Thorndike *v.* Collins, 68 N. H. 299, 44 Atl. 495; State *v.* White, 70 Vt. 225, 39 Atl. 1085; Goble *v.* State, 42 Tex. Crim. 501, 60 S. W. 968 (payment of internal revenue tax).

The record of special tax payers kept in the internal revenue collector's office come within the class of public books and official registers which are competent evidence of the facts properly appearing therein, and which may be proved by a certified or examined copy. State *v.* White, 70 Vt. 225, 39 Atl. 1085; *citing* State *v.* Spaulding 60 Vt. 228, 14 Atl. 769.

88. Haddock *v.* Kelsey, 3 Barb. (N. Y.) 100; Miller *v.* Boykin, 70 Ala. 469; Litchfield *v.* Farmington, 7 Conn. 100.

The records of a town postoffice showing incoming and outgoing mails are admissible in evidence in actions for malicious prosecutions brought by a deputy postmaster against an agent of the postoffice department for illegal imprisonment for taking mails, even though in accused's handwriting, as they are public records made by a sworn officer of the government. Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514.

The register of letters received at a particular postoffice being an official record authorized by law to be kept is admissible in evidence without the testimony of the person who kept it. But the postmaster may properly testify that the entry of the date when a particular letter was received is erroneous and should have been one day earlier; such testimony being based on his knowledge of the course of the mails and the time of their arrival. Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299.

89. An order of the major-general concerning court martial being required to be recorded by the orderly officer, a certified copy from his books is admissible. Parker *v.* Currier, 24 Me. 168.

Roll of Military Company required to be kept is competent evidence of the mustering of company and the absence of delinquents. Emery *v.* Goodwin, 17 Me. 76; Cate *v.* Nutter, 24 N. H. 108, although not recorded on company's orderly book. Robinson *v.* Folger, 17 Me. 206. But see Com. *v.* Pierce, 15 Pick. (Mass.) 170.

Where by statute the clerk of a company in the militia is required to keep a roll of the company and a record of the state of the arms and equipment belonging to each man, a clerk's roll showing such facts is admissible in evidence to show the deficiency of the equipment of a particular militiaman. Hammond *v.* Dunbar, 24 Pick. (Mass.) 172.

Rosters kept by sworn recording

25. Surveys. — The records of official surveyors are competent to prove facts properly appearing therein,[90] and this rule applies to records kept by deputy surveyors.[91]

26. Record of Liquor Sales. — A record of sales of liquor kept pursuant to law by a licensed vendor is competent evidence of the facts properly recorded therein.[92]

27. Ship's Papers. — A ship's papers executed by the proper authorities and coming from the proper custody are competent evidence as public documents.[93]

officers, though not competent proof of commissions and discharges, are the best evidence of the time they were delivered. Mathews *v.* Bowman, 25 Me. 157.

90. *Kentucky.* — Crockett *v.* Greenup, 4 Bibb 158.

Louisiana. — Wells *v.* Compton, 3 Rob. 171.

Michigan. — Pugh *v.* Schindler, 127 Mich. 191, 86 N. W. 515.

Minnesota. — Fish *v.* Chicago St. P. & K. C. R. Co., 82 Minn. 9, 84 N. W. 458, 83 Am. St. Rep. 398.

Mississippi. — Spears *v.* Burton, 31 Miss. 547.

Pennsylvania. — Conkling *v.* Westbrook, 81 *Pa. St. 81; Boyles *v.* Johnston, 6 Binn. 125; Brown *v.* Long, 1 Yeates 162.

Virginia. — Cline's Heirs *v.* Catron, 22 Gratt. 378.

A copy of the survey made by the public surveyor as required by law is admissible in evidence. Meehan *v.* Forsyth, 24 How. (U. S.) 175.

Under a statute providing for a record of the surveys made by the county surveyor, the records of such surveys in his office are admissible. Sherrard *v.* Cudney, 134 Mich. 200, 96 N. W. 15.

Surveys made by sworn city officials for the sole purpose of arriving at a correct estimate of the amount of earth to be removed in cross sectioning certain grading to be done, are *prima facie* evidence of the correctness of the estimate. Clarke *v.* Williams, 29 Neb. 691, 46 N. W. 82.

A survey of a district surveyor is not evidence without showing an authority to make it, or proving that such authority existed and was afterwards lost. Wilson *v.* Stoner, 9 Serg. & R. (Pa.) 39, 11 Am. Dec. 664. See Motz *v.* Ballard, 6 Serg. & R. (Pa.) 210 (unsealed copy of warrant sent by surveyor general to a deputy surveyor as his authority); Carnahan *v.* Hall, Add. (Pa.) 127.

91. Russel *v.* Werntz, 24 Pa. St. 337 (found among papers of deceased deputy surveyor); Lindsay *v.* Scroggs, 2 Rawle (Pa.) 141; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

Field notes and other official proceedings of a deputy surveyor may always be given in evidence to explain his acts. McCormick *v.* McMurtrie, 4 Watts (Pa.) 192.

92. **Druggist's Record of Liquor Sales.** — The records of sales which druggists holding liquor permits are required to keep are public records and competent evidence to show the names of persons to whom sales were made, the kind and quality of liquor sold, the date of sale and purpose for which sold, even though contents may tend to criminate. State *ex rel.* McClory *v.* Donovan, 10 N. D. 203, 86 N. W. 709.

93. See article "Admiralty," Vol. I.

A Ship's Clearance Papers, found after the captain's death with other of the ship's documents, were held properly admitted without additional proof of the official character and signature of the officers who executed them. They consisted of an application by a vice consul to the authorities for a permit for the vessel to depart, a bill of lading signed by the captain, which bill and signature were identified by the mate, a license to sail, a certificate of the custom-house officer that the vessel had paid its tax for hospital dues, and the bill of health signed by the maritime subdelegate of the port. All of these official doc-

28. Records of Custom-House and Collector of Port. — The records and official documents of the custom-house are competent evidence.[94]

The records and documents properly kept in the office of the collector of a port are likewise admissible.[95]

29. The Registry or Enrollment of a Vessel required by law is

uments were under seal, executed by the Chilean authorities, who were public agents appointed for the purpose of protection to foreign commerce, to furnish the documentary evidence that vessels are engaged in regular traffic, and that they have permission to sail, which the laws of maritime nations generally require. "They were produced by the proper custodian from the proper place of custody, and that they were the clearance papers intended for use upon that voyage was manifest. These documents are of a public nature, which are made by persons specially appointed for that purpose, in discharge of public duty, are entitled to confidence on that account, and their admissibility stands upon the same ground with that of official registers. . . . It is true that they are foreign official documents, but, because the laws of maritime countries universally require the issuance of that general class of documents, and the statutes of this country require them to be taken by the master of a foreign vessel if he is destined for a port in this country, and compel their production to the collector of the port where he makes entry of his vessel, they stand, in regard to admissibility, upon the same footing with other original official documents." Grace *v.* Browne, 86 Fed. 155, 29 C. C. A. 62.

But the official documents from the customs and other officials of the republic of Mexico, having jurisdiction of the place of lading of a ship, containing what purports to be a protest made by the charterer against the action of the vessel, and the deposition of certain witnesses in support of the facts alleged in the protest, being *ex parte*, are not admissible in evidence to establish any controverted fact in an action for breach of the charter party. The Ira B. Ellems, 48 Fed. 591.

94. Appraisement by Custom-House Officers. — In the trial of a case where goods had been seized upon suspicion of being fraudulently imported, it was held proper to allow to go to the jury, as evidence, appraisements of the goods made either by the official appraisers or appraisers acting under appeal, they being present to verify the papers. The objection that the appraisements had not been made in the presence of the jury was not sufficient. They were made and returned in accordance with the provisions of the acts of Congress. "From the character of those papers, we think they were admissible. They are documents or public writings, not judicial. As such they may be used as evidence, subject to the rules applicable to the admissibility of such writings as evidence. The originals or examined copies were admissible, as is the case wherever the original is of a public nature." Buckley *v.* United States, 4 How. (U. S.) 251; *citing* Richardson *v.* Mellish, 1 Ryan & M. (Eng.) 66, 21 E. C. L. 381, as holding that a copy of an official document, containing an account of the cargo of a ship, made in pursuance of an act of parliament by an officer of the customs and lodged there as an official document, should be admitted as proof that the property mentioned in it was put on board the vessel.

95. Where by law it is the duty of the collector of the port to record in books kept for that purpose all manifests, a copy of such record compared with the original and shown to be correct is admissible in evidence. United States *v.* Johns, 4 Dall. (U. S.) 411.

The record of the collector of a port is competent evidence to show the ownership and nationality of a vessel registered therein, and a sworn or examined copy is likewise admis-

competent as a public record to show the ownership of such vessel,[96] though the contrary has been held.[97]

30. Church and Parish Records. — Church and parish records of births, marriages, deaths and baptisms kept in accordance with the regulations or usage of the church or parish are competent in some jurisdictions as public records,[98] in others only as entries in the regular course of business.[99] They are sometimes made competent by statute.[1] Such records, however, are only competent to prove the facts of which they form the proper record. Thus a record

sible although the copy certified by the collector is incompetent. Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308.

96. See Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308, and article "ADMIRALTY," Vol. I, p. 302, nn. 55, 56.

Copies of the last enrollment of a vessel and of a bill of sale of the same, duly certified by a collector of customs as a true copy of the enrollment on file and the bill of sale on record in his office, are *prima facie* evidence of the ownership of the vessel, since U. S. Rev. Stat. §4319, requires a record of the enrollment to be kept, and §§4192 and 4194, require duly acknowledged bills of sale of vessels to be recorded with the collector of customs, and require him to keep a record of the same and to furnish certified copies. Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307. To the same effect Sampson *v.* Noble, 14 La. Ann. 347.

In Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561, it was held that a copy of a register of a vessel, certified by the register of the treasury under the seal of the treasury department, was competent evidence.

The registry of a vessel or a certified copy of it is not the only evidence of the vessel's ownership. Stearns *v.* Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608.

97. A copy of the enrollment of a vessel, certified by the collector of the port is not admissible in evidence to prove ownership of the vessel except so far as it is confirmed by some auxiliary circumstance showing that it was made by the authority or assent of the person named in it and who is sought to be charged as owner. Dyer *v.* Snow, 47 Me. 254. See article "ADMIRALTY," Vol. I, p. 302, n. 55.

98. American L. Ins. Co. *v.* Rosenagle, 77 Pa. St. 507; Lewis *v.* Marshall, 5 Pet. (U. S.) 470; Doe *v.* Andrews, 15 Q. B. 756, 69 E. C. L. 756; Sturla *v.* Freccia, 5 App. Cas. (Eng.) 623, 43 L.T.N.S. 209, 50 L.J. Ch. 86; Hyam *v.* Edwards, 1 Dall. (U. S.) 2. See Hancock *v.* Catholic Benev. Legion, 67 N. J. L. 614, 52 Atl. 301, and articles "AGE;" "MARRIAGE."

Record of Baptism. — Draycott *v.* Talbot, 3 Brown, 564, 1 Eng. Reprint 1501; Wilhen *v.* Law, 3 Stark. 63, 3 E. C. L. 595, 23 R. R. 757.

99. Bailey *v.* Fly, 35 Tex. Civ. App. 410, 80 S. W. 675. See also Chambers *v.* Chambers, 32 N. Y. Supp. 875; Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Murphy *v.* People, 213 Ill. 154, 72 N. E. 779.

Church registers are not admissible in evidence except by special statute, unless they are by the civil law of country or state where kept recognized as documents of an authentic and public nature. Childress & Mullanphy *v.* Cutter, 16 Mo. 24; Morrissey *v.* Wiggins' Ferry Co., 47 Mo. 521.

1. Succession of Melasie Hebert, 33 La. Ann. 1099 (register of baptism or copy thereof made evidence of filiation).

Under a statute providing that any "church, parish or baptismal record . . . in which records are preserved, the facts relating to any birth, marriage, or death, including the names of the persons, dates, places and other material facts, may be admitted as *prima facie* evidence," copies of parish registers of births and deaths, kept in a foreign country, in accordance with its laws, are evidence under a stipulation that they

of baptisms is not evidence of the date of birth,[2] nor is a burial record evidence of pedigree or the time and place of birth.[3] Other church records are admissible in some jurisdictions.[4]

should have same effect as originals produced and sworn to by custodian. Where the laws of a foreign country require a record of the birth of all children, "illegitimate as well as legitimate," and authorize certain officials to provide formulas for books which may be considered necessary regarding births, etc., the fact that a public officer did, in performance of his duty, enter upon said record the marital status of the mother, and thereby inferentially the legitimacy of the child, warrants the inference that the laws of that country require such entry. Under such entry the marital status of the mother and the legitimacy of the child become material facts in the birth records and are within the phrase, "other material facts." The evidentiary effect of such record being declared by statute, the record of the birth of a child to one declared therein to be a spinster, in the absence of evidence leaning to the conclusion of legitimacy, is sufficient to overcome the *prima facie* presumption of legitimacy which exists in favor of all children, and to support a finding that such child was illegitimate. Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504.

2. Burghart *v.* Angerstein, 6 Car. & P. (Eng.) 690, 25 E. C. L. 600; Rex *v.* Clapham, 4 Car. & P. 29, 19 E. C. L. 260; Fox *v.* Peninsular W. L. & C. Wks., 92 Mich. 243, 52 N. W. 623.

In Clark *v.* Trinity Church, 5 Watts & S. (Pa.) 266, a church record was identified by the clerk of the church as a registry of baptisms and births kept in his church. An entry therein of the baptism of a particular person also recited the date of his birth. The court held that the entry was not competent to prove the date of birth since its evident object and design was to register the baptism and not the date of birth. "The mention of the latter seems to have been introduced rather for the purpose of description than anything else."

3. Childress & Mullanphy *v.* Cutter, 16 Mo. 24 (not competent to prove pedigree).

A record of deaths and burials kept by the pastor of a church is admissible in evidence only to show the deaths and burials; where the pastor has also made entries as to the birth and parentage of the parties dying, these are not admissible in evidence, as it was no part of the pastor's duty to make such entries. "The rule is thus stated by Mr. Greenleaf in his work on Evidence, Vol. I, § 493: 'A parish register is evidence only of the time of the marriage, and of its celebration *de facto;* for these are the only facts necessary within the knowledge of the person making the entry. So a register of baptism, taken by itself, is evidence only of that fact, though, if the child were proved *aliunde* to have been then very young, it might afford presumptive evidence that it was born in the same parish. Neither is the mention of the child's age, in the register of christenings, any evidence of the day of his birth, to support a plea of infancy. In all these and similar cases, the register is no proof of the identity of the parties there named, with the parties in controversy, but the fact of identity must be established by other evidence. It is also necessary in all these cases that the register be one which the law requires should be kept, and that it be kept in the manner required by law.' This principle is recognized in most of the leading text-books and numerous decisions in England and in this country. It is sufficient to refer to Rex *v.* Clapham, 4 C. & P. 29; Burghart *v.* Angerstein, 6 Id. 690; Williams *v.* Lloyd, 39 E. C. L. R. 595; Whitcher *v.* McLaughlin, 115 Mass. 168; Blackburn *v.* Crawfords, 3 Wall. 189." Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207.

4. Arnold *v.* Bath, 5 Bing. 316, 2 M. & P. 559, 15 E. C. L. 459; Hartley *v.* Cook, 9 Bing. 728, 23 E. C. L. 442, 5 Car. & P. 441, 24 E. C. L. 402; Rex *v.* Martin, 2 Campb. 100, 11 Rev. Rep. 674. See Nason *v.* First Bangor

31. Hospital Records. — The books or records of a hospital are ordinarily not public records and hence are not competent evidence as such.[5] But when kept in accordance with a requirement of law they become admissible like any other public record.[6]

32. Public Documents and Publications. — A. GENERALLY.— Documents containing the official acts of legislative and executive officers are competent evidence of such acts and facts of a public nature stated therein.[7]

B. PRINTED PUBLICATIONS. — Books printed under public authority containing a record of public facts,[8] of the acts of public offi-

Christian Church, 66 Me. 100; Rayburn *v.* Elrod, 43 Ala. 700; Pettyjohn *v.* Pettyjohn, 1 Houst. (Del.) 332.

5. Baird *v.* Reilly, 92 Fed. 884, 35 C. C. A. 78; Kemp *v.* Metropolitan St. R. Co., 94 App. Div. 322, 88 N. Y. Supp. 1; Cashin *v.* New York, N. H. & H. R. R. Co., 185 Mass. 543, 70 N. E. 930.

The "temperature chart" of a hospital patient, known as "bedside notes," taken in the case of every patient and relating chiefly to his physical condition is not competent evidence of the facts stated therein. Griebel *v.* Brooklyn Hgts. R. Co., 95 App. Div. 214, 88 N. Y. Supp. 767.

6. The daily record of a patient at an insane hospital, required to be kept, is admissible in evidence to show mental characteristics while at the hospital in any judicial proceeding where the facts are material under the general rule that a public record required to be kept for public purposes is admissible in any judicial proceeding where material. Hempton *v.* State, 111 Wis. 127, 86 N. W. 596.

7. **The Proclamation of the Governor** declaring who is elected to Congress is *prima facie* evidence of the facts therein stated. Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

Proclamation of Secretary of State. — Whiton *v.* Albany City Ins. Co., 109 Mass. 24.

The journal of the House of Representatives of the United States together with a letter of the secretary of war, and a report of a topographical engineer reported to the house in pursuance of a resolution, if properly authenticated, are evidence to prove that there was no harbor at the point designated, and that it was practicable and in the contemplation of the government to make an artificial harbor there. But they are not evidence to prove that third parties had knowledge of the facts contained in them, merely because they were the acts of authorized and accredited agents of the government, and such third parties are not bound to take notice of them. Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Rep. 621.

8. A book published under an act of the legislature authorizing the adjutant general to publish a list of the officers and soldiers of the commonwealth in the late civil war and designating the name of the town or city upon whose quota such soldiers were credited is admissible as evidence of the facts authorized to be recorded therein, being a public document recognized by legislative act. "This class of evidence is not strictly confined to facts within the personal knowledge of the officers making the record." Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270.

Where by statute the comptroller of the state is required to publish an abstract of land titles, a printed volume published by him is admissible without further authentication. Huffman *v.* Eastham, 19 Tex. Civ. App. 227, 47 S. W. 35.

Census Reports published by authority of congress are competent evidence of the population of a political subdivision. Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652. See also State *v.* Neal, 25 Wash. 264, 65 Pac. 188; Lycett *v.* Wolff, 45 Mo. App. 489; People *v.* Williams, 64 Cal. 87, 27 Pac. 939.

cers[9] or copies of public documents and papers[10] are competent evidence of facts of a public but not of a private nature[11] contained therein. But such publications not authenticated or shown to be authorized are not admissible.[12]

C. American State Papers. — The publication known as the "American State Papers," relating to public lands and published by virtue of an act of congress is competent evidence to the same extent as the original papers and documents from which it was compiled.[13]

D. Legislative Acts and Journals. — The method of proving legislative acts and the competency of legislative journals is elsewhere discussed.[14]

E. Official Maps when properly authenticated are competent evidence.[15]

9. Journals of State Senate printed under authority of law are competent evidence of the proceedings of that body. State *v.* Smalls, 11 S. C. 262; Root *v.* King, 7 Cow. (N. Y.) 613, 636.

The State Register being made by law the public paper in which the official acts of the governor required to be made public are published, is correctly admitted in evidence to prove the existence of facts stated in the governor's proclamation. Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430.

10. A copy printed by authority of the senate of the United States of a public document communicated to the senate by the President is as competent evidence as the original document. "Acts of Congress, and proclamations issued by the secretary of state in accordance therewith, are the appropriate evidence of the action of the national government. . . . And the volume of public documents, printed by authority of the senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the senate, was as competent evidence as the original documents themselves." Whiton *v.* Albany & Narragansett Ins. Co., 109 Mass. 24. See also Root *v.* King, 7 Cow. (N. Y.) 613, 636.

Appendices to an adjutant general's report printed under official supervision and by official printer are admissible in evidence as copies of original documents. Milford *v.* Greenbush, 77 Me. 330.

11. A government gazette is not competent to prove a fact of a private nature. Brundred *v.* Del Hoyo, 20 N. J. L. 328. See Rex *v.* Holt, 5 T. R. 436.

12. A printed pamphlet purporting to be a copy of a report of a sub-committee of the House of Representatives in no way authenticated nor certified to by any officer, and not identified by any testimony, nor purporting to be incorporated in, or a part of, the authenticated journal of the House, is not admissible in evidence. "It is not even a publication required to be made, or a record required to be kept by the House of Representatives. It is not such a document as is entitled to admission." Marks *v.* Orth, 121 Ind. 10, 22 N. E. 668.

13. Gregg *v.* Forsyth, 24 How. (U. S.) 179; Bryan *v.* Forsyth, 19 How. (U. S.) 334; Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408; Doe d. Magruder & Logan *v.* Roe, 13 Fla. 602; Clemens *v.* Meyer, 44 La. Ann. 390, 10 So. 797; Dutillet *v.* Blanchard, 14 La. Ann. 97.

14. See articles "Foreign Law," Vol. V; "Judicial Notice," Vol. VII; "Municipal Corporations," Vol. VIII, and "Statutes," in which this subject will be fully discussed.

15. See article "Maps," Vol. VIII.

A map made by a county surveyor is admissible in evidence though certain protractions were made by a

33. Official Reports. — Reports made by a public officer as to his official acts and the result thereof may under some circumstances be competent evidence of his action and the facts of a public nature shown thereby,[16] but ordinarily such a report is not admissible in controversies between third persons[17] unless made so by statute.[18]

deputy surveyor. Gates *v.* Kieff, 7 Cal. 124.

A map of a city prepared pursuant to the charter is only *prima facie* evidence of the streets of the city. Wilder *v.* City of St. Paul, 12 Minn. 192.

A map, properly certified by the secretary of state, of the county in which the trial is pending and in which a portion of the land in question lies, is admissible in evidence. Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

A map of the towns and counties of the state published by authority of the legislature is some evidence of the boundaries of a particular town shown therein; but the fact that it was published by order of the legislature is a preliminary fact which, if disputed, must be shown before the map is admissible. Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536.

Maps of a school district made by authority of law, and properly filed in the office of the county clerk, are public documents and competent as evidence. Henry *v.* Dulle, 74 Mo. 443.

16. Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241; Boggs *v.* Miles, 8 Serg. & R. (Pa.) 407.

A report of the finance committee of the city council, which by charter is charged with the duty of examining books and accounts of city treasurer and comptroller and ascertaining amount of cash on hand, is, after adoption by city council, competent evidence as to the state of the city funds for period covered by report. Bardsley *v.* Sternberg, 18 Wash. 612, 52 Pac. 251.

Where surveyor, who by order of court makes a survey and reports same, dies before case comes up for trial, his report is competent evidence. Cline's Heirs *v.* Catron, 22 Gratt. (Va.) 378.

17. The Report of the Board of Health to the mayor and council of the city that a particular mill pond is a nuisance is not competent evidence in a proceeding before the mayor and council requiring the owners of the pond to show why it should not be declared a nuisance. The members of the board being competent witnesses, if their testimony is desired they should be sworn. Mayor of Montezuma *v.* Minor, 73 Ga. 484.

18. The quarterly report and bill of a city hospital against the city for the board and care of patients is not competent evidence against the city, being merely a statement by the hospital authorities and not in any way binding on the city. Lynn *v.* Troy, 57 Hun 590, 10 N. Y. Supp. 594.

The report of a state fair committee as to the utility of a patented machine is not competent evidence on that issue. Being *ex parte* and not under oath and by men whose testimony might be taken it is hearsay and inadmissible; though for some purposes public documents are admissible. Gatling *v.* Newell, 9 Ind. 572.

The return made by a collector of taxes to the treasurer is not competent evidence of the contents of the assessment roll. Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632.

A report of the register of the state land office is not competent evidence to show that certain land had been patented to a railroad company. "It is not a certificate of a public officer, a copy from the records in his custody duly authenticated, or in fact any such document as courts will receive in evidence on account of their public character." Gordon *v.* Bucknell, 38 Iowa 438.

Abstracts which the commissioners appointed by an act of congress to investigate and report on titles to land in Louisiana, east of the Mississippi River and Island of New Orleans, were directed to make and transmit to congress, being properly

And even when competent it is only so as to those statements which he is bound to make in the regular course of his duty.[19]

34. Official Receipts. — A. GENERALLY. — A receipt issued by a public officer in the course of his official duties is competent evidence of the facts stated in it,[20] although no statute expressly au-

deposited with registers of different land offices, a copy thereof duly certified is admissible in evidence. The abstracts are evidence only to identify the land, by showing on what the confirmation of acts of congress operated, but are not evidence of facts recited in them for they are merely the declarations of the officers appointed to make them, from other facts on record in the office. Inverarity *v.* Heirs of Mims, 1 Ala. 660.

A Statute providing that an account of sales made by an administrator, kept and verified in a prescribed manner, shall be filed in the office of the clerk of the probate court "to be preserved as evidence of the sales of property therein specified" makes such account so filed competent evidence of such sales without preliminary evidence. Meek *v.* Spencer, 8 Ind. 118.

Under Code §1553 (b) a copy of the record in the department of agriculture of the report of the state chemist of an official analysis of any fertilizer or chemical under the seal of the department is admissible in evidence on the trial of any issue involving the merits of such fertilizer. Since such a report is only admissible by virtue of the statute the terms of the law must be fully and exactly complied with, and the analysis must be an official one and not one made at the instance of a purchaser for use in litigation, except by procurement of the ordinary and compliance with the other provisions of the act of Dec. 27, 1890. But any analysis which is of record in the department of agriculture is *prima facie* official. Jones *v.* Cordele Guano Co., 94 Ga. 14, 20, S. E. 265.

19. In an action against the sureties on a contractor's bond to the United States, a statement of a demand upon the contractor for performance and his failure and refusal, made by an officer of the government in the line of his official duty in reporting them to his official superior, is not legal evidence of any of those facts. The rule that official reports and certificates made contemporaneous with the facts stated in the regular course of official duty by an officer having personal knowledge of them are admissible for the purpose of proving such facts is limited to such statements only in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative is no proof of such circumstances and is therefore rejected. United States *v.* Corwin, 129 U. S. 381.

Where a Special Indian Agent is instructed to report the names, age, sex, tribe, residence, etc., of applicants for lands to be allotted to Indians, such a report while in the nature of a judgment as to those matters directly submitted to the agent for decision is not admissible on the question of the age of persons named therein in an action between two parties, each of whom claims under the same allotment. The agent's instructions did not contemplate any special inquiry into the ages of the Indians. "No provision was made in either the act of congress or the rules and regulations of the Indian Department to preserve the list as a muniment of title, much less as a public record admissible to prove merely incidental recitals based on hearsay. Such a list does not come within the rule which permits for some purposes the use of official registers or books kept by persons in public office." Hegler *v.* Faulkner, 153 U. S. 109.

20. Wood *v.* State, 8 Heisk. (Tenn.) 329; Fager *v.* Campbell, 5 Watts (Pa.) 287.

Receipt Issued by Receiver of

thorizes the giving of it.[21] So also a receipt endorsed upon a record is part of and competent as such.[22]

B. Tax Receipts. — While a receipt for taxes is competent evidence of the payment recited therein[23] it is not admissible against third persons of the payment of lawful taxes without proof of a proper assessment and levy.[24] Nor is such a receipt for taxes on land competent evidence to disprove an acceptance by the public of a dedication of such land.[25]

United States Land Office. — Where entries are made which are required to designate the particular tract settled upon by its accurate governmental description and such receipts though not designated to be an actual title to land embraced therein are intended from the incipiency of entry to its final culmination in a patent, to be evidence of the entrymen's right to possess and control the particular land covered thereby and independently of any statute on the subject, from prime purpose of law in providing for issuance of receipts to settlers for public domain, they are admissible in evidence when properly identified, in any cause in which the settler's right to the land embraced therein or possession thereof is called in question, particularly so in any suit for redress of any interference with his occupancy of land. Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568.

A parish treasurer's receipt for moneys collected and paid over by a tax collector furnishes the best evidence of a discharge for such collections as he made. State *ex rel.* Dist. Atty *v.* Sheriff, 45 La. Ann. 162, 12 So. 189.

Authority of Person Signing. An ancient receipt of the receiver general for the price of lands, proved to be in the handwriting of his son, who did business in the office for his father, and occasionally signed the father's name, is evidence, over the objection of insufficient proof of its being signed under authority of the receiver general. Urkett *v.* Coryell. 5 Watts & S. (Pa.) 60.

21. A receipt given by the sheriff for money paid to redeem land from sale on execution is competent common law evidence of the facts stated in it, although no law requires him to give such receipt. Being a public officer acting under an official oath and vested by law with the authority to receive the money, the giving of a receipt though not strictly an official act is a proper and reasonable one in the ordinary course of business and within the general scope of the sheriff's authority and duty. Livingston *v.* Arnoux, 56 N. Y. 507.

22. Lothrop *v.* Blake, 3 Pa. St. 483.

23. See Robbins *v.* Townsend, 20 Pick. (Mass.) 345; Lessee of Simon *v.* Brown, 3 Yeates (Pa.) 186, 2 Am. Dec. 368; Hopkins *v.* Millard, 9 R. I. 37; and *infra*, "Best and Secondary Evidence — Taxation and Taxes."

"The giving of a receipt for taxes by the township treasurer is an *official* act which the statute *requires* him to perform. The manifest purpose of the statute, we think, was to furnish the tax payer with written evidence of payment." Johnstone *v.* Scott, 11 Mich. 232.

24. Hopkins *v.* Millard, 9 R. I. 37.

In an action for breach of warranty in that the grantee has been forced to pay taxes assessed against the grantor upon the property conveyed, it is not error to exclude a tax receipt where no other evidence is offered to show that the tax had been properly assessed and levied by the proper authorities. "Ordinarily tax receipts may be given in evidence to prove payment of taxes, but the receipts themselves are simply evidence that money was paid to the treasurer. They are not evidence that the taxes were duly assessed. Hanna *v.* Fisher, 95 Ind. 383.

25. A receipt for taxes on land in controversy being in the possession of private persons claiming to own it, is incompetent to disprove

Authentication of. — Such receipts, however, do not prove themselves when offered but must be authenticated or identified.[26]

35. Official Certificates Required by Law. — The competency and admissibility of certificates of their official action, made by public officers in compliance with law, are elsewhere discussed.[27]

36. Duplicate Original Retained by Public. — Where duplicate originals of documents are retained in a public office as archives thereof they are competent primary evidence equally with the corresponding ones issued.[28]

37. Letters to and by Public Officers. — The letters of a public officer are not competent to show the contents of his records.[29] Letters written by public officers may be competent as public documents,[30] but they are ordinarily not competent evidence of the facts stated in them.[31] Letters written to a public officer may be

an acceptance by the public of the dedication claimed. Village of Mankato *v.* Meagher, 17 Minn. 265.

26. Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568.

27. See fully article "CERTIFICATES," Vol. II.

28. Duplicate Originals on Record. — In Gregory *v.* McPherson, 13 Cal. 562, the court in holding a copy of a Spanish grant, signed by the governor and countersigned by the secretary of state, and of record in the archives of the government, original evidence of such grant, said: "We are at a loss to know upon what ground such a document can be denied the weight of original evidence. It was made, and signed, and authenticated, as a record by public officers in the discharge of public duties. The papers were retained in the custody of appropriate public officers, for the purpose of proof — and the highest and most authentic proof — of their own action. The documents receive the stamp, and the most satisfactory stamp, of official authenticity. The signatures are made on this, as on the paper sent out by the department. We cannot see why such papers should be called copies, or why, in the scale of proofs, they should stand in any subordinate relation to the paper handled to the grantee." Nor is an exemplified copy of such record inadmissible as a copy of a copy.

29. Daniel *v.* Braswell, 113 Ga. 372, 38 S. E. 829; Hendry *v.* Willis, 33 Ark. 833; Morgan County Bank *v.* People, 21 Ill. 304.

Where an act of congress provides that no suit shall be maintained for any tax illegally assessed until appeal is made to commissioner of internal revenue, a letter purporting to be that of commissioner saying that claim for refunding had been rejected is not competent, as the best evidence is the written appeal or an authenticated copy. Hubbard *v.* Kelly, 8 W. Va. 46.

A rule of the land commissioner's office requiring letters written bearing upon the records of the office to be copied and giving them the character of quasi records, would not make them admissible evidence as to the records. Hendry *v.* Willis, 33 Ark. 833.

30. See Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Rep. 621.

A letter from the President of the United States to the governor of a state calling for volunteers will be judicially noticed as a public act of the government. Crowell *v.* Hopkinton, 45 N. H. 9.

31. Strong *v.* United States, 6 Wall. (U. S.) 788; Moyers *v.* Graham, 15 Lea (Tenn.) 57. See Lessee of Peterson *v.* Logan, 3 Yeates (Pa.) 195; Bell *v.* Levers, 3 Yeates (Pa.) 23.

A letter by an officer although written pursuant to law requiring certain facts to be so transmitted is not competent evidence of such facts, although his certificate would be. Struthers *v.* Reese, 4 Pa. St. 129.

admissible for some purposes as part of the archives of his office.[32]

38. Memoranda and Endorsements on Records, Official Documents and Papers. — A. GENERALLY. — The endorsement by an officer upon a document or paper of his official action thereon or thereunder is ordinarily competent evidence of such action.[33] So also other endorsements made by an officer pursuant to law upon documents and books in his custody are competent.[34] But an endorse-

In an action against a collector for the return of duties paid under protest, it is not competent for him to give in evidence a letter from the secretary of the treasury to show that the removal of one of the merchant appraisers was done by his orders. Greeley *v.* Thompson, 10 How. (U. S.) 225.

Unofficial letters of a subordinate officer of the treasury department are not admissible in a suit for defalcation against the disbursing agent to contradict or even to explain the adjustment of his accounts as shown in the certified transcripts thereof. Strong *v.* United States, 6 Wall (U. S.) 788.

32. See Raymond *v.* Longworth, 4 McLean 481, 20 Fed. Cas. No. 11,595; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

But an order or letter from the grantee of a land certificate addressed to the clerk of the county land board directing him as to the disposition to be made of the certificate when issued is not an archive of the county clerk's office, and a certified copy given by such officer is not competent evidence. Lott *v.* King, 79 Tex. 292, 15 S. W. 231.

In an action for infringement of a patent, the letters of the plaintiff to the secretary of state containing applications for a patent and specifications, certified under the seal of that department as papers remaining in that office, were held properly admissible. Pettibone *v.* Derringer, 4 Wash. C. C. 215, 19 Fed. Cas. No. 11,043.

33. Finley *v.* Woodruff, 8 Ark. 328 (endorsement of decision on application for donation grant).

The endorsement of the treasurer upon a copy of a certificate of appraisers filed in his office for his information and guidance, of his official action under the certificate, is competent original evidence. Jackson *v.* Cole, 4 Cow. (N. Y.) 587.

An endorsement upon a written appointment of a deputy treasurer, signed by the chairman of the board of county commissioners and showing the action of the board upon the appointment, is competent evidence of such action in the absence of an entry thereof in the record. Comrs. of Loraine County *v.* Stone, 7 Wyo. 280, 51 Pac. 605.

Where the commitment of a certain person to an industrial home was offered in evidence and was enforced with the approval of the circuit judge, an objection to a consideration of the endorsement on the ground that only the commitment was offered in evidence, was held untenable, since the endorsement was part of the commitment, without which the latter would have been incomplete. People *v.* Kuney, 137 Mich. 436, 100 N. W. 596.

Unsigned Indorsement. — In an action upon a recognizance which has indorsed upon it the words "filed Feb. 25, 1863," not signed by any one, it will be presumed that the paper was filed in the office of the clerk of the county where the prisoner was held to bail and therefore became a record. Hurlbutt *v.* Trask, 44 Barb. 126.

Marriage Certificate. — For the competency of the certificate made by an officer performing a marriage ceremony, see article "MARRIAGE," Vol. VIII, 468.

34. The endorsement by the clerk of the county court of payments of interest upon a bond given for the loan of school moneys being official entries in accordance with statute, are competent evidence of such payments. Lawrence Co. *v.* Dunkle, 35 Ala. 395.

A memorandum made by a deputy surveyor, long since deceased, on the warrant book belonging to his office,

ment which has been without authority of law is not admissible.[35]

B. Endorsements Intended Merely as Notice and Not as Evidence. — But an endorsement which is designed merely as notice and not as evidence of the fact or action indicated thereby, of which there is other better record evidence, is not competent.[36]

C. Certificate of Recordation. — The certificate of a recording officer endorsed upon documents filed with him for record stating the fact and time of their filing and recording is competent evidence of these facts,[37] even though no law expressly authorizes or requires such endorsement.[38]

in regard to a warrant then in his hands is legal evidence. Ross *v.* Rhoads, 15 Pa. St. 163.

Pencil Endorsement of Date of Receipt of Return. — According to a custom in the surveyor general's office the dates of the receipt of returns to surveys are marked in pencil on them, and handed to the survey clerk for examination; these surveys so marked in pencil are sufficient evidence of dates of returns. Conkling *v.* Westbrook, 81 Pa. St. 81.

35. Wardwell *v.* Patrick, 1 Bosw. (N. Y.) 406, holding that the endorsement by a deputy sheriff upon a summons of the time when he received it was not competent evidence of this fact, because no such endorsement was provided for by law as in the case of executions.

36. Memorandum of Allowance by Probate Court endorsed on demand against an estate is not evidence of fact of allowance, or of ownership in person in whose favor this is expressed to have been made. A probate court record is the only proper evidence of allowance — the memorandum directed by statute being intended to put subsequent purchaser on inquiry. Bobb *v.* Letcher, 30 Mo. App. 43.

37. Burton *v.* Pond, 5 Day (Conn.) 160; Silvester *v.* Coe Quartz Min. Co., 80 Cal. 510, 22 Pac. 217; Clarke *v.* Williams, 29 Neb. 691, 46 N. W. 82; Smith *v.* Veysey, 30 Wash. 18, 70 Pac. 94; Benedict *v.* Heineberg, 43 Vt. 231; Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011. But see Musser *v.* Hyde, 2 Watts & S. (Pa.) 314, holding that such certificate is of no avail against an inconsistent entry in the recorder's filing book.

In Stuart *v.* Broome, 59 Tex. 466, it was held that the certificate of the clerk as to the date of the filing and recording of an itemized account of materials furnished for a building and endorsed thereon, is competent evidence of the facts recited.

Parol Evidence. — For the competency of parol evidence to vary such certificate or endorsement, see *infra* this article "Parol Evidence," and Musser *v.* Hyde, 2 Watts & S. (Pa.) 314.

38. Where by law certain documents such as deeds and executions are required to be recorded with the town clerk, his certificate of the recordation endorsed upon the document is competent *prima facie* evidence of that fact, although no statute expressly requires him to make such a a certificate. Hubbard *v.* Dewey, 2 Aik. (Vt.) 312; Benedict *v.* Heineberg, 43 Vt. 231.

Certified Copy. — In Trustees of Kentucky Sem. *v.* Payne, 3 Mon. (Ky.) 161, it was held that a copy of an endorsement upon a patent stating the date when the patent was received in the office of the register and certified by the latter to be a true copy was competent evidence of the date of registration, though the mere certificate of the register as to such date was not. "We have been unable to find any statutory provision which expressly enjoins that duty upon the register, but it is impossible for him legally to perform the functions of his office, without regarding the time of receiving surveys into his office, and surely, whatever is necessary to a fulfillment of the functions of his office, can not be said to be out of the sphere of his duty to do. . . . It would seem to follow as

But the fact that the recorder's certificate is competent evidence of the recording of an instrument does not render inadmissible the record book itself when offered for this purpose.[39]

D. OFFICER'S RETURN. — a. *Generally.* — An officer's return of his official action under a returnable writ or process endorsed thereon is competent evidence of the facts stated relating to such action.[40] But a return which is not required or authorized by law is not admissible;[41] nor is the return competent evidence of matters not authorized to be recited therein.[42] The fact that a return has been made after the commencement of the action in which it is offered does not render it incompetent,[43] nor does the fact that

a necessary consequence, that the note of that fact by him, if properly authenticated, should be received in all cases involving the fact, as legitimate evidence. Instead, however, of certifying, . . . that the original survey was received by him on a particular day, the register should regularly keep the note or memorandum made upon the original survey, and certify the same to be a correct transcript."

39. Falls Land & Cattle Co. *v.* Chisholm, 71 Tex. 523, 9 S. W. 479.

40. Erickson *v.* Smith, 38 How. Pr. (N. Y.) 454. See Hildreth *v.* Lowell, 11 Gray (Mass.) 345; Crawford *v.* Berry, 6 G. & J. (Md.) 63.

"We take the rule to be well settled that, the return of an officer of his doings by virtue of any process which it is his duty to execute and to return, duly made, is *prima facie* evidence in any action to which a stranger is a party, and for or against himself, in any action to which the sheriff is a party, subject to be impeached, contradicted, or varied, like other *prima facie* evidence, by any parol testimony or other competent proof." Angier *v.* Ash, 26 N. H. 99.

Return of an Execution Unsatisfied as evidence of insolvency. See Article "INSOLVENCY," Vol. VII, p. 492.

Return on Notice of Garnishment. The return of a constable endorsed on the notice of garnishment which was served on the garnishee, is original evidence of the fact of service, and it is not necessary to show an endorsement of the fact on execution. Cooper *v.* Scyoc, 104 Mo. App. 414, 79 S. W. 751.

The indorsement of a levy of an execution by the sheriff or his deputy, being an act required by law, is to be considered as true until impeached, and is admissible in evidence without proof of the handwriting of the officer. Barron *v.* Tart, 18 Ala. 668.

Return of Tax Collector Is *prima facie* evidence that tax had not been paid and that sufficient personal property could not be found on premises, out of which the tax could have been collected. Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864.

41. Erickson *v.* Smith, 38 How. Pr. (N. Y.) 454; Davis *v.* Clements, 2 N. H. 390, *holding* inadmissible the return of a surveyor of highways upon his warrant for the collection of highway taxes.

Where a collector of taxes is not required or authorized by law to make a return of his actions on a warrant for seizing property for delinquent taxes, any return he might make would not be an official act, and hence would be inadmissible as evidence. Spear *v.* Tilson, 24 Vt. 420.

42. See Morgan *v.* Thames Bank, 14 Conn. 99; Angier *v.* Ash, 26 N. H. 99.

A sheriff's return on an execution is only evidence to show that there has been satisfaction or part satisfaction of the judgment, or that there has been no satisfaction at all. It is not competent evidence to prove that land was sold under the execution, or that it was redeemed from such an execution sale, or of any fact affecting the title of the property. Kimmel *v.* Meier, 106 Ill. App. 251; *citing* Osgood *v.* Blackmore, 59 Ill. 261, 271; Gardner *v.* Eberhart, 82 Ill. 316.

43. **Return After Commencement of Action.** — Where after the com-

the document containing it has not been returned to the proper office.[44] But a fatally defective return is not competent.[45]

b. *Officer of Another State.* — The return of an officer of a foreign state on domestic process sent to him is not competent evidence unless it is in the form of an affidavit under oath.[46]

c. *Upon What Issues Competent.* — An official return is only competent evidence upon an issue which directly involves a right, or liability, or consequence, resulting from the official act which the return purports to describe.[47]

d. *Applications of Rule.* — The rule admitting official returns or process applies to returns made on a summons,[48] subpoena,[49] writ of attachment,[50] execution,[51] warrant for collection of taxes,[52]

mencement of an action against a sheriff for failure to return an execution within sixty days, he returned the same endorsed *nulla bona,* it was held that the return being an official act of a public officer which he was bound by law to make was evidence in his own favor, and its admissibility was not affected by the fact that it was made after the commencement of the action. Bechstein *v.* Sammis, 10 Hun (N. Y.) 585.

44. When Process Has Not Been Returned to Court. — A writ of attachment with the officer's return of service endorsed upon it, together with the testimony of the officer, is competent evidence although the writ has never been returned to court and the suit has been discontinued, if the object is to show the situation of the property, that it was in the custody of the law, and not to make claim under the attachment. Tomlinson *v.* Collins, 20 Conn. 364.

45. Insufficient Return Incompetent. — The return of the sheriff on an execution not showing that an attested copy of the execution was left with a proper officer, and there being nothing to show that the copy left was authenticated or attested as required by law, is defective and insufficient to show title and is therefore not competent. Goss & Phillips Mfg. Co. *v.* People, 4 Ill. App 510.

46. "The certificate of a sheriff in our own state is proof because he is acting under his official oath, but a sheriff of a county in Ohio when he serves process or notices from our state does it not by virtue of his oath of office but as a private individual . . . He should therefore make his affidavit of service." Thurston *v.* King, 1 Abb. Pr. (N. Y.) 126; Morrell *v.* Kimball, 4 Abb. Pr. (N. Y.) 352.

47. People *v.* Lee, 128 Cal. 330, 60 Pac. 854, holding that where a person is charged with the crime of having forged a fictitious name to a check, the return of the sheriff on a subpoena directed to such supposed fictitious person, that he had made diligent search for such person but had been unable to find him, is not even *prima facie* evidence that there was no such person. See Com. *v.* Hart, 1 Ashm. (Pa.) 77.

48. Fleming *v.* Williams & Co., 53 Ga. 556.

49. See People *v.* Lee, 128 Cal. 330, 60 Pac. 854.

50. Angier *v.* Ash, 26 N. H. 99.

51. Curlee *v.* Smith, 91 N. C. 172; Peebles *v.* Pate, 90 N. C. 348; Loftin *v.* Hugins, 13 N. C. 10; Spoor *v.* Holland, 8 Wend. (N. Y.) 445; Benedict *v.* Heineberg, 43 Vt. 231; Hardy *v.* Gascoignes, 6 Port. (Ala.) 447.

In an action by a sheriff to recover the price of real estate sold by him under execution, the return on the execution, whether made by him or his deputy, is legitimate and proper evidence in support of an action. Hand & Huddleston *v.* Grant, 5 Smed. & M. (Miss.) 508.

Venditioni Exponas. — Knowlton *v.* Ray, 4 Wis. 288.

Fi. Fa. — Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

52. Taylor *v.* Moore, 63 Vt. 60, 21 Atl. 919.

The Return of a Collector of

and also to returns made upon search and seizure process.[53]

E. Lead Pencil Memoranda on Records. — By the weight of authority mere lead pencil memoranda in an official book are not competent evidence.[54]

39. Records of Unrecognized Government. — Records made under the authority of a government which has never been recognized even as a *de facto* government are invalid and are therefore incompetent as evidence of the proceedings shown thereby,[55] even

Taxes upon his warrant is *prima facie* evidence in his favor in an action against him for an unlawful arrest for non-payment of taxes. Lothrop *v.* Ide, 13 Gray (Mass.) 93.

53. Search and Seizure Process. In a prosecution for maintaining a liquor nuisance, an officer's returns upon search and seizure process are admissible in evidence as part of the record of judgment as tending to show that defendant had in his possession the liquor described. State *v.* Long, 63 Me. 215.

54. A Lead Pencil Memorandum appearing in the books of the secretary of the treasury of the republic of Texas in 1837 is evidence of the payments made on the sale of government lots which it recites, unless it is clearly shown that the individual who wrote it had no authority to make the entries. Franklin *v.* Tiernan, 56 Tex. 618. In the same case on a second appeal (62 Tex. 92) the court adheres to its former decision based on Kerr *v.* Farnish, 52 Miss. 101, but on the consideration of further authorities holding the contrary (Meserve *v.* Hicks, 24 N. H. 295; Stone *v.* Sprague, 24 N. H. 309) concludes that the latter enunciates the general rule and limits its former decision to the particular facts involved. "We do not believe that any case in which the precise point has been directly made, and was seriously considered by the court, can be found, where loose lead pencil memoranda like those under consideration in this case, have been held to constitute public official records, and entitled to the same respect and consideration as if regularly entered in ink. In view, however, of the fact that the decision has already been made in this case, and of the further fact that it is judicially known to the court that many of the records of the public offices in the early and revolutionary days, when the infant republic was struggling for existence, were necessarily very loosely and carelessly kept, and entries were not in those days always made as carefully and as regularly as they can now be made, we are not disposed to enforce strictly, in such cases, the rule laid down on this subject in Stone *v.* Sprague, at least where the early records of the public offices of the republic are concerned. Further than this, we are not at present disposed to abide by the rule on the question laid down in this case, when formerly before this court.

"The making of official entries in lead pencil, upon the records of the public offices of the state, is a practice not to be tolerated. The evil consequences likely to flow from such a course can be easily imagined.

"The statute does not in so many words say that the public records are to be kept in ink, but it means it. They might as well be kept in the frail memory of man, or handed down by tradition, as to be kept in pencil.

"We make these remarks with reference to the case of Franklin *v.* Tiernan, 56 Tex. 618, so that the decision may be hereafter limited in its operation, and no one misled by it into the belief that a mere loose pencil memorandum, that may happen to be found upon the public records of the state, will have the same effect as evidence that a regular formal official entry or statement made in due form, and preserved permanently through the medium contemplated and intended by the law, would and should have."

55. The recording of a deed by a recording officer appointed under

though such proceedings may to some extent be valid and provable.[56]

40. Record or Document Unlawfully Obtained. — Although a record or document has been unlawfully obtained it is not thereby rendered incompetent,[57] the general rule being that courts will not inquire into the method by which evidence, otherwise competent, was obtained.[58]

The fact that a record is unlawfully abstracted from the place where it is kept in violation of a statute or a rule of court does not render it incompetent.[59]

41. Abbreviations Used in Record. — The fact that a part of the entries in a record are abbreviations does not render them incompetent where such abbreviations are properly explained by the witness.[60]

42. Absence of File-Mark. — A paper which has been actually or constructively filed is not inadmissible because it contains no file-mark.[61]

the so-called "provisional government of Kentucky," which existed for a short time during the war of the Rebellion, was an invalid act because such government was not and never has been recognized as a *de facto* government by either the United States or of the state of Kentucky; hence a certified copy of such record is not competent evidence. Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 458.

56. The judicial proceedings under the "Franklin Government," which was in opposition to North Carolina government, by act of North Carolina remained obligatory on the parties unless incompatible with justice. Such proceedings though not to be proved by the written memorials of them kept by clerks, because these are not records, may be proved by persons present at them, and such persons may use the writings to refresh their memory. Ingram's Heirs *v.* Cocke, 1 Overt. (Tenn.) 22.

57. People *v.* Alden, 113 Cal. 264, 45 Pac. 327; Stevison *v.* Earnest, 80 Ill. 513; McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107; Brooks *v.* Daniels, 22 Pick. (Mass.) 498. See also "Cyc.," p. 297, n. 40.

An original notarial act cannot be rejected when offered in evidence on the ground that the keeper of it ought not to have parted therewith. Baudin *v.* Pollock, 4 Mart. O. S. (La.) 613; Prion *v.* Adams, 5 Mart. N. S. (La.) 691.

58. See article "COMPETENCY," Vol. III, p. 181.

59. Although a rule of the supreme court provides that after a case has been decided neither the record nor the opinion shall be taken from the clerk's office except by a judge of the court or by the official reporter, nevertheless such a record is admissible without a preliminary showing that it was withdrawn from the office of the clerk under such rule. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

60. Terry *v.* State, 46 Tex. Crim. 75, 79 S. W. 320.

61. Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145.

A paper is constructively filed when delivered to the proper filing officer for that purpose; and the fact that it is removed before the file mark is placed upon it does not render it inadmissible in evidence. Board of Comrs. *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

Documents Containing No File Mark. — Production by legal custodian of files and records of board of county commissioners of written description of school district created by subdivision of others, containing no file marks thereon, found by witness in file box together with other papers relating to said district in office of register of deeds, is sufficient in ab-

43. Necessity of Signature to Record. — The records of a public body or a public officer need not be signed to be admissible if they are sufficiently identified,[62] even though the law directs them to be signed.[63]

44. Statutes. — Statutes frequently provide for the evidentiary use of particular records and documents.[64] And many kinds of

sence of evidence to the contrary to sustain the presumption that the county superintendent complied with the law by furnishing said description to the commissioners, and that same was filed with the register of deeds before the election of school district officers. Coler *v.* Rhoda School Twp., 6 S. D. 640, 63 N. W. 158.

62. Bryan *v.* Glass Securities Co., 2 Humph. (Tenn.) 390. See Puckett *v.* Wood, 19 S. C. 597.

The record of the proceedings of a board of supervisors is not inadmissible because it fails to show who constituted a board or that a quorum was present, or because it contained no signature or authentication by the clerk or presiding officer of the board. The presumption is that a quorum at least was present. "Nor do we regard the signature of the president or clerk necessary to the validity of the record. The law requires one to be kept, but does not require it to be signed by any one. While it is proper and desirable that these records should be signed, yet we do not regard the omission as a fatal error, but at most only an irregularity. . . . Even the want of a signature of the presiding judge to the journal of a court, although required by law, does not vitiate the record (see Bartlett *v.* Lacy, 2 Ala., 161), if sufficient in other respects, and in case of the records and journals of public boards, the only prerequisite to their admissibility as evidence is that they be produced from the proper place of custody, and shown to have been kept by the proper officer." Lacey *v.* Davis, 4 Mich. 140.

Where the statute does not require it, the signature of the recorder to the record is not essential to its admissibility even though it is the universal custom for him to sign the record. "An instrument properly executed, acknowledged and authorized to be recorded, appearing upon the records in his office, must be presumed properly recorded and admissible as such, even although not signed by the register." Wilt *v.* Cutler, 38 Mich. 189.

63. The minutes of the board of supervisors are admissible in evidence though not signed by the chairman and clerk as required by law, upon preliminary proof of the handwriting of the entries, their contemporaneous character and the official custody from which the book was produced. People *v.* E. L. & Y. C. Co., 48 Cal. 143.

64. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318 (records of town clerks or city registrars relative to marriages); Standard Oil Co. *v.* Bretz, 98 Ind. 231; Tillery *v.* State, 10 Lea (Tenn.) 35 (list of domestic corporations published with session laws made competent evidence of corporate existence); McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976 (entry of payment of taxes on tax roll made competent evidence); McCoy *v.* Lighter, 2 Watts 132 (documents of auditor general's office).

By statute in Michigan (How. Stat. §5678) the deed of an executor, administrator or sheriff, the record thereof or a certified copy of such record is made *prima facie* evidence of the regularity of all proceedings required by law anterior to such deed; and the statute is retroactive in its operation. Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265.

Under the Minnesota statute a scale bill issued by the surveyor general is *prima facie* evidence of the facts stated therein, and the statute does not require the official seal of the surveyor general's office to be attached thereto, and its authenticity may be established by parol. Glaspie *v.* Keator, 56 Fed. 203.

records are made competent either directly or indirectly by the statutes which exist in all the states relating to the use of certified copies of public records and documents.[65] Such statutes apply to actions between private persons.[66] Where it is provided what the record must contain, to be competent, a record not made in accordance with the statute is not admissible.[67]

It has been held that a statute providing for the preservation of certain records, books and papers impliedly renders them competent evidence of the facts which they show, there being no other useful purpose to be served by the statute.[68]

45. Record of Private Writings. — A. GENERALLY. — Where private writings have been properly recorded pursuant to law, the record so made is not generally regarded as competent primary evidence of the original writing or the transaction embodied therein.[69] In some states, however, such record is competent where the original is not in the possession or under the control of the party desiring to

Under § 197, Ch. 120, Rev. Stat. 1874, the books and records belonging to the office of the county clerk, or copies thereof certified by the clerk, are *prima facie* evidence of the sale of any land or lot for taxes or special assessments, the redemption of the same or payment of taxes or special assessments upon them. Under this section the clerk's certificate of deposit for redemption is properly admitted. Bush *v.* Stanley, 122 Ill. 406, 13 N. E. 249.

Where the charter of a town requires its board of trustees to keep a record of all their proceedings, by-laws and ordinances, and of the time, manner and place of the publication of such by-laws in a book provided for that purpose, and that such book shall be received in all courts without further proof as evidence of the matters therein contained, the book is of course competent evidence without further proof. St. Charles *v.* O'Mailey, 18 Ill. 408.

Statutes as to Use of Records of Deeds, Conveyances and other recorded instruments. See *infra*, III, F, a, (4.).

65. See *infra*, "COPIES."

66. A law making records of a city engineer's department *prima facie* evidence of correctness applies to all actions including those wholly between private parties. Fish *v.* Chicago, St. P. & K. C. R. Co., 82 Minn. 9, 84 N. W. 458.

67. A Michigan statute provides for the admission of the county surveyor's records of his surveys and what the record must contain to be admissible, and a record not made in accordance with the requirements of the statute is not competent. Smith *v.* Rich, 37 Mich. 549; Van Der Groef *v.* Jones, 108 Mich. 65, 65 N. W. 602; Pugh *v.* Schindler, 127 Mich. 191, 86 N. W. 515.

68. On the question of whether a statute had been constitutionally enacted it was held that the inquiry might be carried back to the legislative journal and the records and files of the office of the secretary of state, since the statute (§3171, Sand. & H. Dig.) provided that the secretary of state should receive from the secretary of the senate and clerk of the house of representatives all the records, books, papers and rolls of the general assembly and file the same as records in his office. The only useful purpose of such a statute would be to make the records so preserved evidence of the facts which it showed. Rogers *v.* State, 72 Ark. 565, 82 S. W. 169.

69. Smith *v.* Armistead's Exrs., 7 Ala. 698; Brown *v.* Cady, 11 Mich. 535; Harker *v.* Gustin, 12 N. J. L. 42; Brooks *v.* Marbury, 11 Wheat. (U. S.) 78; Peck *v.* Clark, 18 Tex. 239.

use the record.[70] And where the original is lost or destroyed the record is admissible as secondary evidence.[71]

B. When Original Deed Is Mutilated. — Where the original deed is mutilated and a portion thereof missing, the record is admissible to supply the missing or mutilated portions.[72]

C. Statutes. — The use of such records is quite generally regulated by statute. In some jurisdictions they are made primary evidence;[73] in others they are competent only after some preliminary showing has been made to account for the non-production of the original.[74]

70. Robinson *v.* Pitzer, 3 W. Va. 335; Serles *v.* Serles, 34 Or. 289, 57 Pac. 634; Dixon *v.* Doe, 5 Blackf. (Ind.) 106; Doe *v.* Holmes, 5 Blackf. (Ind.) 319; Foresman *v.* Marsh, 6 Blackf. (Ind.) 285. See also Daniels *v.* Stone, 6 Blackf. (Ind.) 450; Peltz *v.* Clarke, 2 Cranch. C. C. 703, 19 Fed. Cas. No. 10,914; Thomas *v.* Magruder, 4 Cranch C. C. 446, 23 Fed. Cas. No. 13,904; Morrill *v.* Gelston, 34 Md. 413.

In holding that the books of the recorder were not admissible to prove the execution and contents of instruments duly recorded, in the absence of proof that the original was not under the control of the party offering the record, the court said: "The sections of the Code of Civil Procedure above referred to do not by their terms relate to the record of conveyances. It is by virtue of § 1919 of the same Code ('a public record of a private writing may be proved by the original record, or a copy thereof, certified by the legal keeper of the record') that a record of a private writing is evidence. By that section the record is placed upon the same footing as a certified copy of it. But the record only proves itself as a record. The record is not made primary evidence of the original writing. If the record is evidence of the execution and contents of the original writing, it is evidence only in the same cases in which a certified copy would be evidence." Brown *v.* Griffith, 70 Cal. 14, 11 Pac. 500. See Fresno Canal & Irr. Co. *v.* Dunbar, 80 Cal. 530, 22 Pac. 275.

71. Since a lost deed could be proved at common law by the record thereof, such a record is admissible under statute providing that nothing in statutes shall prevent the establishing of lost papers according to rules of common law. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49. See also cases cited in note 69, *supra*.

72. Where a deed produced shows mutilation and a plat therein referred to as part thereof is missing, and the record of the deed shows the missing portion, the record may be introduced to prove such portion. Senterfeit *v.* Shealey, 71 S. C. 259, 51 S. E. 142.

73. Patterson *v.* Dallas, 46 Ind. 48; First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615; Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861; Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963; Taylor *v.* Albemarle Steam Nav. Co., 105 N. C. 484, 10 S. E. 897. See also Stinson *v.* Doolittle, 50 Fed. 12; Mankato *v.* Megher, 17 Minn. 275.

Under Burns' Ann. Stat. 1901, §3372, a record of a mortgage is competent primary evidence without accounting for the original. This statute provides that neither the record nor a transcript thereof shall be admissible in evidence unless the acknowledgment as well as the instrument of conveyance is recorded. Embree *v.* Emmerson (Ind. App.), 74 N. E. 44.

Later Records of Same Deed. Gen. St. Minn. 1878, p. 537, §21, and p. 805, §96, do not limit the effect of the register's record of a deed as evidence to the first record of it, but give at least equal weight as evidence to later records properly made. Stinson *v.* Doolittle, 50 Fed. 12.

74. See more fully *infra*, III, F, a, (4.) and the following cases:

Alabama. — Jones *v.* Hagler, 95 Ala. 529, 10 So. 345.

Colorado. — Owers *v.* Olathe Silv.

D. Preliminary Proof of Execution. — Whether the execution of the original instrument must be proved before the record copy thereof is admissible depends largely upon statute and the effect which is given to the acknowledgment and recording of the instrument.[75] This question is more fully discussed elsewhere in this article.[76]

E. To Show Existence of Record. — The record of a conveyance or other private writing is competent evidence of its own existence and contents regardless of whether it is admissible to prove the writing from which it is made or whether such writing was entitled to record.[77]

F. When Record Competent, Original Instrument Also Admissible. — When the record of a private writing is competent the original instrument is also competent.[78]

Min. Co., 6 Colo. App. 1, 39 Pac. 980.

Florida. — Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172.

Iowa. — Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659.

Kansas. — Williams *v.* Hill, 16 Kan. 23.

Missouri. — Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804; Bank of Aurora *v.* Linzee, 166 Mo. 496, 65 S. W. 735.

Nebraska. — Staunchfield *v.* Jentter (Neb.), 96 N. W. 642; Delaney *v.* Errickson, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep. 487.

Texas. — Watters *v.* Parker (Tex.), 19 S. W. 1022.

Utah. — Wilson *v.* Wright, 8 Utah, 215, 30 Pac. 754.

As a preliminary to the introduction of a certified copy of the record of a deed, its loss must be proved by the testimony of the last custodian, or his absence satisfactorily accounted for, in which case search should be made amongst his papers. Vandergrift *v.* Piercy, 59 Tex. 371.

75. As to the necessity of proving the execution of a deed which has been acknowledged and recorded, see fully articles "Acknowledgment," Vol. I, and "Written Instruments."

"The cases respecting the admissibility of the record or registry of deeds, or the copies of them, without accounting for the absence of the originals or proving their execution, are very numerous and not at all uniform. From a general view of the authorities, we consider the rule of evidence most conducive to convenience in practice, and to the security of titles (excepting perhaps some cases of fraud) to be, that when a deed has been regularly admitted to record in the recorder's office, and is relied upon by a suitor not a party to it, and who cannot be presumed, from the nature of the conveyance, to have the custody or control of the instrument, the record, or a copy of it, is prima facie evidence, and proves the execution of the deed without other testimony; but if the deed is made to the party who relies upon it, or may be presumed from its character to be in his keeping, or under his control, the original must be produced, if not lost or destroyed, and its execution proved." Bowser *v.* Warren, 4 Blackf. (Ind.) 522.

Under the Iowa statute where a party has shown that certain deeds in his chain of title are not in his possession or control and do not belong to him, he is entitled to offer in evidence the record of such deeds without evidence of their execution. Carter *v.* Davidson, 73 Iowa 45, 34 N. W. 603.

76. See *infra*, "Copies — Authenticated Copies — Private Writings."

77. Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659. See *infra*, "Unauthorized or Improper Record," and "Copies — Private Writings — Unauthorized or Improper Record."

To Show that a Deed Has Been Properly Recorded the original record book is competent evidence, although it is only secondary evidence when offered as a muniment of title. Falls Land & Cattle Co. *v.* Chisholm, 71 Tex. 523, 9 S. W. 479.

78. Where a deed is entitled to

G. Competent as to All Matters Properly in the Writing. The record or a certified copy thereof is competent evidence of all agreements or matters properly forming part of the original recorded instrument.[79]

H. Unauthorized or Improper Record. — a. *Generally.* — The unauthorized or improper record of a private writing is not competent primary evidence to prove the original instrument,[80] except

record and the record is competent evidence, the original is also competent. Lacey *v.* Davis, 4 Mich. 140.

79. A certified copy of a deed is admissible to prove the assumption of a mortgage by the grantee therein, as against the objection that the stipulation assuming the mortgage was no part of the conveyance and did not need to be recorded. Weaver *v.* McKay, 108 Cal. 546, 41 Pac. 450.

When a married woman's consent to the execution of a deed by her husband, as trustee for her and her children, is indorsed on the deed after its execution, and is acknowledged by her before a proper officer, it becomes a part of the deed as if incorporated in it; and the deed and consent, each properly acknowledged, being duly recorded, a certified copy is competent and sufficient evidence of the endorsed consent, as well as of the deed. March *v.* England, 65 Ala. 275.

A plat attached to a deed is part of the deed and is therefore provable by the record. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49.

80. *Alabama.* — Martin *v.* Hall, 72 Ala. 587.

Arkansas. — Trammell *v.* Thurmond, 17 Ark. 204; Brown *v.* Hicks, 1 Ark. 232.

California. — Stevens *v.* Irwin, 12 Cal. 306.

Colorado. — Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Georgia. — Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

Illinois. — Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

Indiana. — Starnes *v.* Allen (Ind.), 45 N. E. 330.

Kansas. — Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14.

Maryland. — Cheney *v.* Watkins, 1 H. & J. 527.

Michigan. — Farmers' & Merchants' Bank *v.* Bronson, 14 Mich. 361; Auken *v.* Monroe, 38 Mich. 725.

New Jersey. — Fox *v.* Lambson, 8 N. J. L. 275; Den *v.* Gustin, 12 N. J. L. 42.

New York. — Striker *v.* Striker, 31 App. Div. 129, 52 N. Y. Supp. 729; Blackman *v.* Riley, 63 Hun 521, 28 Abb. N. C. 166, 18 N. Y. Supp. 476.

Pennsylvania. — Stonebreaker *v.* Short, 8 Pa. St. 155; Fitler *v.* Shotwell, 7 Watts & S. 14.

The record of a deed acknowledged before a person named in deed as party thereto is not evidence against one who has no actual notice of the existence of the deed. Haney *v.* Alberry, 73 Mo. 427.

An Instrument of Adoption is not such an instrument as is contemplated by §§3659 and 3660 of the Code, providing that the record or an authenticated copy thereof shall be competent secondary evidence thereof when the original is shown to be lost or not to belong to the party wishing to use the same, nor within his control. "It is not necessarily an instrument 'affecting real property' in the sense in which that language is used in those sections. It is an instrument affecting the legal status of the parties to it, but it does not describe real estate nor affect it within the contemplation of those sections." McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

An Unauthorized Record of a Transcript of a Will which has been duly probated is not competent evidence. McCarty *v.* Rochel, 85 Iowa 427, 52 N. W. 361, in which it appeared that the record was not made in a proper place and manner provided by law.

In some jurisdictions the record of an acknowledged deed seems to be competent where there is other proof

where by statute such records have been made competent evidence.[81]

b. *Record of Certified Copy.* — The record of a certified copy of a record of a private writing being unauthorized it is not competent evidence,[82] except by statute.[83]

c. *To Prove Existence and Contents of Record Itself.* — Such a record, however, is admissible to prove its existence and contents though not competent proof of the original instrument.[84]

d. *As Secondary Evidence.* — Although a deed or grant is not entitled to record because of the defects in its acknowledgment or proof, the record of such a deed or grant is admissible as a circumstance tending to prove the existence and execution of an original which is claimed to have been lost or destroyed.[85] Such a record is of course admissible as an examined copy when authenticated by the testimony of a competent witness.[86]

46. Judicial Records and Proceedings. — A. GENERALLY. — When and under what circumstances the judgments and proceedings of courts are competent evidence is elsewhere discussed. But when such proceedings are relevant and competent they are properly

of its execution. Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535, and *infra*, "Copies—Private Writings."

Competent Evidence of Transaction Indicated Thereby. — A record of a mortgage and the foreclosure under the power therein, though invalid, is competent as showing how defendant purchased the land in controversy. Groff *v.* Ramsey, 19 Minn. 44.

81. See Lamberton *v.* Windom, 18 Minn. 506; Gildehaus *v.* Whiting, 39 Kan. 706, 18 Pac. 916; and *infra*, "Copies—Private Writings."

82. A record in this state of a copy of a record of a deed in another state is inadmissible as statute does not authorize the recording of a certified copy of the record or deeds of a sister state. Lund *v.* Rice, 9 Minn. 230. See also Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

83. Under a statute permitting the recording in the county where the land lies of any certified copy of a grant from the office of the secretary of state with the same effect as the original, a certified copy of an ancient grant taken from a book in the office of the secretary of state issued by the governor and council of that period, is admissible though but lately recorded, as there does not seem to be any limit in the time in which such copies must be registered. Archibald *v.* Davis, 49 N. C. 133.

84. Heintz *v.* Thayer, 92 Tex. 658, 50 S. W. 929, 51 S. W. 640; Stebbins *v.* Duncan, 108 U. S. 32, 50.

85. Schultz *v.* Tonty Lumber Co., 36 Tex. Civ. App. 448, 82 S. W. 353 (record of an improperly acknowledged assignment of a patent and a deed); Whitaker *v.* Thayer (Tex. Civ. App.), 86 S. W. 364 (holding that the record of such a deed in the handwriting of a deputy clerk, in which he was grantor, was competent circumstantial evidence of the making of such a deed); Simmons *v.* Hewitt (Tex. Civ. App.), 87 S. W. 188; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098; Stetson *v.* Gulliver, 2 Cush. (Mass.) 494. But see Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843 apparently to the contrary. (In this case a certified copy of an unauthorized record was held incompetent as secondary evidence and the language of the court apparently extends to the use of the record itself).

Certified Copy. — As to whether a certified copy of such record is admissible, see *infra*, "Authenticated Copies — Unauthorized or Improper Record — As Secondary Evidence."

86. Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139; Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843.

proved by the record thereof duly authenticated.[87] Such records are admissible to prove their existence and contents,[88] their validity or invalidity,[89] and the existence,[90] nature[91] and state of the proceedings which they evidence.[92]

87. *Alabama.* — Driver *v.* Spence, 1 Ala. 540.

Colorado. — Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Kentucky. — Farley *v.* Lewis, 102 Ky. 234, 19 Ky. L. Rep. 1255, 44 S. W. 114.

Maine. — Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793.

Massachusetts. — Lothrop *v.* Tilden, 8 Cush. 375.

Mississippi. — Payne *v.* Stovall, 67 Miss. 514, 7 So. 502.

Missouri. — Beardslee *v.* Steinmesch, 38 Mo. 168.

Montana. — Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337.

North Carolina. — Lindsay *v.* Beaman, 128 N. C. 189, 38 S. E. 811.

Texas. — Hyde *v.* Baker, 26 Tex. Civ. App. 287, 62 S. W. 962.

Wisconsin. — Durr *v.* Wildish, 108 Wis. 401, 84 N. W. 437.

88. Rainey *v.* State, 20 Tex. App. 455 (holding an original writ of attachment to be competent evidence of its issuance and existence). The existence of a judgment or decree which operates as a deed (Dolph *v.* Barney, 5 Or. 191); or forms a link in a chain of title (Den *v.* Hamilton, 12 N. J. L. 109) may be shown by the record thereof in controversies between persons not parties to the proceedings in which it was rendered.

A judgment is evidence for and against the whole world, to prove the fact of its rendition and its amount. Harrison's Admr. *v.* Harrison, Distrib., 39 Ala. 489.

89. Records Competent To Show Their Invalidity. — Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

90. Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757 (coroner's subpoena and return competent to show an effort to secure witnesses).

91. The record of a judgment is always admissible to prove that such a judgment was rendered, though it is not admissible to prove the facts on which such statement was rendered. Bank at Hamburg *v.* Flynn, 38 Fed. 798.

Where it is alleged and denied that another action is pending between certain parties and involving certain issues, the record in that suit is admissible upon this issue, although it is not otherwise competent. Burks *v.* Watson, 48 Tex. 107. See also Co-Operative Life Assn. *v.* Leflore, 53 Miss. 1.

In an action to recover a proportionate share of the cost and expense of maintaining a canal, the plaintiff may introduce the judgment rolls in actions brought by third persons to prevent the reasonable use of the canal, to show the nature of such actions in support of attorney's fees incurred in defending such actions, properly claimed as expense of maintaining. Rogers *v.* Riverside L. & I. Co., 132 Cal. 9, 64 Pac. 95.

92. Bartlett *v.* Decreet, 4 Gray (Mass.) 111 (the time when they commenced).

In actions brought to cancel deed on the ground of misrepresentation in regard to the final determination of a suit, the court erred in prohibiting a party from reading the case, as no better evidence of the finality of the case could be had than the record itself. Mason *v.* Pelletier, 77 N. C. 52.

To Show Termination of Prosecution. — In Action for Malicious Prosecution. — Whether or not a judgment of acquittal in a criminal prosecution is any evidence of want of probable cause for such prosecution, such judgment is properly admissible in evidence in a suit for malicious prosecution to show that the prosecution has terminated. Winn *v.* Peckham, 42 Wis. 493. See article "Malicious Prosecution," Vol. VIII, p. 418.

In an action for malicious prosecution of a charge before a justice of the peace, where a change of venue

To be admissible as records, however, they must be more than mere recitals of the court's action and must purport to be the written embodiment thereof.[93]

B. What the Record Includes. — a. *Generally.* — The term record as used in the rules relating to proof of judicial records and proceedings has a broader meaning than when applied to what is technically called the record, for purposes of review on appeal. It includes the writs and process with the returns endorsed thereon, all of the pleadings in the case, the required or authorized written memorials of the proceedings taken by the parties and the court, together with such papers and documents appearing in the files as form part of the proceedings taken.[94] But any entries not

is had to next nearest justice, the transcript of the docket showing plaintiff's discharge is properly admitted where sufficient appears to show that such justice acquired jurisdiction. Kerstetter *v.* Thomas, 36 Wash. 620, 79 Pac. 290.

In an action for malicious prosecution based upon proceedings in a justice court, the docket entries of the justice are admissible to show the termination of such proceedings, but for no other purpose. And when the defendant will stipulate that such proceedings had terminated before the suit was commenced, then such docket entries should not be admitted because of their tendency to prejudice the jury. McGuire *v.* Goodman, 31 Ill. App. 420. "If we should follow literally the decision of the Supreme Court in Skidmore *v.* Bricker, 77 Ill. 164, these docket entries should not have been admitted at all; but we incline to adopt the ruling of the Appellate Court of the second district in the case of Comisky *v.* Breen, 7 Ill. App. 369."

An Entry in the Order Book of the court showing the failure of the defendant, charged with a crime, to appear to the indictment according to the condition of his recognizance, and the forfeiture of his bail, is admissible in connection with oral proof of his flight and subsequent rearrest. Barton *v.* State, 154 Ind. 670, 57 N. E. 515.

93. Burge *v.* Gandy, 41 Neb. 149, 59 N. W. 359. See also Davidson *v.* Murphy, 13 Conn. 213.

94. See Numbers *v.* Shelly, 78 Pa. St. 426; Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; Dingee *v.* Kearney, 2 Mo. App. 515; Archibald *v.* Davis, 49 N. C. 113; Smith *v.* Smith, 22 Iowa 516; State *v.* Hawkins, 81 Ind. 486.

All proceedings including summons, returns, pleadings and all other proceedings constitute the record, and are admissible to prove what has been done during trial under a plea of *nul tiel record.* State *v.* Logan, 33 Md. 1.

Pleadings. — Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

The Pleadings in another action are admissible on behalf of the party suing for services rendered as an attorney in that action, as is also the entry of judgment. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107. But the pleadings of a party are not competent evidence of the facts stated in them in behalf of such party in a subsequent action. Blair *v.* Caldwell, 3 Mo. 353.

Papers of a cause when filed become part of record as fully as though copied into the record book. Harding *v.* Larkin, 41 Ill. 413.

Written in Pencil. — The fact that part of the pleadings are written in pencil does not render them incompetent, even though the court in its discretion may refuse to allow pencil pleadings to be filed. Tait's Admr. *v.* Presley, 50 Ala. 342.

The Return of a Trial Justice in in an appeal case being part of the record should be admitted in evidence when the record is received. Cothran *v.* Knight, 47 S. C. 243, 25 S. E. 142.

The report of commissioners, mak-

authorized by law do not form part of the record and are not admissible as such.[95] The fact that a paper found in the files is not

ing partitions and appropriations, being confirmed by court and filed in the case and enrolled is competent evidence. Archibald *v.* Davis, 49 N. C. 133.

Where a guardian's deed is required to be entered at length upon the probate record, such record is admissible in evidence in proof of the title acquired by the deed. The objection in this case was that the deed was not a legitimate part of the record. Worthington *v.* Dunkin, 41 Ind. 515.

The Appraisement of an Estate in a sister state, forming part proceedings of Orphan's Court of that state, is admissible over the objection that acts were under private signature. Dismukes *v.* Musgrove, 8 Mart N. S. (La.) 375.

Where Letters Appear in the transcript of a record, the record being of a case in which there was a consent decree rendered many years ago, and the letters apparently have some relevancy to the fact of consent, they may be treated as part of the record and be received in evidence accordingly. Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89.

A promissory note upon which another action was based is admissible in connection with the record of the case as a part of its history in an action to recover for services as an attorney in the case. McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

Where an indictment is filed by the grand jury in the district court, the certified transcript of the proceedings sent down from that court for the trial in the county court form part of the record and are admissible in evidence. Kennedy *v.* State, 11 Tex. App. 73.

An exhibit on file in the court of probate referred to by the record may be produced in evidence. Wolcott *v.* Parmelee, 2 Root (Conn.) 181, holding admissible on account of an executor referred to by the record as "on file," although the evidence was objected to because not part of the record.

Where execution and levy have never been returned and filed, the execution itself may be given in evidence in trover by sheriff, and the inventory of property to be sold if proved and identified to be the one made by sheriff at time of making the levy may also be given in evidence. Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547.

An Affidavit filed with a justice of the peace and forming the basis of his jurisdiction in a particular case is competent as part of the record. Knapp *v.* Miller, 133 Pa. St. 275, 19 Atl. 555.

Ancient Record.— In case of proceedings in the General Court of St. Louis of date 1806, everything found in the office of the clerk with the papers, and manifestly relating to the case, is part of it, and all such papers and entries purporting to form the record of the cause, though not signed by the presiding judge, are admissible to prove what was done during its progress. Dingee *v.* Kearney, 2 Mo. App. 515.

95. Minutes on a Loose Piece of Paper copied into a magistrate's book but not in the handwriting of the magistrate and of which he had no recollection are not competent evidence of an adjournment of the proceedings before the magistrate, since it is not a record nor a minute upon a docket which afterwards is extended into a record, nor a paper drawn up by the magistrate. Wetherbee *v.* Martin, 10 Gray (Mass.) 245.

The statute does not require the justice to make any record or certify, or include in a transcript anything concerning the failure of a constable to return process, and if he does make such a record it is not evidence against the sureties on the constable's bond. People *v.* Hayes, 63 Ill. App. 427.

Memoranda made by the clerk of the court which he is not required by law to make do not form part of the record and are not official documents, and are consequently not competent evidence as such.

marked as having been filed does not alone render it inadmissible.[96]

But a document or paper which does not properly form part of the record in a case although attached thereto is not admissible, nor is a copy thereof certified by the clerk along with the record.[97]

The Opinion of the trial court is not a part of the record.[98]

b. *Evidence in Former Suit.* — The testimony on which the judgment in another action was based is not rendered admissible by the introduction of the record of such action.[99] But documents introduced and used in a cause become part of the files thereof and are admissible as such.[1]

c. *Writs and Returns.* — Writs issued out of a court and the returns thereon form part of the records thereof when filed and are competent as such.[2]

Danielson *v.* Dyckman, 26 Mich. 169.

96. A certified copy of an application for the sale of lands found among the papers of an estate — "old time worn papers in the custody of the clerk"—and containing an endorsement of the court's action thereon, was held properly admitted although not marked "filed." Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

97. See Theobald *v.* Stinson, 38 Me. 149.

Where the record of an action in ejectment was admitted in evidence to show an eviction, the report of a surveyor attached to the record was held improperly admitted because it constituted no part of the record, not having been made so by bill of exception or otherwise. Patton *v.* Kennedy, 1 A. K. Marsh. (Ky.) 389; Gaither *v.* Brooks, 1 A. K. Marsh (Ky.) 409.

98. The opinion of the trial court delivered in deciding a motion in a case does not form a part of the record. Gunn *v.* Howell, 35 Ala. 144.

99. Mestier *v.* New Orleans Opelousas R. Co. 16 La. Ann. 354; Florance *v.* Bachemin, 3 La. Ann. 174. See also Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651.

Minutes of Testimony taken by a justice of the peace are not competent to prove such testimony. Zitske *v.* Goldberg, 38 Wis. 216; Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803.

1. Plaintiff having obtained judgment against defendant for same cause of action in another state, offered the record in evidence: *Held*, that an instrument which formed part of the record and which was used as evidence on the first trial, must be presumed to have been duly proved and cannot afterwards be objected to. Jordan *v.* Black, 1 Rob. (La.) 575.

A Deposition which has been taken and used in a cause becomes a judicial document and part of the files. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598. But see Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651.

2. *Alabama.* — Woodward *v.* Harbin, 1 Ala. 104; Guin *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Creagh *v.* Savage, 14 Ala. 454.

Arkansas. — Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

Illinois. — Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413.

Maine. — State *v.* Lang, 63 Me. 215.

Mississippi. — Harrington *v.* O'Reilly, 9 Smed. & M. 216, 48 Am. Dec. 704.

Montana. — Heyfrom *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

North Carolina. — Peebles *v.* Pate, 90 N. C. 348.

Vermont. — Perry *v.* Whipple, 38 Vt. 278.

Virginia. — Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

Schedules of Property Levied On not returned with the writ are not admissible in evidence for the sheriff to show what was seized under

d. *Bill of Exceptions.* — A bill of exceptions although technically part of the record is not a part thereof within the meaning of the rules relating to evidence and is not admissible.[3]

e. *Assignment or Satisfaction of Judgment.* — An entry of the assignment[4] or satisfaction of a judgment[5] although not a necessary part of the record is competent evidence to prove the facts recited.

f. *Effect of Dismissal.* — The dismissal of a cause[6] or a portion of the complaint or declaration therein[7] does not serve to remove from the files the record relating thereto which is admissible where relevant and material.

g. *On Appeal* in case of a trial *de novo* the record of the lower court need not be formally introduced in evidence as it is always

the writ. McElrath *v.* Kintzing, 5 Pa. St. 336.

3. Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83; May *v.* International Loan & T. Co., 92 Fed. 445, 34 C. C. A. 448; O'Neall *v.* Calhoun, 67 Ill. 219.

A bill of exceptions is not entitled to admission in evidence as a part of the record in the case. "Where a bill of exceptions is filed for the purpose of exhibiting the evidence, it does not become a part of the record in the sense that the pleadings and entries upon the order book and dockets do. The pleadings and entries are necessarily a part of the record; indeed, they in strictness constitute the record. Without them, the admissions and allegations of the parties could not be understood, nor the scope and effect of the judgment be fully apprehended. This is not true of the bill of exceptions. The office of the bill of exceptions is altogether different from that of the entries and pleadings. In truth, a bill of exceptions is only proper when it becomes necessary to make some fact or proceeding appear which strictly and properly forms no part of the record." State *v.* Hawkins, 81 Ind. 486. But see Miles *v.* Wingate, 6 Ind. 458, *holding* the bill of exceptions competent as part of the record to show the identity of the subject-matter of a former action with that of the pending action.

Where a bill of exceptions is improperly included in the record of another suit, if party offering record has used the bill the other party may do likewise, *aliter non.* Such bill may be used to show the character of former action or defense, or to refresh a witness' memory as to transactions or testimony in that trial but not to prove facts essential to case in hand. Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

4. Assignment of Judgment. Where the assignment of a judgment has been made a part of the record of the court, a certified copy thereof is competent evidence in an action on the judgment in a foreign court the same as other parts of the record. Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

5. Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54. See also Williams *v.* Jones, 12 Ind. 561; Ellis *v.* Madison, 13 Me. 312; Hall *v.* Hall (Tenn. Ch.), 59 S. W. 203.

The record entry of the satisfaction of a judgment is competent proof of its payment, although it is not usual for records to contain the history of the execution. Packard *v.* Hill, 7 Cow. (N. Y.) 434.

A Receipt which acknowledges the payment of the judgment and is endorsed upon the record is competent. Lothrop *v.* Blake, 3 Pa. St. 483.

6. The dismissal of a cause does not take from the record the papers belonging thereto, and such papers may be used as evidence. Woods *v.* Kessler, 93 Ind. 356.

7. Although a suit is dismissed as to a part of the bill, the pleadings are not removed from the files and remain as part of the record, and may be relied on if they are ma-

treated as before the appellate court and may be referred to for the establishment of any fact for which it is proper evidence, and oral testimony cannot be received to contradict it as to such facts.[8]

C. When the Whole Record Is Competent. — Where it is sought to show a former judgment or decree, the whole record of the proceedings in which such judgment was rendered is admissible.[9] Where one party has introduced a portion of the record in another cause his adversary may introduce the remainder or any part of the record in the same cause.[10] And a party who has introduced a record in evidence cannot object to the use of any part thereof by his adversary.[11] But the introduction by one party of the record of one proceeding does not authorize the introduction by his adversary of the record in an entirely separate proceeding.[12] When the record of another case is admissible it cannot be excluded because a portion thereof is objectionable for some reason.[13]

terial and competent as evidence in the case. Lyster *v.* Stickney, 12 Fed. 609.

8. Com. *v.* Lane, 151 Mass. 356, 24 N. E. 48, holding that the record of the lower court might be considered by the jury in determining the date of the trial below, although such record had not been introduced in evidence. See also Cothran *v.* Knight, 47 S. C. 243, 25 S. E. 142, and *infra*, this article "Justice Court — On Appeal."

Contra. — The record of judgment and proceedings of a justice court is inadmissible in evidence upon a trial on appeal. Hudson *v.* Pettijohn, 4 Har. (Del.) 356.

9. Smith *v.* Smith, 22 Iowa 516; Miles *v.* Wingate, 6 Ind. 458.

10. Baker *v.* Mygatt, 14 Iowa 131; Fowler *v.* Stonum, 6 Tex. 60; Lamb *v.* B. C. R. Co., 39 Iowa 333; Hughes *v.* Driver, 50 Tex. 175.

Greenlee *v.* Lowing, 35 Mich. 63, in which after the plaintiff had introduced the files and judgment and two executions thereon in another suit it was held competent for the defendant to introduce other executions issued upon the same judgment.

Where one party has introduced in evidence part of the findings of the referee in another action, it is not error to allow the other party to read in evidence the remainder thereof. Sheahan *v.* National S. S. Co., 66 Hun 48, 20 N. Y. Supp. 740.

Where one party has introduced in evidence the decree in another case, the other party may properly introduce the pleadings and orders in such case. Great Western Tele. Co. *v.* Mears, 154 Ill. 437, 40 N. E. 298.

"The rule is that all of the record, and not merely fragmentary parts, shall be put in evidence. . . . 'A record is an entire thing, and if admissible for any purpose, all its parts are received.'" But "this rule applies only to such matters as are legitimately a part of the record, and not to mere collateral papers incidentally connected with the proceedings." State *v.* Hawkins, 81 Ind. 486.

11. Duncan & Fisk *v.* Gibbs, 1 Yerg. (Tenn.) 256; Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83; Doe *ex dem.* Eaton *v.* Longworth, 10 Ohio St. 20.

12. In an action against an insolvent debtor the fact that the record of his examination before the commissioner of insolvency has been admitted in evidence against him does not entitle him to introduce in evidence the oath taken by him as a preliminary to his discharge at a time previous to and distinct from the examination. Judd *v.* Gibbs, 3 Gray (Mass.) 539.

13. Where the record in another case is admissible for any purpose it cannot be excluded because the complaint and answer are immaterial and incompetent. "A judicial record as evidence is an entire thing, and if it be admissible in evidence for any purpose, all its parts are ad-

D. Void or Defective Record. — A void or fatally defective record is not admissible,[14] but the fact that it is irregular or defective in some particular does not necessarily serve to exclude it.[15]

E. Signature of Judge. — Judicial records and documents to the validity of which the judge's signature is unnecessary are admissible in evidence although unsigned,[16] and a certified copy of such un-

missible. . . . The question here is not whether the admission of a record wherein the pleadings were not included would have been allowable, but is whether the pleadings were admissible as parts of a record otherwise admissible." Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Where a party claims title to real estate under a guardian's sale, the files or records of the case in the probate court when their identity has been established are admissible in evidence. If objection is made to any part of them on the ground of its insufficiency the whole should nevertheless be admitted and the jury instructed with regard to the portions which may be objectionable. Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

14. Nye *v.* Kellam, 18 Vt. 594. See Clayton *v.* Clayton, 4 Colo. 410; Farley *v.* Lewis, 102 Ky. 234, 44 S. W. 114, 19 Ky. L. Rep. 1255; Tuck *v.* Boone, 8 Gill (Md. Ch.) 187.

An exception that would have been quashed on motion made should not have been admitted in evidence in favor of plaintiff therein. Harrington *v.* O'Reilly, 9 Smed. & M. (Miss.) 216.

Misrecital of judgment in the *fi. fa.* renders the *fi. fa.* inadmissible. Miles *v.* Knott, 12 G. & J. (Md. Ch.) 442.

15. Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647 (record of probate court containing no caption naming parties held competent to show an order for specific performance of testator's contract to convey land).

Lack of Verification of Complaint. That the complaint was not verified will not affect the admissibility of the judgment roll in which one of the defendants therein recovered judgment, as the omission of verification is an irregularity that cannot be collaterally called in question. Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337.

The record of a judgment is admissible although no summons is attached thereto and it does not show an order of reference, although founded upon the report of a referee, since these are defects which merely render the judgment erroneous and do not make it void. Calkins *v.* Packer, 21 Barb. (N. Y.) 275.

If Two Judgments Are Found in the Judgment Roll, the later is the only one constituting any part of the roll and the fact that the earlier judgment is bound up in the roll does not affect the admissibility of the judgment roll. The presumption is that the minutes of the court contain an order vacating the first judgment by consent. Colton, L. & W. Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878.

The failure of the clerk to enter the date of the filing of a verdict would not affect its being used as evidence. Baldridge *v.* Foust, 28 Neb. 259, 44 N. W. 110.

Judgment Roll Not Made Up. Where all the necessary papers to constitute the judgment roll in a foreclosure suit existed, although never attached together as required by statute, they are nevertheless admissible in support of a title acquired under a sale made thereon. Sharp *v.* Lumley, 34 Cal. 611.

16. Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380; Pargoud *v.* Morgan, 2 La. 100.

Letters of administration are admissible though not signed by or tested in the name of the probate judge, except in those cases where under the law the probate judge acts as his own clerk. Denver, etc. R. Co. *v.* Woodward, 4 Colo. 1.

A justice's docket though not signed by the justice is admissible since it may be identified by other evidence. Chapman *v.* Dodd, 10 Minn. 350; Cole *v.* Curtis, 16 Minn. 182.

signed records and documents is likewise admissible.[17] This is the rule where a statute providing for the judge's signature is deemed to be merely directory.[18]

F. Unauthorized Records. — Entries on the record of a court which are not required or authorized by law are not competent evidence.[19]

G. Competency of Original Record. — Although the use of the original records of another court as evidence is sometimes condemned as a bad practice,[20] they are nevertheless competent when produced and properly identified.[21] There are, however, dicta to the

Ancient Record. — See Dingee *v.* Kearney, 2 Mo. App. 515.

17. The omission of a judge to add his official character to his signature to the record, does not vitiate the record, and an exemplification thereof is admissible in evidence. Elliot *v.* Cronk's Admrs., 13 Wend. (N. Y.) 35.

A transcript of the proceedings of a district court of the United States is competent, although the transcript shows that the journal record of the proceedings was not signed by the presiding judge. Stacks *v.* Crawford, 63 Neb. 662, 88 N. W. 852.

A copy of the record of the court's approval of a guardian's bond where the order is duly entered by the clerk upon the proper order book is not inadmissible, although the order of approval is not signed by the court, especially in an action against the judge or his estate for his negligence in accepting an insufficient bond. Farley *v.* Lewis, 102 Ky. 234, 44 S. W. 114, 19 Ky. L. Rep. 1255.

18. Eastman *v.* Harteau, 12 Wis. 267.

The Minutes of the county commissioner's court although not signed by the judge, when attested by the clerk, were held admissible upon uncontradicted evidence that the books containing them were the record minutes of that court. "It is true the statute authorizes the minutes to be signed by the judge and attested by the clerk, but this has been held to be directory and not mandatory." Ladwig *v.* State, 40 Tex. Crim. 585, 51 S. W. 390.

19. Sills' Stove Wks. *v.* Brown, 71 Vt. 478, 45 Atl. 1040; Perry *v.* Block, 1 Mo. 404.

A statement of the clerk, on the minutes of the court made in vacation, that opinion of the judge sustaining a motion for a new trial which had been taken under advisement, "was handed in and entered on the minutes by consent of parties," being no proof of official duty is not evidence of such consent. Coopwood *v.* Prewett, 30 Miss. 206.

Unauthorized Entry in Justice's Docket. — A transcript of the justice's docket is not evidence to prove the delivery of execution to constable, because the justice is not required or authorized to enter upon his docket the delivery of execution to the constable. Hunt *v.* Boylan, 6. N. J. L. 211.

A transcript from the justice's docket is not competent to prove facts therein not required by statute to be entered on the docket. So where date of arrest became material in course of trial for crime, the transcript of the preliminary proceedings before the justice of the peace in which was copied the return of the officer showing date of arrest, is incompetent as date is not a fact to be entered on the docket. Armstrong *v.* State, 21 Ohio St. 357.

20. Allis *v.* Beadle, 1 Tyler (Vt.) 179; Strong *v.* Bradley, 13 Vt. 9; Regier *v.* Shreck, 47 Neb. 667, 66 N. W. 618; Anderson *v.* Ackerman, 88 Ind. 481.

21. *United States.* — Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55.

Alabama. — Davidson *v.* State, 68 Ala. 356; Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122.

Colorado. — McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

Connecticut. — Gray *v.* Davis, 27 Conn. 447.

contrary,[22] and statutes providing for the use of certified copies are in some states construed to render the originals incompetent.[23]

Illinois. — Stevison *v.* Earnest, 80 Ill. 513.

Indiana. — Anderson *v.* Ackerman, 88 Ind. 481; Kennard *v.* Carter, 64 Ind. 31.

Indian Territory. — Breedlove *v.* Dennie, 2 Ind. Ter. 606, 53 S. W. 436.

Massachusetts. — Luce *v.* Dexter, 135 Mass. 23; Greene *v.* Durfee, 6 Cush. 362.

North Carolina. — State *v.* Hunter, 94 N. C. 829.

Ohio. — Lessee of Morgan *v.* Burnet, 18 Ohio 535.

Pennsylvania. — Garrigues *v.* Harris, 17 Pa. St. 344.

Texas. — Hardin *v.* Blackshear, 60 Tex. 132; Manning *v.* State, 46 Tex. Crim. 326, 81 S. W. 957; Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451.

Vermont. — Strong *v.* Bradley, 13 Vt. 9; Allis *v.* Beadle, 1 Tyler 179.

Virginia. — Ballard *v.* Thomas, 19 Gratt. 14.

See Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337; Smith *v.* Valentine, 19 Minn. 452; Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651; Goldsmith *v.* Kilbourn, 46 Md. 289; Hopkins *v.* State, 53 Md. 502.

The original record of a judgment rendered by the supreme court is competent evidence in the county court to prove such judgment. It is not necessary to produce a certified copy. "If the clerk of the supreme court were willing to bring the original record into court we think it might well be used. He probably could not be compelled to do so and might have required the party to procure a copy of the same; but when the original record is brought into court we think it would be very difficult to give any substantial reason why it is not evidence of as high a character as a copy of the same record would be." Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

Insolvency Court. — The original papers and record of proceedings in insolvency deposited in the probate office and produced by the register of probate are admissible in evidence equally with certified copies thereof. Odiorne *v.* Bacon, 6 Cush (Mass.) 185.

Court Martial. — On the trial of an action to recover a fine imposed by the sentence of a court marshal, the original record of the court marshal whether it ought or ought not to be permitted to be taken from the adjutant general's office is, nevertheless, if produced, as good evidence at least as a certified copy would be. Brooks *v.* Daniels, 22 Pick. (Mass.) 498.

The Original Writ of Attachment and the Return thereon and the original execution with the endorsement thereon is as good evidence as an authenticated copy thereof. Either one is admissible at the option of the person desiring to use it. Day *v.* Moore, 13 Gray (Mass.) 522. See also Rainey *v.* State, 20 Tex. App. 455.

The Docket of a Justice when properly identified is competent evidence to establish the rendition of a judgment. Although the use of certified copies is provided for by statute, such provision does not exclude the record itself. Miller *v.* State, 61 Ind. 503; Wyandotte, K. C. & N. W. R. Co. *v.* Waldo, 70 Mo. 629.

The Records and Files of Inferior Courts need not be proved by certified copies, but are themselves competent evidence. Keenan *v.* Washington Liquor Co., 8 Idaho 383, 69 Pac. 112. See also Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838.

Record Illegally Obtained. — An original record though illegally obtained is not for that reason incompetent. People *v.* Alden, 113 Cal. 264, 45 Pac. 327. See *supra,* "Record Illegally Obtained."

22. Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628; Wallace *v.* Beauchamp, 15 Tex. 305. But see Hardin *v.* Blackshear, 60 Tex. 132. See also Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740.

23. The original record of a court cannot be introduced in another court, but the proper method of proving it is by a certified copy

H. Where Judgment or Decree Is Required To Be Recorded With the Recorder. — In some states statutes require judgments and decrees affecting title to real estate to be recorded with the recorder of deeds in the county where the land lies.[24] Whether such a judgment or decree which has not been recorded as required is admissible as evidence of title the courts are not agreed.[25] But even under a statute requiring such proceedings to be recorded to be admissible in evidence it is held that an unrecorded judgment or decree is admissible as against everybody except *bona fide* purchasers without notice, the same as in the case of an unrecorded deed.[26]

"The code points out the manner in which proceedings of courts of record may be proved, and that is by copies duly authenticated under the seal of the court. It is replied to this, however, that where the clerk himself appears and swears to the existence of the original, this sufficiently authenticates it. The answer to this is, that the law has pointed out one method of authentication only, and the courts are not at liberty to recognize an entirely different manner of proving records. Aside from this, however, upon considerations of public policy, original documents should be excluded in courts other than those in which they are rendered; otherwise the temptation to attorneys and officers of the court to withdraw from the files original records for the purpose of using them as evidence in distant portions of the state might lead to their loss or destruction, and thus produce unnecessary confusion in the keeping of those things which should stand as permanent memorials of the action of the several courts." Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740. See *infra* for other cases from this state, and Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838, holding that this rule applies only to courts of record.

24. See notes following.

Although the law requires an order or decree of partition to be recorded in the county where the land lies to render it admissible in evidence, where land has been sold on account of the impracticability of partitioning it a transcript of the proceedings of the administration under which the sale was made is admissible to show title although not so recorded, there being no order or decree of partition and no partition in fact. Lewis *v.* Ames, 44 Tex. 319.

An Order of the Probate Court Setting Apart a Homestead is not a judgment or decree within the meaning of Art. 4339 Rev. Stat., which requires all judgments or decrees of any court deciding questions of title or directing partitions of land to be recorded in the county clerk's office before they are admissible in evidence. Fossett *v.* McMahon, 74 Tex. 546, 12 S. W. 324.

25. The record of partition proceedings is admissible in evidence though not recorded as required by code, as it obtains no additional verity or authority by reason thereof, nor is such registration required for the purpose of fixing parties with notice, but simply for convenience in tracing titles, and to keep evidence of title by purchase under one system. Lindsay *v.* Beaman, 128 N. C. 189, 38 S. E. 811.

Probate proceedings where the title of land comes in question are required by statute to be recorded in the town clerk's office as much as in the probate office, and unless so recorded they are not admissible as evidence of title. Royce *v.* Hurd, 24 Vt. 620.

26. Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

The object of the statute requiring judgments and decrees relating to lands to be recorded to be admissible in evidence is not to prohibit their introduction in evidence under all circumstances until recorded, but only to apply to them the same rules as are applied to deeds and other instruments required to be recorded. Thornton *v.* Murray, 50 Tex. 161.

I. In Same Court. — a. *In Same Case.* — **(1.) Generally.** Whether the previous records in the same case are competent evidence on the trial or hearing, and if so what is their force and effect, will be found elsewhere discussed.[27] But when competent they need not be formally offered in evidence because the records of the pending case are always before the court.[28]

(2.) Pleadings Superseded or Stricken Out. — Whether pleadings which have been stricken out or superseded by amendment or otherwise are competent evidence in the same case is elsewhere discussed.[29] But where such pleadings are competent they must be offered or introduced to become evidence.[30]

(3.) Collateral Proceedings in Same Case. — In proceedings which are not independent but are merely collateral to and dependent upon a previous proceeding or action the record of the latter may be looked to by the court without being offered in evidence.[31]

b. *Other Records.* — Other records of the court trying the case are admissible when relevant without resorting to an authenticated copy, the necessity for using the latter being grounded upon the inconvenience or impossibility of obtaining the original.[32] But a certified copy is nevertheless admissible,[33] except in support of a plea of *nul tiel record*.[34]

27. See articles "Admissions" and "Answers," Vol. I; "Injunction," Vol. VII.

The Charge to the Jury in the first trial is not competent evidence on a second trial. Butler *v.* Slam, 50 Pa. St. 456.

28. See article "Judicial Notice," Vol. VII, p. 999, *et seq.*

29. See articles "Admissions," and "Answers," Vol. I.

30. Pleadings which have been superseded by an amendment or otherwise remain as a part of the record in the case, but are not, like the pleadings upon which the case is finally submitted to the jury, to be considered as evidence unless they are introduced as such on the trial. Shipley *v.* Reasoner, 87 Iowa 555, 54 N. W. 470.

31. See article "Judicial Notice," Vol. VII, p. 1001.

When a motion is not an original or independent proceeding, but one to effectuate a decree, still pending, and the entire record is before the court as part of the case, it may be looked to in supplying immaterial irregularities or omissions which appear on the face of the judgment. Richards *v.* Williams, 3 Baxt. (Tenn.) 186.

32. Morrill *v.* Gelston's Lessee, 34 Md. 413; Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 264; Clink *v.* Thurston, 47 Cal. 21; State *v.* Voight, 90 N. C. 741; State *v.* Hunter, 94 N. C. 829; Ward *v.* Saunders, 28 N. C. 382 (though not recorded in a well bound book as required by law); Wallace *v.* Beauchamp, 15 Tex. 305.

The declaration and other original papers on file in the clerk's office may be used in evidence in the same court to which they belong. Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368

Transferred Record. — Geer *v.* Geer, 109 N. C. 679, 14 S. E. 297.

Where one court has superseded another and the records of the latter have become a part of the records of the former, they may be introduced in evidence in a proceeding in the new court without resorting to a certified copy. Jones *v.* Levi, 72 Ind. 586.

33. Sawyer *v.* Garcelon, 63 Me. 25.

34. In which case the original must be produced. Adams *v.* State, 11 Ark. 466. But see *infra*, III, 2, E, b.

J. JURISDICTION. — a. *Generally.* — Before the record of another tribunal or a certified copy thereof is admissible as an adjudication its jurisdiction must appear in some way, either directly or indirectly, or by inference.[35]

b. *Jurisdiction of Parties.* — Jurisdiction of the parties to an action must appear in some manner before the record thereof is admissible against them.[36] This may, however, sufficiently appear from the recitals or from those portions of the record showing an appearance[37] or service of summons.[38]

35. See article "JUDGMENTS," Vol. VII, pp. 786, 859, and Smith *v.* Dudley, 2 Ark. 60; Shorter *v.* Urquhart, 28 Ala. 360; Dogan *v.* Brown, 44 Miss. 241. But see article "PRESUMPTIONS," Vol. IX.

A paper purporting to be a copy of a decree in another case and certified by the clerk of the court to be such, but which fails to show in what court the decree was rendered, or that the court had jurisdiction of the person, or that the matters decreed were within the relief sought, is not competent evidence. Cline *v.* Gibson, 23 Ind. 11.

A decree of the probate court for sale of real estate by executor or administrator is invalid as evidence of said sale unless the record shows affirmatively all the requirements of the statute under which land is decreed to be sold. The law does not presume a decree of probate for the sale of realty, which has been subsequently lost or destroyed and which recites every fact necessary to give court jurisdiction, to be valid and conclusive, unless process is shown to have been issued and executed upon parties interested. Martin *v.* Williams, 42 Miss. 210, 97 Am. Dec. 456.

In a statutory proceeding by garnishment, jurisdiction must affirmatively appear by record, and when that fails to show the affidavit required by statute as the foundation of the proceeding, neither a docket entry that affidavit was made and filed (not showing its contents) nor appearance and submission to court can give validity to judgment so as to admit same in evidence. Wells *v.* American Express Co., 55 Wis. 23, 12 N. W. 441, 11 N. W. 537, 42 Am. Rep. 695.

Where the jurisdiction of a court of chancery to grant divorces is not original but limited and statutory, an exemplified copy of the record of a decree of divorce in that court which does not recite the facts showing jurisdiction is not admissible in evidence without exemplified copies of the pleadings, orders and master's report. The Probate of Will of Lawrence, 1 Tuck. (N. Y.) 64.

36. Where the record of an action does not show jurisdiction over the parties it is not complete and therefore not admissible. Buford *v.* Hickman, Hempst. (U. S.) 232, 4 Fed. Cas. No. 2,114a.

The proceedings and judgment of another state not showing that summons to defendant was ever issued or that defendant appeared in said suit, a transcript of same is inadmissible against the defendant therein. Drake *v.* Granger, 22 Fla. 348; Manlin *v.* Insurance Co., 24 N. J. L. 222.

37. Where the foreign record showed a general appearance by attorney, this is *prima facie* sufficient to give the court jurisdiction to admit same in evidence. Reber *v.* Wright, 68 Pa. St. 471.

38. In a suit on a judgment of a sister state the record showed that the writ of summons was returned executed in full. *Held*, that there was *prima facie* evidence of jurisdiction of person entitling same to admission in evidence. Blackburn *v.* Jackson, 26 Mo. 308.

Where the transcript of the record of a judgment of a justice of the peace of another state shows the issuance of a summons and its return "served," jurisdiction of the person sufficiently appears. Lattou-

c. *Probate Court.* — Probate courts are ordinarily courts of record and their proceedings are entitled to general presumptions of regularity and jurisdiction.[39]

d. *Courts of Inferior Jurisdiction.* — The jurisdiction of a court of limited or inferior jurisdiction must affirmatively appear before its records are admissible as adjudications.[40]

e. *Presumptions.* — Where a court is one of general jurisdiction it is presumed that the subject-matter of its adjudication was within its jurisdiction.[41]

Foreign State. — Where the record of a foreign court of general jurisdiction or a copy thereof is properly authenticated, its jurisdiction over the subject-matter involved will be presumed.[42]

Probate Court. — This presumption applies to the records and proceedings of foreign courts of probate.[43]

rett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

The failure of a judgment to recite service of process does not render it inadmissible in evidence where the process itself is in evidence and shows service. Kinkade *v.* Gibson, 209 Ill. 246, 70 N. E. 683.

39. See fully articles "Executors and Administrators," Vol. V, and "Presumptions," Vol. IX.

Where a probate court possesses general jurisdiction of a given class of subject-matters, and where its records are offered in collateral proceedings, a particular case is not intended to be without its jurisdiction unless it affirmatively appear on the face of the record. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

Since the court of ordinary is a court of general jurisdiction, an exemplification of its proceedings appointing a guardian and ordering a sale of the ward's land, although it contains nothing upon its face showing the jurisdiction of the court, is admissible to prove such appointment and order since jurisdiction is presumed. Bush *v.* Lindsey, 24 Ga. 245, 71 Am. Dec. 117.

A record entry of the probate court is admissible in evidence to show an order by such court for the specific performance by an executor of a contract made by testator for conveyance of land, and it is immaterial that such record entry contains no captions naming the parties, and does not recite either the filing of the petition or notice to executor, as same liberal intendments attend acts of probate court as courts of general jurisdiction. Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647.

40. See articles "Presumptions," Vol. IX, and "Judgments," Vol. VII.

A transcript of a judgment of the justice of the peace of another state is not admissible until it has been shown that the justice had jurisdiction over the subject-matter upon which he attempted to adjudicate. Trader *v.* McKee, 2 Ill. 557.

A decree by a court of limited jurisdiction for a conveyance, together with a deed executed in accordance therewith, when offered alone are not admissible where they do not show that the court had jurisdiction over the subject-matter or the parties. Adams *v.* Tiernan, 5 Dana (Ky.) 394.

A court held by the justice of the peace in Connecticut is a court of record, and the record of the proceedings before him import verity, and every act recited in it is presumed to have been properly and rightly done. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955.

41. Nelson *v.* Brisbin (Neb.) 98 N. W. 1057. See fully articles "Judgments," Vol. VII, and "Presumptions," Vol. IX.

42. Slaughter *v.* Cunningham, 24 Ala. 260; Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139; Jordan *v.* Black, 1 Rob. (La.) 575; Bortness *v.* Keran, 24 Gratt. (Va.) 42.

43. Puryear & Wallace *v.* Beard, Trustee, 14 Ala. 121.

f. *Recital.* — Recitals in the record showing the court's jurisdiction are presumptive evidence thereof in the case of courts of both superior[44] and inferior[45] jurisdiction. This rule applies equally to the records of foreign courts.[46]

g. *Form of Record and Authentication.* — The fact that a court is a court of record and consequently had jurisdiction may sufficiently appear from the form of the record and the method of its authentication.[47]

A copy of the record of probate proceedings showing the adoption of a child, from the minutes of a probate court of another state, is competent without proof of the facts which would give such court jurisdiction of the subject-matter. Jurisdiction is presumed. Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64, adhering to the opinion rendered in Brown *v.* Mitchell, 75 Tex. 9, 12 S. W. 606.

The record of the proceedings of a regularly constituted tribunal of another state is itself *prima facie* evidence of its conformity to law and the authority of the tribunal to act judicially in the premises; and this rule applies to the record of a court of probate, and "a sentence or order of that court upon matters properly within the jurisdiction of such a court should be regarded as furnishing at least *prima facie* evidence not only of the authority of the court to act on the matters of which it has taken cognizance, but also that its action was in conformity with the law on that subject." Manion *v.* Titsworth, 18 B. Mon. (Ky.) 582.

44. See fully article "PRESUMPTIONS," Vol. IX.

Probate Court. — The recitals in the record of the proceedings of the probate court showing the facts necessary to jurisdiction are *prima facie* evidence of such facts. Comstock *v.* Crawford, 3 Wall. (U. S.) 396.

45. The recital in a decree of a court of inferior jurisdiction of the facts necessary to give jurisdiction is *prima facie* evidence of such facts. Belden *v.* Meeker, 2 Lans. (N. Y.) 470, holding that letters of administration reciting the death of the intestate and his place of residence at the time of his death was *prima facie* evidence of those facts; and *citing* Barber *v.* Winslow, 12 Wend. (N. Y.) 102.

46. The record of a foreign judicial proceeding is *prima facie* evidence of any fact therein distinctly stated that may be necessary to give the court jurisdiction, and this rule is not derived from any provision of the United States constitution but applies to the records of foreign tribunals generally. But a mere recital that the defendant had been notified of the pendency of the suit without showing when, where or how he received the notice does not sufficiently show jurisdiction over a person outside of the state. Downer *v.* Shaw, 22 N. H. 277.

47. Hughes *v.* Harris, 2 Ala. 269 (court of sister state); Steamboat Thames *v.* Erskine & Gore, 7 Mo. 213 (seal of the court raises a presumption that it is a court of record).

Where it appears from the certificates authenticating the record of a judgment of another state that the court rendering the judgment is a court of record, that it had a seal and a clerk, it will be presumed until the contrary is shown that it had jurisdiction of the parties and the subject of the action. Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005; Woodwoth *v.* McKee, 16 Iowa 14, 102 N. W. 777.

The legal presumption is that the court was one of general jurisdiction and had the authority which it exercised, when the transcript of the record of the court of another state granting letters of guardianship is duly certified and authenticated under act of congress and there is no showing to the contrary. Halliburton, Admr. *v.* Fletcher, Admr., 22 Ark. 453.

K. PROBATE COURT. — a. *Generally.* — The records of a probate court are competent evidence to prove the proceedings therein,[48] and to show title to real estate sold or distributed under its order or decree.[49]

Inventory. — Inventories of the estates of decedents filed in the probate court are competent evidence in matters connected with the administration of such estates,[50] and it has been held that they are competent for some purposes against persons not parties to such proceedings.[51]

48. *Georgia.* — Cox *v.* Cody, 75 Ga. 175.

Idaho. — Keenan *v.* Washington Liquor Co., 8 Idaho 383, 69 Pac. 112.

Illinois. — Cully *v.* People, 73 Ill. App. 501.

Indian Territory. — Breedlove *v.* Dennie, 2 Ind. Ter. 606, 53 S. W. 436.

Kansas. — Jordan *v.* Bevans, 10 Kan. App. 428, 61 Pac. 985.

Minnesota. — Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

Mississippi. — Laughman *v.* Thompson, 6 Smed. & M. 259; Eckford *v.* Hogan, 44 Miss. 398.

Missouri. — Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647.

New Hampshire. — Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

Washington. — Gilmore *v.* Baker Co., 12 Wash. 468, 41 Pac. 124.

The record of the proceedings on a guardian's sale is competent evidence of the date of the sale and the amount derived therefrom. Morris *v.* Stewart, 14 Ind. 334.

Certificate of Allowance of Claim. in a suit to set aside a deed as fraudulent as to creditors, certificates of allowances in proper form under the hand and seal of the probate judge (having jurisdiction, by statute, of suits against executors and administrators) showing that a large number of claims including those of plaintiff, had been allowed against the estate of the deceased grantor, are admissible in evidence both for purpose of showing that plaintiffs were judgment creditors of the estate of the deceased grantor at time of commencing this suit and that his estate was insolvent. Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286.

Official Appraisement of the property of the estate being the *ex parte* statement of a third person with which administrator is not shown to have any connection, is not admissible in evidence against him to prove the value of the property. Harrison's Admr. *v.* Harrison's Distrib., 39 Ala. 489. But see fully article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 443 *et seq.*

49. Simpson *v.* Norton, 45 Me. 281; Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447. But not when the court had no jurisdiction. Downer *v.* Smith, 24 Cal. 114. See article "TITLE."

50. See article "EXECUTORS AND ADMINISTRATORS," Vol. V., p. 443 *et seq.*

51. Inventories of the estates of persons deceased are admissible as *prima facie* evidence, for or against strangers, for many purposes; being made by persons appointed under authority of law, to investigate a matter of fact of general interest, under oath, and to make a return or report upon the subject, to be preserved of record. "There is a large class of proceedings, which are not judgments, and which, in many cases, can be regarded as judicial proceedings only by a very liberal construction of that term, which are admissible in evidence. They are the results of inquiries, made under public authority, concerning matters of public or general interest, though the affairs to which they relate may be private. They are generally the conclusions of juries, commissioners, or other officers under oath, and often, though not necessarily, based on evidence taken under oath. Among the cases cited in the books, of the admissibility of this kind of evidence in England, are Domesday Book, in-

b. *Letters Testamentary and of Administration.* — The appointment of personal representatives may be proved by their letters testamentary or of administration.[52]

L. JUSTICE COURT. — The record or docket of a justice of the peace is competent evidence to prove the proceedings had before him,[53] without preliminary proof that it contains the particular rec-

quisitions *post mortem*, inquisitions of lunacy, inquisitions relating to crown lands, under commissions from the court of exchequer, inquisitions relative to the fees of public officers, under an order of the house of commons, sheriffs' inquests, under a writ *de proprietate probanda*, in replevin, coroners' inquests of *felo de se*, and many other inquisitions. The *valor beneficiorum*, surveys of church and crown lands, taken by commissioners under the parliament, *inquisitiones nonarum*, and the like which are enumerated and described in 2 Phil. Ev., chap. 1, sec. 8, pp. 95 and 96. These proceedings are generally unknown in our practice, but the principle on which they are admitted is nevertheless a part of our law. That principle is, that whenever persons are appointed by the law, or under the authority of law, to investigate any matter of fact under oath, and to make a return or report upon the subject, the same being the foundation of no judgment or judicial decree between parties, the return or report so made is admissible in evidence between those who were in no sense parties to the proceeding. It is, however, in general, *prima facie* evidence only, and not conclusive, though in some cases made conclusive by statute." Seavey *v.* Seavey, 37 N. H. 125.

But see article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 445, notes 85, 86.

52. The presumption is that public officers do their duty, and this applies to the court of ordinary in issuing letters testamentary. Where the letters themselves recite that they were issued by the court of ordinary of the county of their issuance and contain other recitals showing that they were properly issued, the presumption is that such recitals are true until the contrary appears, and the letters are admissible in evidence. Ponder *v.* Shumans, 80 Ga. 505, 5 S. E. 502.

In an action by an administrator to recover damages for the negligent killing of his intestate, letters of administration are admissible in evidence as against the objection that they were merely letters of administration to collect. Denver etc. R. Co. *v.* Woodward, 4 Colo. 1.

See more fully *infra*, "Best and Secondary Evidence — Probate Court," and article "EXECUTORS AND ADMINISTRATORS," Vol. V.

53. *California.* — Beardsley *v.* Frame, 85 Cal. 134, 24 Pac. 721.

Colorado. — Baur *v.* Beall, 14 Colo. 383, 23 Pac. 345.

Idaho. — Keenan *v.* Washington Liquor Co., 8 Idaho 383, 69 Pac. 112.

Illinois. — People *v.* Ham, 73 Ill. App. 533.

Indiana. — Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447; Kennard *v.* Carter, 64 Ind. 31.

Iowa. — Plummer *v.* Harbut, 5 Iowa 308.

Maine. — Folsom *v.* Cressey, 73 Me. 270.

Massachusetts. — Day *v.* Moore, 13 Gray 522; McGrath *v.* Seagrave, 2 Allen 443, 79 Am. Dec. 797.

Missouri. — State *v.* Chambers, 70 Mo. 625.

New York. — Carshore *v.* Huyck, 6 Barb. 583.

Pennsylvania. — Knapp *v.* Miller, 133 Pa. St. 275, 19 Atl. 555; Dennison *v.* Otis, 2 Rawle 9.

Texas. — Willis *v.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025.

The minutes of the justice produced by himself and sworn to are competent evidence of the recovery of the judgment. Pollock *v.* Hoag, 4 E. D. Smith (N. Y.) 473.

To prove the issuing of a distress warrant by a justice of the peace on a particular day, the entries on the subject in the justice's docket are competent evidence where the docket

ord or proceedings sought to be shown.[54] Such docket entries are also competent proof of the service of process,[55] but not of its contents.[56]

But record entries or minutes not authorized or required by law are not admissible,[57] though it is not essential that there be a statute requiring a docket to be kept.[58]

M. Proceedings of Appellate Court. — The judgment of an appellate court may be proved either by the mandate,[59] remittitur,[60] or a certified copy of the original record of the judgment,[61] or by the certified transcript in the court below,[62] but the mere certificate

has been proved. Richardson *v.* Vice, 4 Blackf. (Ind.) 13.

When otherwise admissible a judgment of a justice court may be proved by the docket entries, the complaint on file, the summons and the return of service endorsed thereon, and the execution and return endorsed thereon. Reed *v.* Whitton, 78 Ind. 579.

Where the parties have by agreement or other conduct either directly or indirectly discontinued an action before a justice, his docket entry of a discontinuance is competent evidence. Cope *v.* Risk, 21 Pa. St. 59.

A statute requiring a justice of the peace, when removing from the town in which he was elected, to deposit his docket book with the town clerk, is merely directory; and his omission to do so, will not prevent the docket from being received in evidence. Carshore *v.* Huyck, 6 Barb. (N. Y.) 583.

54. Whether the offered docket contains an entry of the judgment relied on is a "fact to be ascertained by inspection of the docket after its introduction and not one to be proved by oral evidence before the docket should be introduced." Selsby *v.* Redlon, 19 Wis. 17.

55. An entry in the justice's docket was held competent to show the service of summons, where it appeared that the original summons was lost and the only objection to the evidence was that the original or an exemplified copy thereof was the best evidence. Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838; *citing* Gray *v.* McNeal, 12 Ga. 424, as holding that the justice's docket and not the original summons with the return of the officer endorsed thereon is the best evidence of the service of a summons; and *distinguishing* Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740, on the ground that the decision in that case applies only to courts of record.

56. The minutes of a justice of the peace, noticing upon his docket the issuing and return of execution are not evidence of the contents of such execution. Stinson *v.* State, 2 Ind. 434.

57. Armstrong *v.* State, 21 Ohio St. 357; Brown *v.* Pearson, 8 Mo. 159; Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803 (minutes of testimony). See also Gott *v.* Williams, 29 Mo. 461; Stinson *v.* State, 2 Ind. 434; Hunt *v.* Boylan, 6 N. J. L. 211; People *v.* Hayes, 63 Ill. App. 427.

58. Chapman *v.* Dodd, 10 Minn. 350; Cole *v.* Curtis, 16 Minn. 182.

59. A judgment of the court of civil appeals is properly proved by the mandate setting out a copy of the judgment, which mandate is signed by the chief justice attested by the clerk under the seal of the court. Hyde *v.* Baker, 26 Tex. Civ. App. 287, 62 S. W. 962.

60. Freeman *v.* Bigham, 65 Ga. 580.

61. Miller *v.* Vaughan, 78 Ala. 323; Draughan *v.* Tombeckbee Bank, 3 Stew. (Ala.) 54; and see *infra*, "Best and Secondary Evidence — Action of Appellate Court."

62. Hoy *v.* Couch, 5 How. (Miss.) 188. In this case the certified copy of a judgment of reversal filed in the court below was objected to because it did not contain the whole record. The court says: "The clerk of this court is required to certify every final judg-

of reversal made by the clerk of the appellate court and filed with the clerk below, though an official act is not competent evidence of a judgment of reversal or affirmance,[63] except where the judgment is only incidentally or collaterally involved.[64]

N. Transcripts, Abstracts and Docket Entries of Justice's Record. — a. *Transcript and Docket Entry in Office of Clerk of Superior Court.* — **(1.) Generally.** — Statutes frequently provide for the filing of a transcript of a justice's judgment with the clerk of the superior court and the entry of the judgment upon the judgment docket. Under such statutes the transcript so filed or a certified copy thereof and of the docket entry are competent evidence to prove the judgment.[65]

But where the statute authorizes the recording of a transcript of

ment or decree to the clerk of the court from which the cause was brought, within twenty days after the adjournment of this court. He is not required to send back the whole record, but only the judgment. His duty was therefore correctly performed, and being an official act required by law, and in due form, was admissible under the general rule. . . . The rule in reference to the introduction of records does not apply to it. It is true that it might have been necessary to identify the judgment which had been reversed, so as to give the certificate a proper application. The means of doing this were in the court below; the record of the case was there, and the identity could have been established by the proceedings in the case." See *infra*, "Copies."

63. Draughan *v.* Tombeckbee Bank, 3 Stew. (Ala.) 54; Miller *v.* Vaughan, 78 Ala. 323; Dothard *v.* Sheid, 69 Ala. 135.

The Recitals in an Execution that it has been issued on a judgment affirmed by the supreme court, and that ten per cent. damages is to be made thereon, is evidence against the sheriff of the fact, without producing the record of the affirmed judgment, as the certificate of affirmance is the record of the affirmed judgment upon which execution issues. Hill *v.* Fitzpatrick, 6 Ala. 314.

64. McCollum *v.* Hubbert, 13 Ala. 282, 48 Am. Dec. 56.

65. Herrick *v.* Ammerman, 32 Minn. 544, 21 N. W. 836; Belgard *v.* McLaughlin, 44 Hun (N. Y.) 557.

The transcript of a justice's judgment filed in the county clerk's office is competent evidence of the judgment itself and the jurisdiction of the justice, and it may be proved by a certified copy. "We think the legislature, when they made provisions for rendering justice's judgments a lien upon land, under which it may be sold, and the title transferred to the purchaser, must have intended that the document filed in the clerk's office, and upon the filing of which the judgment is to be entered or docketed, should be a substitute for an ordinary judgment record. . . . The transcript, it is conceded, is an authority to the clerk to issue an execution. It must, therefore, be evidence of a judgment having been rendered; for nothing but a judgment can warrant an execution. If evidence of a judgment for that purpose, why should it not be for the purpose of sustaining a title acquired by the purchaser under the execution thus issued? It is true the act does not require that the certificate or transcript of the justice should be sworn to by him, or be authenticated by any collateral evidence." Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233.

On a Plea of Nul Tiel Record a certified copy of a transcript so filed and docketed is sufficient to prove the judgment. State *v.* Crow, 11 Ark. 642.

Secondary Evidence. — In an action on a justice's judgment where the justice's docket has been lost or destroyed, the transcript filed with the superior court is competent sec-

the judgment only, the record so made is not competent to show proceedings subsequent thereto,[66] though it has been held that they may be proved by the transcript itself.[67] And the entry on the docket, or a certified copy thereof, while admissible to show that a judgment has been rendered by the justice,[68] is not alone competent evidence of what the judgment is, but must be accompanied by the transcript,[69] though it has been held that a recital of the transcript in the records of the circuit court is competent.[70]

(2.) In Sister State. — A justice's judgment so filed and docketed may be proved in a sister state in the same manner as the judgments of the court where the transcript is filed.[71]

(3.) In Federal Courts. — The same general rule applies in federal courts outside the state in which the record is made.[72]

ondary evidence to prove the judgment. Wise *v.* Keer Thread Co., 84 Miss. 200, 36 So. 244.

66. Where the statute authorizes transcripts of justice's judgments to be entered on the order book of the circuit court, such transcripts become a matter of record in that court and the order book is competent evidence thereof. But such book is not competent evidence of the issuance of an execution by the justice and a return thereon, since the statute does not authorize a record of these facts to be made in the order book. Mahan *v.* Power, 6 Blackf. (Ind.) 445.

67. Although the issuance of an execution by the justice and its return unsatisfied are facts which must exist before the clerk of the circuit court can issue an execution, the transcript of the justice's docket entries is competent evidence of these facts. Coonce *v.* Munday, 3 Mo. 373; Burke *v.* Miller, 46 Mo. 258 (*affirming* Transe *v.* Owens, 25 Mo. 329, and *distinguishing* Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470). But a recital in an execution issued by the clerk of the circuit court that execution had been issued and returned unsatisfied is not competent evidence of these facts. Coonce *v.* Munday, 3 Mo. 373.

68. An entry on the docket of the superior court showing that a transcript of a justice's judgment has been filed is *prima facie* evidence that the judgment has been rendered by the justice. The fact of docketing the judgment is *prima facie* evidence of its existence. Moore *v.* Edwards, 92 N. C. 43.

69. "A judgment must be proved by the judgment record, or an authentication of it. The docketing, which is no part of the judgment, but which is an act done after its entry, for the purpose, under the statute, of making it a lien on real estate, does not prove it. The case of Herrick *v.* Ammerman, 32 Minn. 544, (21 N. W. Rep. 836), relied on by respondent, does not decide that the docket alone is the judgment, but that under 1878 G. S. ch. 65, §§ 72, 73, the filed transcript with the docketing, makes the judgment of the justice a judgment of the district court, and it may be proved by copies of the transcript and rocket, authenticated by the clerk of that court." Todd *v.* Johnson, 50 Minn. 310, 52 N. W. 864.

70. Huston *v.* Bicknell, 4 Mo. 39.

71. Upham *v.* Damon, 12 Allen (Mass.) 98.

72. A judgment of the justice of the peace in Pennsylvania entered in the records of the court of common pleas was held properly proved by the record of the latter court certified by the prothonotary and the presiding judge according to the act of congress, although it consisted of short docket entries only, stating a summons and judgment by default upon a note and open account and contained no declaration or plea. Hade *v.* Brotherton, 3 Cranch C. C. 594, 11 Fed. Cas. No. 5,982 (Circuit Court for the District of Columbia).

(4.) Abstract. — Where the statute provides for the filing or docketing of a mere abstract and not a copy of a justice's judgment, the record so made while competent for some purposes is not evidence to prove the judgment where its existence must be established.[73]

(5.) On Appeal from a justice's judgment a certified transcript forms part of the record in the case and is competent evidence to the same extent as to the other portions of the record.[74]

O. Minutes, Docket Entries, Files, Memoranda, Etc. — a. *Generally.* — The competency of minutes, journal and docket entries, files in a case, and memoranda of judicial officers as evidence depends somewhat upon their nature as records under the law and practice of the state in which they are kept and whether under such law they are regarded as the final memorial or record of the proceedings which they show. Where the minutes or jour-

73. Dickinson *v.* Railroad Co., 7 W. Va. 390. But see Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011.

An authenticated copy from the recorder's docket of an official abstract of judgment, docketed under the code, is evidence that such abstract was docketed, and when, and of notice to purchasers of land under which the alleged judgment is claimed as a lien, when the existence of such judgment is properly proved; but where the existence of the judgment is put in issue by a distinct denial in the answer, an authenticated copy of such abstract, as docketed by the recorder, is not proof of judgment and will not dispense with the production of an authenticated copy of such judgment. Anderson *v.* Nagle, 12 W. Va. 98.

74. Where a cause is removed from a justice court by appeal to a court of common pleas, the return of the justice is intended for the information and guidance of the court and not as evidence to the jury. And it is conclusive only as to those matters required by law to be contained in it. It cannot ordinarily be used as evidence of any other facts recited therein. But a statement in the return as to the admissions of the parties on the trial below may properly be considered as embraced in the words of the statute which require the justice to "state the admissions of the parties and the issue joined," and hence may properly be received in evidence. Rawson *v.* Adams, 17 Johns. (N. Y.) 130.

The certified transcript of a judgment obtained in a justice's court though irregular in form is admissible and sufficient evidence of the judgment on appeal. Payne *v.* Taylor, 34 Ill. App. 491.

Amended Return. — On an appeal from a judgment of a justice court the justice may properly be allowed to amend his transcript and return, and the return so amended is a part of the record like any other paper and may be read to the jury as showing the matters in issue. Cooper *v.* Woodrow, 3 Iowa 189.

In an Action on a Foreign Judgment Rendered on an Appeal from a judgment of a justice court, an authenticated copy of the transcript from the docket of the justice who first tried the cause, which transcript was embraced in the record and proceedings of the court rendering the judgment sued upon, is competent evidence. Clemmer *v.* Cooper, 24 Iowa 185, 95 Am. Dec. 720.

On an Appeal by a Garnishee from a judgment against the defendant and himself in a justice's court from which judgment the defendant has taken no appeal, the transcript of the justice is admissible as competent evidence of the judgment upon which to base the proceedings against the garnishee, since the appeal by the garnishee alone did not vacate the judgment against the defendant. Flannigen *v.* Pope, 97 Ill. App. 263.

nal entries of a court constitute the record of its proceedings they are competent evidence thereof.[75]

Thus judgments, orders and decrees are properly proved by the minutes or calendar entries where the latter form the legal record thereof.[76]

Where, however, the record consists of a judgment roll or some more formal writing, the latter, if in existence, is the proper evidence, and not the minutes or other docket entry by the clerk.[77] And where a judgment or order of the court is required to be recorded in the minutes, a copy of a detached paper though signed

75. Norvell *v.* McHenry, 1 Mich. 227; Crane *v.* Hardy, 1 Mich. 56. See Clark *v.* Cassidy, 64 Ga. 662; Browning *v.* Flanagin, 22 N. J. L. 567.

Statute. — Certified copies of minutes of any court of record in this state are admissible in evidence under provisions of statute making copies of record and judicial proceedings duly authenticated admissible in all cases in this state. Hoodless *v.* Jernigan, 46 Fla. 213, 35 So. 656.

Under an indictment for illegal voting, the defendant's conviction of larceny by a judgment of the county court, which disqualifies him to exercise the right of an elector, may be proved by the trial docket of the court, when shown to be the only record book of the court and one in which the final record of its judgment was kept. Gandy *v.* State, 86 Ala. 20, 5 So. 420.

76. The record which the clerk is required to make of all the proceedings in a suit is the final record of the cause, answering to the judgment roll of the common law, and is the only legal evidence of judgment, to be established by the record itself, an examined copy, or a copy attested by the clerk. Ansley *v.* Corlas, 9 Ala. 973.

The minute book in order to prove a valid judgment need not show a convening order, or state where or by what judge the court was held, where the minute book is fully identified by clerk, and judgment entry therein is in regular form and declares that on a trial before the court on a designated day of a regular term of said court, the parties approving by counsel a recovery of sum stated was had by plaintiff against defendant. Ayers *v.* Roper, 111 Ala. 651, 20 So. 460.

Journal Entries of interlocutory decrees and orders in chancery are to be considered as originals and are competent evidence without producing the original. "We can . . . perceive no good reason why the journal entries were not properly admitted for they are as much the originals as orders drawn by a solicitor and filed, and are the evidence of such orders preserved under the immediate direction of the court." Lothrop *v.* Southworth, 5 Mich. 436.

77. Choppin *v.* Michel, 11 La. 233 (minutes incompetent to prove judgment though signed by judge); People *v.* Gray, 25 Wend. (N. Y.) 465. See Ferguson *v.* Harwood, 7 Cranch (U. S.) 408; Steele *v.* Steele, 89 Ill. 51; Gillett *v.* Booth, 95 Ill. 183; Hood *v.* Hood, 2 Grant's Cas. (Pa.) 229.

When the final record of a case is made up, it, and not the original papers in the case, is proper evidence to establish what the record contains. Duncan *v.* Freeman, 109 Ala. 185, 19 So. 433; Brown *v.* Isbell, 11 Ala. 1009.

"The minutes of a court are not a record nor any part of a record, but mere memoranda to guide the clerk in making up the record. They have no probative force in a proceeding of this character and should never have been admitted as evidence in the case." Moore *v.* Bruner, 31 Ill. App. 400 (in which the clerk testified that the formal record of the

by the court and filed is not competent evidence of the judgment or order which it purports to be.[78]

In some cases docket entries have been held admissible,[79] but the general rule is that a judgment or decree cannot be proved by the docket entry thereof if any other record of it is in existence.[80]

judgment had not yet been made up).

An entry upon the appearance docket of a district court indicating the return of a writ of attachment issued in the cause is not admissible in evidence in proof of the service of such writ, as the Code requires that the facts constituting the service shall be stated in the return. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989.

Memorandum of clerk in his register of actions, "cause tried July 23, 1888" is by itself no evidence that the case had been tried. State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80.

The mere memorandum of the clerk upon the margin of his docket or his minutes cannot be regarded as legal evidence of any fact, until it is shown that such entries are the best evidence the nature of the case admits of. So a memorandum in the handwriting of the clerk on margin of the execution docket is not evidence of the issue and return of an execution unless its existence at one time and subsequent loss are first proved. Hanna, Admr. *v.* Price, 23 Ala. 826.

Ancient and Imperfectly Kept Records. — Where an execution purchaser offered a mere memorandum from clerk's docket of the amount of judgment dated forty years back, and proved that nothing more could be found among the papers in the suit, it was held that the entry having been made in a new and frontier county at close of Revolutionary War, might be received as a record, though if judgment were of recent date it would be otherwise. Walker *v.* Greenlee, 10 N. C. 281.

78. In International & G. N. R. Co. *v.* Moore (Tex. Civ. App.), 32 S. W. 379, writings to which were attached the clerk's certificate "that the foregoing printed pages constitute true and correct copies, each, of all the original orders appointing receivers, . . . in the above respectively styled causes, now on file in said court," were held inadmissible because the certificate did not show that the orders were entered upon the minutes of the court and because the minutes were the best evidence, the statute requiring all judgments to be entered of record.

79. Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

See also Ruggles *v.* Gaily, 2 Rawle (Pa.) 232.

In State *v.* Shaw, 73 Vt. 149, 50 Atl. 863, the docket entries in another case were held admissible to show the action taken by the court in that case. *Citing* Armstrong *v.* Colby, 47 Vt. 359.

In a proceeding for the sale of land for the payment of debts owing by an intestate's estate, where contestants set up bar of statute of non-claim, and petitioner contends that said claims were filed in the office of the probate judge within the prescribed time; the entry in the docket required by statute to be kept by the probate judge is the best evidence, and in the absence of an accounting for failure to introduce such docket entry the testimony of the probate judge that the claims involved in the proceedings were presented in his office is inadmissible. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

80. Leveringe *v.* Dayton, 4 Wash. C. C. 698, 15 Fed Cas. No. 8,288; Brown *v.* Hathaway, 10 Minn. 303; Lauby *v.* Gill, 42 Misc. 334, 86 N. Y. Supp. 718; Baxter *v.* Pritchard, 113 Iowa 422, 85 N. W. 633; Austin *v.* Howe, 17 Vt. 654.

A copy of the docket of a judgment is not legal evidence to prove the existence of such judgment except in special cases provided for by statute. But the record of a judgment or a sworn or exemplified copy thereof must be produced. Baker *v.*

But when the record has not been extended or made up, the minutes or docket entries and files of the case are admissible to prove the proceedings of the court.[81]

Where no particular form for the record is provided by law, informal minutes or memoranda may be sufficient.[82]

Kingsland, 10 Paige (N. Y.) 366; Handly *v.* Greene, 15 Barb. (N. Y.) 601.

81. *Alabama.* — Gandy *v.* State, 86 Ala. 20, 5 So. 420; Gay *v.* Rogers, 109 Ala. 624, 20 So. 37; Ansley *v.* Carlos, 9 Ala. 973.

Maine. — Jay *v.* Livermore, 56 Me. 107.

Massachusetts. — Pruden *v.* Alden, 23 Pick. 184, 34 Am. Dec. 51 (minutes of clerk on the docket); Central Bridge Corp. *v.* City of Lowell, 15 Gray 106.

Ohio. — Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459; Chapman *v.* Seeley, 8 Ohio Cir. Ct. 179.

Vermont. — Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628.

Wisconsin. — Jackson *v.* Astor, 1 Pin. 137.

A motion entered on the docket with the memorandum of the judge written across it showing his action thereon, though not spread upon the minutes of the court, is *quasi* a record and admissible in evidence to prove the facts which it imports. Governor, use of etc. *v.* Bancroft, 16 Ala. 605.

Files and docket entries of the superior court in another action, the record of which has not been extended, are admissible in evidence. Luce *v.* Dexter, 135 Mass. 23.

When it is not shown that a final record of an executor's settlement has been made up, a certified transcript is not required, but original papers are competent evidence. Wharton *v.* Thomason, 78 Ala. 45; Buffington *v.* Cook, 39 Ala. 64.

The Files in the case are competent evidence when a formal record has not been made. Sharp *v.* Lumley, 34 Cal. 611; Wharton *v.* Thomason, 78 Ala. 45; Watts *v.* Clegg, 48 Ala. 561; Kahn *v.* Boltz & Kahn, 39 Ala. 66; Barron *v.* Tart, 18 Ala. 668.

A duly authenticated copy of the docket entries of a police court is admissible in evidence if the record has not been extended, since the docket is the record unless and until it has been extended. Com. *v.* Meehan, 170 Mass. 362, 49 N. E. 648.

A complete record not being made up, the journal and docket entries and all the files and papers properly connected with the case are admissible in evidence. Lessee of Morgan *v.* Burnett, 18 Ohio 535.

A former conviction may be proved by the original complaint and warrant and the minutes endorsed upon the warrant where the record has not been extended. State *v.* Narcarm, 69 N. H. 237, 45 Atl. 744; State *v.* Cox, 69 N. H. 246, 41 Atl. 862.

Pendency of Action. — The pendency of an action in court is properly proved by the docket entry or a copy thereof; the presumption being in the absence of evidence to the contrary that the officer properly performed his official duty and that the action has not been disposed of. Philadelphia, W. & B. R. Co. *v.* Howard, 13 How. (U. S.) 307.

Entries in the docket are the only proper evidence of judgment, where the record of judgment is not fully extended. Davis *v.* Smith, 79 Me. 351, 10 Atl. 55.

Statute. — People *v.* Gray, 25 Wend. (N. Y.) 465; Carpenter *v.* Simmons, 1 Rob. (N. Y.) 360, 28 How. Pr. 12.

An Entry on the Trial List at a stated term of the court, made by the president, of a substitution of a defendant in ejectment, is sufficient evidence of such substitution, though not transferred by the clerk, as a trial list of a stated term is a monument from the entries upon which the record may be made up at any distant time. Wilkins *v.* Anderson, 11 Pa. St. 399.

82. Com. *v.* Bolkom, 3 Pick. (Mass.) 281; Forthree *v.* Lawrence, 30 Miss. 416. See Headman *v.* Rose,

b. *Judge's Minutes and Memoranda.* — The minutes and memoranda made by the judge are not competent primary evidence of the proceedings had before him and his action therein,[83] except by statute.[84]

63 Ga. 458. But see Newton *v.* Mutual Ben. L. Ins. Co., 15 Hun (N. Y.) 595.

Where no formal record is required to be made, a copy of the docket entries properly proved is admissible in evidence. Philadelphia, W. & B. R. Co. *v.* Howard, 13 How. (U. S.) 307; *citing* Arundell *v.* White, 14 East (Eng.) 216; Jones *v.* Randall, 1 Cowp. (Eng.) 17; Reg. *v.* Reaveley, 8 Ad. & El. (Eng.) 806, and *distinguishing* apparently contrary English decisions on the ground that they were cases in which a formal record was required by law.

The docket entry and original papers in insolvency showing a discharge are sufficient evidence of the fact, and no formal order written out and signed by the judge sitting need be produced. Willison *v.* Douglas, 66 Md. 99, 6 Atl. 530.

A statute requiring justices to record their proceedings prescribes no particular form for the record; hence a copy of the original writ and of the officer's return thereon with a copy of the minutes of the continuance of the suit and the minutes of the final proceedings signed by the justice, all of which is certified by the justice to be a true copy, is properly admitted as a certified copy of the record. Starbird *v.* Moore, 21 Vt. 529, *distinguishing* Strong *v.* Bradley, 13 Vt. 9, "where the original files and entries upon them were offered in evidence instead of a record;" and Nye *v.* Kellam, 18 Vt. 594, "where the record was held to be defective upon its face."

83. Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206; Gilbert *v.* McEachen, 38 Miss. 469 (written memorandum of the judge made on the inventory, or other papers relating to the guardianship, not competent evidence of an order allowing more than the income to be spent on the ward's education); McGuire *v.* Goodman, 31 Ill. App. 420; Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434.

The minutes on the judge's docket are not admissible to prove the proceedings in another suit, but the record must be produced. Gurnea *v.* Seeley, 66 Ill. 500; Smith *v.* State, 62 Ala. 29 (*distinguishing* Foster *v.* State, 38 Ala. 425).

The bench docket of the trial court is not a part of the record unless made so by statute, and copies of extracts therefrom do not properly form a part of a transcript of the record of a particular case. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

A justice's entries in his calendar are not legal evidence of a judgment. "The justice's calendar is no part of the court record provided by law. It is essentially in the nature of a private memorandum of the conclusion reached. It is true it is designed in part as a communication to the clerk, but it has no more legal force than an oral communication would have." Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

An entry on a probate judge's docket made in vacation and requiring an administratrix to give additional security is not admissible where it appears that the entry was never carried to the minutes of the court. The statute requires the judge to enter orders made in vacation upon the minutes of the court, and an order not so entered cannot be proved. Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389.

84. Where the statute requires a justice to take minutes of an examination of a garnishee defendant and to file the same with the other papers in the cause, such paper is the original and best evidence of the examination, and a docket entry would not be competent without accounting for such original paper. Watson *v.* Kane, 31 Mich. 61.

The original minutes of a surrogate of testimony taken in a controversy in reference to the granting of letters of administration are not rendered inadmissible by statute requir-

c. *Judgment Book.* — Where by law a judgment book is required to be kept, it is proper evidence of the judgment of the court.[85]

d. *Execution Docket.* — An execution docket required by law to be kept has been held to be competent primary evidence of an execution,[86] and of other facts properly recorded therein,[87] though the general rule seems to be to the contrary.[88] Such a docket is, at least, secondary evidence of a lost execution.[89]

ing the testimony taken to be entered in a book provided for that purpose and preserved as a part of the records of the office. Haddon *v.* Lundy, 59 N. Y. 320.

85. Baxter *v.* Pritchard, 113 Iowa 422, 85 N. W. 633. See also Williams *v.* McGrade, 13 Minn. 46.

In an action of ejectment by one claiming title through a mortgage foreclosure, where it appears that the judgment roll in the action of foreclosure is lost, the judgment-book is competent evidence of what matters were determined and passed upon. The court said: "The judgment-book is part of the records of the court, and is the final repository of the determination of the court upon every cause which passes to judgment (Code Civ. Proc. sec 88). It is, of course, a judicial record, and is competent evidence of what matters were considered and passed upon by the court (Code Civ. Proc. secs. 1904, 1905); it is indeed the most permanent memorial of those matters ordained by law to be kept. As the record offered in this instance was competent evidence of the final adjudication in the former suit, so its recitals showing acquisition of jurisdiction over the defendants therein were evidence of the facts recited; the judgment thus carried on its face evidence of its validity. . . . We are not unmindful of the decision in Wickersham *v.* Johnston, 104 Cal. 407, and the previous cases there followed, . . . nor do we now impugn the principle on which they proceed, viz., that to render a judgment admissible in evidence it must be shown to be a valid judgment, and that the appropriate method of doing this is to produce the roll so that it may be seen whether the court had jurisdiction to determine the cause. But in none of those cases does it appear that facts showing that the court had jurisdiction were recited in the judgment itself; since such recitals are evidence of their own truth, as numerous decisions of this court establish."

"Besides Wickersham *v.* Johnston and Young *v.* Rosenbaum, were cases of foreign judgments, between which and domestic judgments it may be that a distinction lies as to mode of proof." Simmons *v.* Threshour, 118 Cal. 100, 50 Pac. 312.

86. The execution docket of the district clerk of a county is by law made a record; hence entries therein are entitled to as much dignity as the execution itself, and certified copies of such entries are competent evidence. Schleicher *v.* Markward, 61 Tex. 99, recognizing that certified copies of such entries were held proper evidence even before the passage of this law.

87. Ross *v.* Davis, 30 Ga. 823 (to show delivery of *fi. fa.'s* to sheriff and amount of cash due clerk on cost *fi. fa.'s.*) But see Duff *v.* Ivy, 3 Stew. (Ala.) 140.

88. Ayers *v.* Roper, 111 Ala. 651, 20 So. 460. See also Snyder *v.* Norris, 6 Blackf. (Ind.) 33 and *infra,* this article "Best and Secondary Evidence — Judicial Records." But see Hartley *v.* Chandler, 6 Ala. 857; Stewart *v.* Conner, 9 Ala. 803.

The docket entries of a prothonotary are not evidence of the issuing, service and return of a writ. They are merely minutes of the officer; and the writ itself, with the return endorsed on it, should be produced. Vincent *v.* Lessee of Huff, 4 Serg. & R. (Pa.) 298.

89. Curlee *v.* Smith, 91 N. C. 112; Buchanan *v.* Moore, 10 Serg. & R. (Pa.) 275.

Where an execution has been lost and it becomes necessary to prove that it was issued, a transcript from

e. *As Secondary Evidence.* — The minutes and other entries in a case may be competent as secondary evidence of the lost or destroyed records.[90]

f. *Memoranda and Minutes of Inferior Court.* — Informal minutes[91] and memoranda made on the files of the case[92] in an inferior court are competent evidence of its proceedings where a formal

the execution docket is admissible as tending to prove that fact. And the entries preliminary to the return and which are necessary to an understanding of the last entry constitute evidence to be considered with all the other evidence on the subject. Becker *v.* Quigg, 54 Ill. 390.

90. Smith *v.* Allen, 112 N. C. 223, 16 S. E. 932; Hair *v.* Hollaman, 94 N. C. 14; Hanna, Admr., *v.* Price, 23 Ala. 826. See also "Best and Secondary Evidence — Judicial Records."

Memorandum on Judge's Calendar. Where the original records of the case are shown to have been destroyed by fire, parol evidence of the memorandum made by the judge upon his calendar showing that a decree of divorce had been ordered is admissible as tending to show that such a decree had been entered of record. *In re* Estate of Edwards, 58 Iowa 431, 10 N. W. 793. See also Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

Calendar Entries. — Where the files in a cause have been lost, the calendar entries may be given in evidence to show the steps taken in the cause before judgment. Norvell *v.* McHenry, 1 Mich. 227.

91. Chamberlain *v.* Sands, 27 Me. 458.

A Magistrate's Minutes of an oral recognizance entered into by a judgment debtor are competent if the extended record has not been made. "It has often been held that the minutes or memorandum upon the docket of the clerk of the court of a magistrate are competent evidence of an order or proceeding in court in case the extended record has not been made. . . . Such memorandum though brief in its terms is competent evidence to establish the fact of taking the recognizance before the same has been extended." Townsend *v.* Way, 5 Allen (Mass.) 426.

The testimony of a justice of the peace, to the former existence of a complaint and warrant, with his minutes endorsed thereon, of the subsequent proceedings in a case before him, though not extended into a complete record, is sufficient, upon proof of a thorough and unsuccessful search among his papers for the original, to warrant the admission of secondary evidence of their contents. Tillotson *v.* Warner, 3 Gray (Mass.) 574.

92. A minute entry by a police justice upon the files of the case stating the non-appearance of the accused and the forfeiture of his recognizance and ordering his rearrest is proper and sufficient evidence of his default in an action on a recognizance. People *v.* Gordan, 39 Mich. 259, in which, however, it appeared that the clerk had failed to make up the record from this minute. *Contra.* — Strong *v.* Bradley, 13 Vt. 9; Nye *v.* Kellam, 18 Vt. 594.

The original summons issued by a justice of the peace, containing an endorsement of its service and also of the entry of judgment against such parties for a specified sum, is not competent evidence to prove the judgment, since the law requires the justice to keep a docket and enter his judgments thereon, which is the proper evidence of the judgment. And where no docket entry has been made at the time such summons is offered and executed it is not error to refuse to allow the justice who was in court to make the entry of judgment in the docket *nunc pro tunc.* The proper way to amend the judicial record is by application to the court to which it belongs at the proper time. Ramsey *v.* Cole, 84 Ga. 147, 10 S. E. 598.

Where a Justice Has Deceased without making a formal record, minutes of a judgment rendered by him made on the writ if they show

record has not been made. But such memoranda or minutes must show the particular proceeding or act in question otherwise than by mere inference; they must be some sort of a record of that act or proceeding.[93] Statutes sometimes provide for the use of the files and minutes of a justice where the formal record has not been made.[94]

O. Court Stenographer's Notes. — a. *Generally.* — A court stenographer's notes, except by statute, are not public records and are not admissible as such, although accompanied by a certificate authenticating them.[95] It has been held, however, that under a statute admitting certified copies of papers kept under authority of law, a certified copy of a court stenographer's notes is admissible in all cases where the original would be competent.[96]

a judgment rendered and the amount may be received as evidence of the judgment. Story *v.* Kimball, 6 Vt. 541, where the court recognizes that no particular form of record is required to be made by the justice and that great liberality should be used in passing upon the sufficiency and admissibility of an informal record.

93. In Davidson *v.* Murphy, 13 Conn. 213, as evidence of the judgment sued on the plaintiff offered a writ with an endorsement thereon of its service, the declaration and the following minutes in the handwriting of the justice before whom the case was tried, signed by him: "Court fees paid. Plea, general issue, non-assumpsit—and issue. Continued 26th September, 1836. Damages, $5.75." These minutes also included an itemized bill of costs. The plaintiff also offered an execution in the usual form, counting on a judgment between the parties to the action, recovered before the justice, on the 26th of September, 1836, for the amount of damages and costs stated in the minutes, endorsed with a return of *non est inventus.* It was admitted that the justice had since died. These documents were held not sufficient to constitute a record of a judgment and therefore inadmissible, there being no showing of the loss of a once existing record. "A record, in judicial proceedings, is a precise history of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer, for the purpose of perpetuating the exact state of facts." The court held that there was nothing in these minutes except by way of inference to show an appearance by the parties or the rendition of a judgment. "It appears to be a mere *memorandum* or minutes of the magistrate, kept to assist him in making up his record. Such minutes are recognized in law, as something distinct from the record." The court further held that an execution is not a record of the judgment. "Neither the minutes of the justice, nor the execution signed by him, nor both, constitute a record." In reply to the contention that this evidence should have been admitted because the justice had died before he made a record in the case it was held that there was no valid judgment without a record, *disapproving* Story *v.* Kimball, 6 Vt. 541.

94. West *v.* Hayes, 51 Conn. 533 (when the justice had died or removed from state).

95. Smith *v.* State, 42 Neb. 356, 60 N. W. 585; Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717.

A stenographer's minutes are not the best evidence of what transpires at a trial so as to render oral evidence of the testimony of a witness at the trial incompetent. "Any person who is present at a trial and hears the evidence is competent to testify with regard thereto." Weinhandler *v.* Eastern Brew. Co., 46 Misc. 584, 92 N. Y. Supp. 792. Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

96. Spielman *v.* Flynn, 19 Neb. 342, 27 N. W. 224.

b. *Statute.* — Statutes sometimes provide for the use in certain cases of a certified transcript of the official reporter's notes, but under such statutes they are only competent for the purposes therein specified.[97]

47. Necessity of Producing Complete Record. — A. GENERALLY. Generally speaking a mere extract from a record or document is not admissible in evidence unless it appears that it contains all that relates to the matter in question.[98] This, however, does not mean that the complete records of a particular office must be produced, but merely that so much thereof as may be relevant and material to the matter in issue must be offered.[99] Thus where the record is in a book or in such form that it contains other unrelated

97. By statute in Iowa (ch. 9, acts of 27th Gen. Assembly) it is provided that a transcript of the evidence taken in the case, certified by the official reporter, when material and competent shall be admissible in evidence on any retrial of the case or proceeding in which the same was taken, and for the purpose of impeachment in any case; and shall have the same force and effect as depositions; hence such transcript is competent only on a retrial or for purposes of impeachment. Walker *v.* Walker, 117 Iowa 609, 91 N. W. 908.

A stenographer's notes of a party's testimony in a civil case cannot except by consent be introduced to contradict him on a subsequent trial of the same case; and a statute authorizing the minutes of the official stenographer to be used in settling a bill of exceptions does not give them the character of depositions or of record evidence generally. Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717.

98. State *v.* Clark, 41 N. J. L. 486; Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598; Smith *v.* Rich, 37 Mich. 549; Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444.

A paper purporting to be "a certified extract from the general draft of the districts north and west of the Ohio and Alleghany, as framed by the surveyor general. . . . remaining in the surveyor general's office" was held inadmissible because it was only an extract and it was impossible for the court to say how far the parts not certified might throw light on the mutilated part offered in evidence. "It is for the court and not the officer who certifies this paper to determine this." Griffith *v.* Tunckhouser, Pet. C .C. 418, 11 Fed. Cas. No. 5,823. To the same effect Griffith *v.* Evans, Pet. C. C. 166, 11 Fed. Cas. No. 5,822.

Detached Leaf from Postoffice Record. — In United States *v.* Cummings, 25 Fed. Cas. No. 14,900, a leaf from the register of the postoffice at a particular place showing the entry of a certain letter was offered in evidence, but it was held necessary to produce the register itself.

A document although certified to be a true copy from the records is not admissible as such where it shows on its face that it is merely a succession of extracts from various documents. Barnet *v.* Woodbury, 40 Vt. 266.

Certificate attached to copy as evidence of completeness of record. See *infra*, "Certified Copies — Certificate as Evidence."

99. Wallace *v.* Douglas, 114 N. C. 450, 19 S. E. 668; Farr *v.* Swan, 2 Pa. St. 245.

"The general rule may be stated to be, that extracts are not admissible in evidence, unless it appears that the copy of the record, and, by parity of reason, of any other instrument, contains all that relates to the matter in question." Morrill *v.* Foster, 33 N. H. 379.

In a proceeding to set aside a tax deed as a cloud upon title, the certified copies of the records relied upon to show the invalidity of the tax deed

matters, only that part which is relevant to the issues or which forms a record of a separate and distinct proceeding need be produced.[1] The record, however, of a meeting of a board or other official body is ordinarily considered a single record which must all be produced.[2]

Practice of Land Office. — Where it is the practice of the commissioner of the general land office in certifying copies of his records and documents on file therein to include in the transcript only those portions which apply to the particular property involved in the action, such a certified copy though not containing the complete record is nevertheless admissible.[3]

B. Necessity of Using Whole Record. — Where the complete record is present in court at the opposite party's disposal, no objection can be made to extracts therefrom.[4]

If a party produces a record he need not read the whole of it,

need contain only so much of the record as relates to the lots in suit. Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757.

1. Wallace *v.* Douglas, 114 N. C. 450, 19 S. E. 668.

"In admitting copies of records it would be absurd to require a copy of the whole book. Copies of so much of the record as relates to the subject-matter of the suit are allowed. But there should generally be an entire copy of the proceedings of a particular meeting or anything else done and transacted at a particular time. Records are usually in parts and there should be a copy of all the matter made up and attested as a record at any particular time so that the jury may have the whole evidence and the courts be enabled to give the right construction to what was done. But where what relates to the matter in question is a distinct and independent record a copy of that is sufficient." Woods *v.* Banks, 14 N. H. 101.

Under a statute providing for the admission of certified copies of the records of the proceedings of the board of supervisors, a copy of certain portions of such records containing everything that was done in regard to a certain matter in issue is admissible in evidence, although it does not contain all of the record of the proceedings on a certain day or session of the board. Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

2. Myers *v.* Clark, 41 N. J. L. 486 (town meeting). See Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106; Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

3. A certified copy of the list of lands selected for a railroad company as required by law, filed with the land office, which copy is certified to by the land commissioner, is admissible in evidence although the certificate warrants the inference that the list of lands is not complete. "It seems to be the practice of such department to certify a document so far as it applies to the particular property involved, and in this case the list included only the land in question here. To have certified the whole list would have made unnecessary expense and encumbered the record with voluminous papers of no value. The same practice prevails in certifying field notes of surveys. See Gilman *v.* Riopelle, 18 Mich. 158; Lacey *v.* Davis, 4 Id. 150, where it is held that authentication according to the practice of the department makes papers admissible though not certified in accordance with our statutes." Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837.

4. An objection to extracts of records is sufficiently answered by the fact that the records themselves are present in court and at the disposal of the other party. Davis *v.* Mason, 4 Pick. (Mass.) 156.

but his opponent may read portions thereof which he omitted.[5]

C. Record or Document Recited or Referred To. — Although another document is recited or referred to for purposes of description or otherwise, it need not be produced.[6]

D. Endorsements upon an original document need not appear in a certified copy of the record of such document where the endorsement though required by law is not required to be recorded.[7]

E. Judicial Records. — a. *Generally.* — Although it is sometimes said that the record of a particular case or proceeding is an entirety and must be produced as a whole,[8] this depends upon the

5. A party who produces a judicial record need not read the whole of it, but his adversary may read the omitted portions. Davis *v.* Forrest, 2 Cranch C. C. 23, 7 Fed. Cas. No. 3,634.

A party is not bound to read the whole of a record offered by him in evidence, but only such part as he may deem necessary to prove the facts he desires to establish; the opposite party has a right to have the balance read or such parts as he may deem material to his side of the question. Haile *v.* Hill, 13 Mo. 612.

6. Where an original grant could not be obtained, and a copy thereof was allowed in evidence, a copy of the grant was admitted without any copy of the plat to which the copy of the grant referred. Rosamond *v.* M'Ilwain, 2 Brev. (S. C.) 132.

But a plat being part of the record, a certified copy should be annexed to the transcript, else the record is not admissible. Orndorff *v.* Munna, 3 H. & J. (Md.) 70.

A mere reference in any public act to a certain plan or record, for the sake of certainty, does not make it a part of the act, and hence a certified copy of the act is complete without such plan or record. Garrish *v.* Hyman, 29 La. Ann. 28.

A copy of the record of letters patent is not inadmissible because it fails to contain a copy of the map which the letters patent stated was annexed to them, where the patent shows that such maps were also filed with the clerk of the county in which the land was situated and with the commissioner of the land office. New York Cent. & H. R. R. Co. *v.* Brockway Brick Co., 10 App. Div. 387, 41 N. Y. Supp. 762.

7. Hedden *v.* Overton, 4 Bibb (Ky.) 406, holding that a copy of the record of a patent need not show the register's endorsement on the original that the grantee is entitled to the land, since such endorsement though a necessary one was not required to be recorded.

8. *Alabama.* — Cargile *v.* Ragan, 65 Ala. 287; Farley *v.* Whitehead, 63 Ala. 295.

Illinois. — Vail *v.* Iglehart, 69 Ill. 332.

Kentucky. — McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187.

Louisiana. — Dismukes *v.* Musgrove, 8 Mart. (N. S.) 375; Briggs, Lacoste & Co. *v.* Campbell, 19 La. 524.

Maine. — Jay *v.* East Livermore, 56 Me. 107.

Michigan. — Platt *v.* Stewart, 10 Mich. 260.

Missouri. — Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444.

South Carolina. — Vance *v.* Reardon, 2 Nott & McC. 299.

Tennessee — Renshaw *v.* Tullahoma First Nat. Bank, 63 S. W. 194; Phipp *v.* Caldwell, 1 Heisk. 349.

Virginia. — Shite *v.* Clay, 7 Leigh 68.

A copy of a bankrupt's schedule is by itself incompetent, being but part of the whole record. Wilson *v.* Harper, 5 Rich. (S. C.) 294.

A deposition taken in another suit between the same parties annexed to the bill by way of schedule, is incompetent where there is no certified copy of any proceedings in which it was taken produced. Camden & A. R. Co. *v.* Stewart, 19 N. J. Eq. 343.

Under a statute providing that the exemplification of any record of any last will and testament proved before the surrogate of any county,

purpose for which the record is offered. To prove the issues in another action the complete record must be offered.[9]

But in general it is only necessary to produce those parts of a judicial record which pertain to the matter sought to be proved,[10]

etc., certified under the seal of the officer having such record, shall be received in evidence with the same effect as the original will. a mere exemplification of the will recorded in the surrogate's court as having been proved, which exemplification does not contain the proof taken before the surrogate, is not sufficient, since it is not a complete copy of the record which includes the proofs as well as the will. Hill *v.* Crockford, 24 N. Y. 128.

A Plea of Guilty based upon an affidavit charging the defendant with a criminal act, is not admissible in a civil action for the same act without producing such affidavit or a copy thereof. Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

9. To prove what the question in issue in a previous suit was, the complete record of the suit, and not a detached special plea filed in it, must be produced. Foot *v.* Glover, 4 Blackf. (Ind.) 313.

10. *United States.* — Priest *v.* Glenn, 51 Fed. 400, 2 C. C. A. 305; O'Hara *v.* Mobile etc. R. Co., 76 Fed. 718, 22 C. C. A. 512.

Illinois. — Walker *v.* Doane, 108 Ill. 236 (separate portions of the record may be offered one at a time); Phillips *v.* Webster, 85 Ill. 146.

Indiana. — Anderson *v.* Ackerman, 88 Ind. 481; Jones *v.* Levi, 72 Ind. 586.

Texas. — Townsend *v.* Munger, 9 Tex. 300; Lee *v.* Wilkins, 1 Posey Unrep. Cas. 287.

Where a sheriff is sued for waste of property seized under legal process, the record of the case in which the writ was issued, including the writ, may be read without reading the return. State *v.* Lawson, 8 Ark. 380, 47 Am. Dec. 728.

A bill and a decree in another suit are admissible in evidence without producing the remainder of the record when offered for the purpose of showing that the land thereby decreed to be conveyed was the same as that described in the bond which formed the basis of the action in which the evidence was offered, since only that portion of the record which concerns the matter in question need be produced. Francis *v.* Hazlerig, 1 A. K. Marsh. (Ky.) 93.

Except in Criminal Trial for Perjury it is only necessary to introduce in evidence such parts of the record of another proceeding as relate to matters in issue. By the code the consent of accused is necessary before part only of the record may be given in evidence in a prosecution for perjury. McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415.

A certified copy of some of the orders made in a criminal case is not inadmissible because unaccompanied by all of the remainder of the record where the certificate of the clerk shows it to be a true copy of all of the entries which the certificate purports to certify, and the entries offered include the record of the rendition of a verdict of not guilty, although not including the formal judgment and discharge of the prisoner. McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883.

In Louisiana the production of the entire record in mortuary and in insolvency proceedings is not necessary in order to prove a single fact or date of a certain part of the proceedings. Sarrazin *v.* W. R. Irby Cigar & Tobacco Co., 93 Fed. 624, 35 C. C. A. 496; Henderson *v.* Maxwell, 22 La. Ann. 357.

Foreign Judicial Record. — Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139; Packard *v.* Hill, 7 Cow. (N. Y.) 434.

Presumptions in Aid of Partial Record. — A part of a record will generally prove what it purports to prove but cannot prove more than that, and no liberal presumptions can be entertained or resorted to for the purpose of supplying omissions, aid-

and if the opposite party desires more of the record he must himself offer it.[11]

And where the purpose is not to prove a judicial proceeding but rather to show the contents of a part of the record or that a particular step was taken, only the portion immediately involved need be shown.[12] The pleadings alone need be introduced where relied on as an admission[13] or waiver.[14]

b. *Effect of Certificate.* — It has been held that when a certified copy of a judicial record is offered in evidence its admissibility is governed by the certificate, and if that recites that the copy is a complete transcript of the record as it appears the copy is admissible for what it is worth although it may be necessary to supplement it by other evidence.[15]

c. *Statute.* — By statute particular portions of judicial records

ing deficiencies or explaining the import of its language. It is only when the whole of the record is introduced in evidence that liberal presumptions can be invoked to aid the record. Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Inventory of Estate. — Where the object is to establish that certain property made part of the estate, an extract from the inventory is proper evidence, and the whole need not be produced. Thatcher *v.* Camlier, 4 La. 272.

11. Priest *v.* Glenn, 51 Fed. 400, 2 C. C. A. 305; Walker *v.* Doane, 108 Ill. 236.

12. Clayton *v.* Clayton, 4 Colo. 410.

The entire record need not be produced when parts of record are used in evidence as original papers and not in connection with such record. Brown *v.* Patton (Tenn.), 48 S. W. 277.

Extracts from the inventory of an estate or from the proces-verbal of the sale, when duly certified, are admissible in evidence without producing copies of the whole of the originals. Perkins *v.* Dickson, 1 Rob. (La.) 413.

A certified copy of an order of the federal court adjudging a corporation a bankrupt, being a copy of a judgment of the federal court, is competent evidence under statute relating to exemplification of judicial records, without production of remainder of record, when offered collaterally to main issue to show that order was made. Rosenfeld *v.* Siegfried, 91 Mo. App. 169.

Where the existence of another decree is the only point of inquiry, an exemplification of the decree alone is sufficient, without proof of the other proceedings. Adams *v.* Olive, 62 Ala. 418; Locke *v.* Winston, 10 Ala. 849.

13. Henderson *v.* Cargill, 31 Miss. 367; Clayton *v.* Clayton, 4 Colo. 410; Gay *v.* Rogers, 109 Ala. 624, 20 So. 37.

14. Numbers *v.* Shelly, 78 Pa. St. 426 (to show waiver of exemption).

15. Eberts *v.* Eberts, 55 Pa. St. 110; Schuylkill & Dauphin Imp. Co. *v.* McCreary, 58 Pa. St. 304; Edmiston *v.* Schwartz, 13 Serg. & R. (Pa.) 135. See also Anderson *v.* Ackerman, 88 Ind. 481; Guilford *v.* Love, 49 Tex. 715. But see *infra*, "Certified Copies — What Certificate Must Show," and Christian *v.* Whitehall, 16 Serg. & R. (Pa.) 98.

An exemplification, duly certified according to the act of congress, of a petition in bankruptcy, schedules, certificate and endorsement of filing as the same remain on file in the clerk's office of the United States district court, is admissible in evidence in a Pennsylvania court though it does not appear from the certificate or exemplification that said papers constitute the entire record of said bankruptcy proceeding. Bonesteel *v.* Sullivan, 104 Pa. St. 9; *aliter*, if it appears affirmatively from the certificate or exemplification that said papers comprised only a part of the record in the case.

are sometimes made competent evidence of the facts shown thereby without producing the remainder of the record.[16]

d. *Judgment.* — **(1.) Generally.** — Some courts hold that a judgment or decree cannot be proved by the record thereof alone or a copy, but that it is necessary to show the remainder of the proceedings in the case.[17] Others hold that it is necessary to produce only the record of the judgment or decree owing to the presumptions of regularity and jurisdiction which attach to it, or because of the recitals contained in it.[18]

16. See Hankinson *v.* Charlotte R. Co., 41 S. C. 1, 19 S. E. 206.

By statute an authenticated copy of the certificate of probate is sufficient evidence of the appointment of an executor in another state. "The fact that he has been appointed and qualified by the court is evidence that he was duly and rightfully appointed and presupposes that all the prerequisites to a rightful appointment had been shown." Smith *v.* Roach, 7 B. Mon. (Ky.) 17. See also Owings *v.* Beall, 1 Litt. (Ky.) 257.

Certified Copy of Order of Probate Court settling administrator's account held admissible without production of record of prior proceeding of court to show its jurisdiction to make such an order, being expressly made admissible by statute. Ewell County Judge *v.* Prescott, 38 Wis. 274.

17. Mason *v.* Wolff, 40 Cal. 246 (But see Simmons *v.* Threshour, 118 Cal. 100, 50 Pac. 312, holding that recitals in the judgment of the previous proceedings are sufficient *prima facie* to dispense with their production); Stark *v.* Billings, 15 Fla. 318; Ashmead *v.* Wilson, 22 Fla. 255; Walls *v.* Endel, 20 Fla. 86; Willis *v.* Louderback, 5 Lea (Tenn.) 561; Garrick *v.* Armstrong, 2 Coldw. (Tenn.) 265; Christian *v.* Whitehall, 16 Serg. & R. (Pa.) 98.

A certified copy of a decree for the allowance of an executor's account from the minutes of the orphan's court unaccompanied by the account itself, is not sufficient evidence of a balance remaining upon settlement of account in hands of executor, in action against surviving executor upon suggestion of *devastavit;* a duly certified copy of both decree and account should be produced by plaintiff. Bartow *v.* Morris, 13 N. J. L. 8.

Judgment of Sister State. — Kusler *v.* Crofoot, 78 Ind. 597; State *v.* Misenheimer, 123 N. C. 758, 31 S. E. 852.

18. Whitmore *v.* Johnson's Heirs, 10 Humph. (Tenn.) 610 (decree divesting title from one and vesting it in another); Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508 (decree of divorce); Mayfield *v.* Kilgour, 31 Md. 240; Starke *v.* Gildart, 4 How. (Miss.) 267; Sanet *v.* Taylor, 12 Heisk. (Tenn.) 488; Dickinson *v.* Railway Co., 7 W. Va. 390.

A certified copy of a decree of partition which showed that it was made upon the report of commissioners based upon the consent of the parties and containing nothing indicating a want of jurisdiction, was held admissible without producing the proceedings prior thereto. Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643.

A decree of partition offered as a link in a chain of title is not inadmissible because service on the parties is not shown, or the proceedings upon which it was based are not produced, when the decree itself recites that the defendants were duly cited and made default. When judgment is relied upon in a collateral proceeding it is the judgment and not the proceedings had in the case which must be adduced." If there is nothing in the proceedings in the cause of which the opposite party may avail himself he should show it, but he cannot require that his adversary shall introduce it in evidence for him. The statute requires the decree of partition or the judgment by which title to land is recov-

(2.) The True Rule seems to be that for the purpose of proving the existence and contents of a judgment the record thereof or an authenticated copy is sufficient without producing the remainder of

ered to be recorded before it can be received in evidence. . . . but does not require the record of all the proceedings in the cause." Trueheart *v.* McMichael, 47 Tex. 222.

In an action on a judgment of another state, a plea denying the existence of the record of such a judgment is fully met by legal proof of such a record and it is not necessary to introduce an authenticated copy of the record of the entire proceedings, but a *prima facie* case is made by the introduction of a copy of the judgment itself. "This plea could not be construed as calling for the record of the entire proceedings but simply for legal and proper evidence of the verdict and judgment sued on." Little Rock Cooperage Co. *v.* Hodge, 112 Ga. 521, 37 S. E. 743, *following* Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

It is not essential to the admissibility of a judgment setting apart a year's support that the party offering it should produce a transcript of the proceedings in the court of ordinary leading up to it. "It is well settled that a judgment of the ordinary setting apart a year's support is a judgment of a court of general jurisdiction and the presumption is that everything necessary to authorize the rendition of such judgment was properly done. . . . . Therefore it is not essential to the admissibility of such judgment that it should be accompanied by a transcript of the proceedings leading up to it." Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767.

A party may prove his naturalization by an exemplified copy of the record thereof in a court of competent jurisdiction without showing the preliminary proceedings necessary to give the court jurisdiction, namely, the petition, declaration and oath of allegiance, where these proceedings are recited in the record. The Acorn, 2 Abb. U. S. 434, 1 Fed. Cas. No. 29.

Where a former judgment was pleaded as *res judicata*, it was held that the record of the judgment was competent evidence in support of the plea without showing the previous pleadings or proceedings upon which it was based. The holding is apparently based upon various statutory provisions which "show that special force and effect are given to the judgment entries of courts in this state having general jurisdiction. In such cases the judgments are presumed to have been duly rendered by a court having jurisdiction not only of the subject-matter of the litigation but of the litigants so far as necessary to authorize the rendition of the judgment. . . . The competency of judgment entries and even of entries in the judgment docket without other parts of the record has been frequently recognized by this court." American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48.

"When the decree is so distinct and certain as to be understood without reference to the pleadings and other proceedings, the same need not be attached to the decree." Beck *v.* Henderson, 76 Ga. 360.

In an action by an heir against an administrator to recover his share of the estate, the defendant may introduce copies of judgments or decrees rendered against him as administrator, to show the amount for which he is made liable, without producing complete transcripts in each case. Chinn *v.* Caldwell, 4 Bibb (Ky.) 543.

Sentence of Condemnation by Court of Admiralty. — In Hourquebie *v.* Girard, 2 Wash. C. C. 212, 12 Fed. Cas. No. 6,732, a sentence of condemnation by a vice admiralty court was held properly admitted without producing the rest if the record, it "being full and showing the ground of condemnation and the property condemned." To the same effect Gardere *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 514

A Certificate of the Discharge of a Bankrupt need not set out the

the record.[19] But when the record of a judgment is offered as an estoppel or as an adjudication upon certain facts it must be ac-

whole record in order to be competent evidence. Pennell *v.* Percival, 13 Pa. St. 197.

19. *England.* — Jones *v.* Randall, Cowp. 17.

Alabama. — Adams *v.* Olive, 62 Ala. 418.

Arkansas. — Denton et al. *v.* Roddy, 34 Ark. 642.

Florida. — Watson *v.* Jones, 41 Fla. 241, 25 So. 678.

Georgia. — Kerchner *v.* Frazier, 106 Ga. 437, 32 S. E. 351; Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767.

Illinois. — Phillips *v.* Webster, 85 Ill. 146.

Missouri. — Jones *v.* Talbot, 9 Mo. 121.

New York. — Gardere *v.* Columbian Ins. Co., 7 Johns. 514.

North Carolina. — Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410; McLeod *v.* Bullard, 84 N. C. 515.

Virginia. — White *v.* Clay's Exrs., 7 Leigh 68; Wynn *v.* Harman, 5 Gratt. 157. See Clark *v.* Hebert, 15 La. Ann. 279.

In Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250, which was an action against the sureties on an administrator's bond, a certified copy of a judgment of the superior court against the administrator in an action on a claim against the estate was held properly admitted to prove the *devastavit*, such judgment being *prima facie* evidence of the sufficiency of the assets of the estate. "It was only to prove the fact of rendition of the judgment and the contents thereof that a certified copy of the judgment entry" was tendered in evidence. The existence and contents of such judgment was the sole subject of inquiry so far as the suit which resulted in it was concerned." The court *distinguishes* Mitchell *v.* Mitchell, 40 Ga. 11, on the ground that a verdict is not a judgment; and Dupont *v.* Mayo, 56 Ga. 304. "The reason of the opinion" in this last case "may go too far, but limited and explained by the facts of the case it led to no incorrect result."

Where a decree of divorce is not offered to operate as an estoppel but only by way of explanation and as corroborative of witness, failure to prove pleadings and depositions is not an objection to its introduction in a collateral suit. Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224.

In an Action by a Judgment Creditor to Set Aside an Assignment by a judgment debtor, a certified copy of the record of the judgment is competent and sufficient to show the judgment without producing the remainder of the record. "While the transcript of a judgment would not be evidence of the contents of the judgment roll so as to operate as an estoppel under the provisions of § 933 of the Code of Civ. Proc., it is evidence of the fact that a judgment has been duly recovered and of all the matters that it recites under the provisions of law for the purpose of showing the right of the plaintiff in this action to the relief which he seeks." This section of the Code makes a certified copy of a record kept in pursuance of law in a public office of the state equally competent with the original. Bailey *v* Fransioli, 101 App. Div. 140, 91 N. Y. Supp. 852; *citing* Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 App. Div. 442, 51 N. Y. Supp. 111. See Mayfield *v.* Kilgour, 31 Md. 240.

Prosecution for Illegal Escape. On the trial of one indicted for an illegal escape from the penitentiary, a certified copy of the judgment of the circuit court sentencing the defendant to serve in the penitentiary is competent to prove that he was legally in the custody of the keeper of the penitentiary without a transcript of the whole record of conviction. By statute a certified copy of the judgment is made a sufficient authority to the sheriff to execute it and is therefore sufficient to show that the defendant's confinement in the penitentiary was lawful. Hudgens *v.* Com., 2 Duv. (Ky.) 239. See also Sandford *v.* State, 11 Ark. 328, holding sufficient a transcript of the original conviction showing that the defendant was sentenced for the crime al-

companied by the remainder of the record in the case.[20] The reasons on which the judgment was founded do not need to appear in it, and hence their absence is no valid objection to its introduction.[21] It has been held that although a transcript of a judgment[22]

leged in the indictment for escape.

20. *Alabama.* — Adams *v.* Olive, 62 Ala. 418; Smith *v.* McGehee, 14 Ala. 404.

Florida. — Watson *v.* Jones, 41 Fla. 241, 25 So. 678.

Georgia. — Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

Louisiana — Bussy & Co. *v.* Nelson, 30 La. Ann. 25; Clark *v.* Hebert, 15 La. Ann. 279; Brown *v.* King, 3 La. Ann. 504; Mayo *v.* Brittan, 34 La. Ann. 984.

New York. — Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 App. Div. 442, 51 N. Y. Supp. 111.

North Carolina. — Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410.

"In the case of Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, Justice Lumpkin, delivering the opinion of the court, clearly expresses the rule on this subject in the following language: 'It is well recognized as a general rule that where a judgment is relied on as an estoppel, or as establishing any particular state of facts of which it was the judicial result, it can be proved only by offering in evidence a complete and duly authenticated copy of the entire proceedings in which the same was rendered. But, where the only direct object to be subserved is to show the existence and contents of such judgment, this rule does not apply, and a certified copy of the judgment entry of a court of record possessing general original jurisdiction is admissible, by itself, to prove rendition and contents.'" Kerchner *v.* Frazier, 106 Ga. 437, 32 S. E. 351; *citing* and *quoting* 3 Tayl. Ev. § 1574a; 1 Greenl. Ev. § 511.

A transcript of a foreign judgment of divorce, containing a copy of the complaint with indorsement thereon, the writ of summons with return of service, and file marks indorsed thereon, and copy of decree was held to be a sufficient transcript of the entire record. Williams *v.* Williams, 53 Mo. App. 617.

Action on Judgment. — Brown *v.* Eaton, 98 Ind. 591.

In an action on a judgment it is sufficient to produce an exemplification of the writ, declaration, pleas and judgment, the execution need not be included. Erb *v.* Scott, 14 Pa. St. 20.

In an Action on a Foreign Judgment where the certified copy of the record shows that an execution was issued but contains no copy of the same with the proceedings had under it, the copy of the record is not admissible because the best evidence of the execution and the proceedings under it is a certified copy of the record of the same. Howell *v.* Shands & Co., 35 Ga. 66.

Judgment of Sister State. — A copy of a naked judgment of a sister state is not sufficient to make proof of matters contained in it. The whole of the record must accompany the judgment to give it effect in our courts. Tait *v.* De Ende's Exrs., 18 La. 33.

21. West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736.

22. Where the transcript of a judgment is otherwise competent evidence it cannot be excluded solely on the ground that it does not contain copies of all the pleadings and proceedings in the cause. "The certified copy was competent evidence of all it contained, and nothing more. It might be true that if the other proceedings of the court and the pleadings in the cause were not supplied and given in evidence the mere copy of the judgment and decree would not be sufficient evidence, but it would be none the less competent as evidence for whatever it might be worth. Gale *v.* Parks, 51 Ind. 117. The other proceedings and pleadings in the cause may have been supplied by other competent evidence, and, as the contrary is not shown by the record, we would be bound to presume, if necessary, in aid of the judgment below, that such other evidence was introduced."

or order[23] may not be sufficient proof because not supported by the rest of the proceedings in the case, yet when offered it cannot be excluded but is admissible for what it is worth. But even where it is proper to introduce a portion of the records of a case or proceeding, the opposite party may introduce the remainder thereof to show a lack of jurisdiction.[24]

(3.) Courts of Inferior and Limited Jurisdiction. — To prove a judgment of a court of limited and inferior jurisdiction such as a justice court, enough of the record must be produced to show jurisdiction.[25]

(4.) Recitals. — The recitals in a judgment may be sufficient to supply the absence of the preliminary records and proceedings upon which it is based.[26] But a recital in an order, of a jurisdictional requisite[27] has been held insufficient, and so has a recital of a judg-

Anderson *v.* Ackerman, 88 Ind. 481.

23. A certified copy of proceedings had in the probate court in an estate is admissible if relevant so far as it goes. It is not rendered incompetent because not complete or because other proceedings may control its effect. Guilford *v.* Love, 49 Tex. 715, holding competent certified copies of orders of the probate court. *Citing* Townsend *v.* Munger, 9 Tex. 300.

24. Hankinson *v.* Charlotte R. Co., 41 S. C. 1, 19 S. E. 206.

25. Adams *v.* Tiernan, 5 Dana (Ky.) 394; Wells *v.* American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695; Benn *v.* Borst, 5 Wend. (N. Y.) 292; *In re* Lawrence, Tuck. Sur. (N. Y.) 64; Simons *v.* De Bare, 4 Bosw. (N. Y.) 547.

In a collateral proceeding a simple transcript from the docket or book of entry of a magistrate is insufficient proof of judgment; so much of the proceeding as shows jurisdiction should appear. Donald *v.* McKinnon, 17 Fla. 746.

26. *Arkansas.* — Wilson *v.* Spring, 38 Ark. 181.

California. — Simmons *v.* Threshour, 118 Cal. 100, 50 Pac. 312 (*modifying* Mason *v.* Wolff, 40 Cal. 246, and Harper *v.* Rowe, 53 Cal. 233).

Georgia. — Beck *v.* Henderson, 76 Ga. 360; Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767.

Indiana. — See Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707.

Mississippi. — Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94; Dogan *v.* Brown, 44 Miss. 235.

Missouri. — Blackburn *v.* Jackson, 26 Mo. 308.

Tennessee. — Verhine *v.* Ragsdale, 96 Tenn. 532, 35 S. W. 556.

Texas. — Trueheart *v.* McMichael, 47 Tex. 222.

The service of a summons is sufficiently shown by a recital, of such a fact in the decree. "The fact was an essential preliminary to the entry of the decree, and of facts of that nature the recital is *prima facie* evidence." Norton *v.* Meader, 4 Sawy. 603, 18 Fed. Cas. No. 10,351, *per* Field, C. J.

The recitals in a record of a decree of foreclosure of the previous proceedings in the case are at least sufficient *prima facie* evidence thereof to supply the missing original papers showing such proceedings. Koons *v.* Bryson, 69 Fed. 297, 16 C. C. A. 227.

27. An affidavit of non-residence being a preliminary jurisdictional prerequisite to an order for the appearance of non-resident defendants in partition cases its existence cannot be proved by a recital in the order. "Without the previous existence of the affidavit no order could be made which would be evidence of anything. To make the order evidence of the affidavit is then merely to assume the prior existence of the affidavit which alone could make the order evidence of it. This would be reasoning in a circle." Platt *v.* Stewart, 10 Mich. 260.

ment in an execution,[28] to supply essential portions of the record.

e. *Verdict.* — A verdict or copy thereof is not competent evidence of the facts found by it unless accompanied by the judgment or decree,[29] but when offered merely to show the fact that a verdict was rendered is competent by itself.[30]

f. *Execution.* — Ordinarily before an execution is competent evidence in support of any claim made under it the judgment or decree upon which it is based must be produced.[31] But an officer may vindicate or defend his right to the possession of property levied upon by producing the writ without the judgment.[32]

28. A recital of the judgment in the execution is not competent evidence against third persons. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

29. Fowler *v.* Stoneham, 6 Tex. 60. See also Donaldson *v.* Jude, 2 Bibb (Ky.) 57; Pitton *v.* Walter, 1 Str. (Eng.) 162; Velott *v.* Lewis, 102 Pa. St. 326.

A verdict of a jury is not a judgment or decree, and even when accompanied by the pleadings would not be admissible in evidence for most purposes if no judgment or decree appeared. Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

A copy of a verdict in an equity case unaccompanied by the bill, answer and other parts of the record, is not competent evidence. Mitchell *v.* Mitchell, 40 Ga. 11.

30. Pitton *v.* Walter, 1 Str. (Eng.) 162; Waldo *v.* Long, 7 Johns. (N. Y.) 173; Kip *v.* Brigham, 7 Johns. (N. Y.) 168.

31. *United States.* — Campbell *v.* Strong, Hempst. 265, 4 Fed. Cas. No. 2,367*a*; Tindall *v.* Murphy, Hempst. 21, 23 Fed. Cas. No. 14,055*a*.

California. — Vassault *v.* Austin, 32 Cal. 597.

Missouri. — Ramsey *v.* Waters, 1 Mo. 406.

New York. — Wilson *v.* Conine, 2 Johns. 280.

Pennsylvania. — Gaskell *v.* Morris, 7 Watts & S. 32.

South Carolina. — McCall *v.* Boatright, 2 Hill 438.

Vermont. — Richardson *v.* Pearl, 1 Chip. (Vt.) 113.

In an action against a sheriff for false return of *nulla bona*, the execution cannot be admitted in evidence without judgment. State *v.* Records, 5 Har. (Del.) 146.

In a suit by the sheriff against a purchaser at sheriff's sale to recover damages for breach of contract of sale, the writs of *alias* and *pluries venditioni exponas* are not evidence without the record of the judgment and previous process, requisite to show that same was legally issued, but such error is cured by afterwards reading the record in evidence. Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32

Contra. — In the trial of a claim arising upon the levy of an execution, it is not necessary for the plaintiff in execution to produce the judgment upon which his execution is founded, but the latter may be read in evidence without the judgment. "The rule of the common law is this: If the defendant in execution brings trespass against the sheriff, he (the sheriff) can justify, by the evidence of the writ without producing the judgment; but if a third person brings trespass against the sheriff the sheriff can defend only upon producing the judgment and the writ." But these rules do not apply to a claim under the Georgia law which is not analogous to the action of trespass. Deloach *v.* Myrick, 6 Ga. 410. See also Carlton *v.* King, 1 Stew. & P. (Ala.) 472 (holding the same under a similar law); Bettis *v.* Taylor, 8 Port. (Ala.) 564.

32. Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32; Deloach *v.* Myrick, 6 Ga. 410; Hunter *v.* McElhany, 2 Brev. (S. C.) 103. But see Martin *v.* Podger, 2 W. Bl. (Eng.) 701, 5 Burr. 2631; Lake *v.* Billers, 1 Ld. Raymond (Eng.) 733.

In an action of trover by a con-

g. *In Support of Judicial Conveyance.* — In support of a judicial conveyance it is not competent to introduce an execution without producing the judgment or decree upon which it is based.[33] The whole of the proceedings in the case need not be produced, but only sufficient to show jurisdiction to render the judgment,[34] and

stable against a stranger, for the value of goods taken under an execution, the production of the execution, without the judgment, is sufficient to support the action. Spoor *v.* Holland, 8 Wend. (N. Y.) 445.

For the purpose of defending his possession of property levied on under execution, the officer may introduce in evidence the writ of execution and his levy thereon without being compelled to produce the judgment upon which the execution issued. Parsons *v.* Hedges, 15 Iowa 119.

Contra. — The mere record of a judgment by a justice of the peace is not sufficient to justify a seizure by a constable on an execution issued thereon but the summons and the return thereon must be introduced to show that the court had jurisdiction. McDonald *v.* Prescott & Clark, 2 Nev. 109.

33. Wilson *v.* Connie, 2 Johns. (N. Y.) 280; Vassault *v.* Austin, 32 Cal. 597. See Kennedy & Co. *v.* Clayton, 29 Ark. 270.

An order of sale is not competent evidence of title without producing a copy of the judgment, although the order recites the existence of such judgment; such recital is not competent evidence. Bermea Land & Lumb. Co. *v.* Adoue, 20 Tex. Civ. App. 655, 50 S. W. 131.

Execution on Deficiency Judgment. — An execution reciting a sale on foreclosure and the amount of the deficiency is not admissible in an action of ejectment in support of a title acquired under an execution sale for such deficiency, but the record of the docketing of the deficiency judgment and the return of the sheriff on the foreclosure sale showing the amount of the deficiency must be introduced. Leviston *v.* Henninger, 77 Cal. 461, 19 Pac. 834.

34. Vaughn *v.* Burton, 113 Ga. 103, 38 S. E. 310.

In proof of title under a sheriff's sale, the copy of the judgment and so much of the record as shows an appearance of the parties, or service of the process on the defendant, is sufficient, without a complete transcript. "It is a general rule, that records, when used in evidence, must be produced entire. But this rule is laid down with some exceptions and limitations. The reason assigned for it is, that the part of the record which is lacking, may give the rest a different meaning. Where a record is used as evidence to prove the facts therein contained, the rule well applies. But where it is only used as it is here, to show the fact that there was such judgment, then, so much of the record as is relevant, is frequently permitted to be used. Here the fact to be shown was, that there was such judgment to warrant the execution, and enough of the record is produced to establish that fact. It would be highly inconvenient to compel parties who hold titles under sheriff's sales, to produce from distant counties complete records in suits in chancery or at law, as part of their title. Enough of the record in such case to show a valid judgment, by the service of process, or appearance of the parties, is sufficient, and this copy produced, shows that the parties appeared." McGuire *v.* Kouns, 7 Mon. (Ky.) 386.

In an action to recover damages for trespass on land described in the deed made in pursuance of a chancery decree, the decree directing said deed to be made, and the decree itself may be offered in evidence without producing the whole record, the decree sufficiently describing the land directed to be conveyed. Guinn *v.* Bowers, 44 W. Va. 507, 29 S. E. 1027.

Where a deed made by commissioners under a decree is offered in evidence as a connecting link in the title, so much of the record of suit in which decree was made as will satisfactorily show that persons having legal title to land conveyed were

it has been held that only the judgment need be produced, the burden of showing a lack of jurisdiction being on the party questioning it.[35] Some courts, however, hold that the whole record of the case must be produced.[36]

h. *Collateral Proceedings.* — Where as an incident to the principal proceeding a collateral contest arises, the record thereof although forming part of the record in the principal proceeding may be admissible without producing the record of the whole proceeding.[37]

i. *When Record is Lost or Destroyed.* — When a record is lost, destroyed, or otherwise unavailable, a copy offered as secondary evidence need not contain all of the proceedings in the case.[38] So

parties to the suit and as will identify the land must be produced. Waggoner *v.* Wolf, 28 W. Va. 820.

If a decree of partition and report of commissioners appointed to divide the land on which decree is based sufficiently designate the land referred to in the decree, they are competent evidence without the whole record. Wynn *v.* Harman, 5 Gratt. (Va.) 157. See also Masters *v.* Varner's Exrs., 5 Gratt. (Va.) 168, 50 Am. Dec. 114.

A registered certified copy of a decree directing sale of the lands and reinvestment of the proceeds, setting out all the essential facts upon its face, is admissible in support and explanation of the deed taken, without copies of any other portion of decree. Verhine *v.* Ragsdale, 96 Tenn. 532, 35 S. W. 556.

35. As a foundation for the introduction of an execution and a sheriff's deed it is only necessary to produce the entry of judgment. If the adverse party questions the jurisdiction of the court he must produce the proceedings anterior to the judgment. Maverick *v.* Salinas, 15 Tex. 57. See also Hair *v.* Melvin, 47 N. C. 59. And see Price *v.* Emerson, 14 La. Ann. 141.

36. If a party attempts to avail himself of a decree as an adjudication upon the subject-matter, or as a link in his chain of title founded on a judicial sale under the decree, he must produce the judgment roll, so that, amongst other things, the court may determine whether the court which rendered the decree had jurisdiction of the subject-matter. Harper *v.* Rowe, 53 Cal. 233; Townshend *v.* Wesson, 4 Duer (N. Y.) 342. See also Glidewell *v.* Spaugh, 26 Ind. 319.

But a deed purporting to be executed under a decree in chancery may be introduced in evidence without producing an exemplification of the whole chancery record, where party does not seek to show title in himself, but merely that he and his adversary claim a common source of title. Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

37. Where an incidental contest arose in the progress of an action for the settlement of a partnership, as to the payment of a note to a receiver appointed by the court, which was cumulated with the main action but had no connection with other matters in contest, an extract from the record containing all the proceedings relative to the note, is admissible although objected to as not being a complete transcript of all the proceedings in the case, where the whole would have been attended with heavy expense, and the nature of the case showed that there was no necessity of producing the whole record. Succession of Stafford, 2 La. Ann. 886, holding that this is the rule in mortuary and insolvent proceedings, which are frequently voluminous and in which all incidental contests are cumulated.

38. When a transcript of record entries in another action is offered as secondary evidence it need not contain the whole record in that case, but is competent evidence of such proceedings as are embraced within it, without reference to the means adopted to establish other portions thereof. Jones *v.* Levi, 72 Ind. 586.

when a portion of a judicial record is not available the remainder is nevertheless admissible.[39]

48. Preliminary Proof. — A. Authentication. — a. *Generally.* Before a record or document is admissible in evidence its authenticity must appear in some manner by evidence either intrinsic or extrinsic.[40] The recitals in a writing are not in the first instance competent to show its official character.[41]

39. Where the record cannot be produced, having been lost or destroyed, a decree in chancery divesting defendant and vesting title in plaintiff, is admissible on behalf of party claiming under it without producing the whole record. Wilson *v.* Spring, 38 Ark. 181. See Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513.

40. *Alabama.* — Hammond *v.* Blue, 132 Ala. 337, 31 So. 357.

Arkansas. — Jones *v.* Melindyl, 12 Ark. 203, 36 S. W. 22.

California. — Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106.

Delaware. — Star Loan Assn. *v.* Moore, 4 Penn. 308, 55 Atl. 946.

Florida. — Simmons *v.* Spratt, 20 Fla. 495.

Illinois. — Huls *v.* Buntin, 47 Ill. 396.

Iowa. — Cooper *v.* Nelson, 38 Iowa 440.

Kansas. — Atchison & N. R. Co. *v.* Maquilkin, 12 Kan. 301.

Maine. — Morrill *v.* Haywood, 16 Me. 11, 32 (roll of military company).

Massachusetts. — Wetherbee *v.* Martin, 10 Gray 245.

Michigan. — People *v.* Etter, 81 Mich. 570, 45 N. W. 1109; Hall *v.* People, 21 Mich. 456.

Minnesota. — Mower County *v.* Smith, 22 Minn. 97.

Missouri. — Alexander *v.* Campbell, 74 Mo. 142.

New Mexico. — Coler *v.* Board of County Comrs., 6 N. M. 88, 27 Pac. 619.

New York. — Schile *v.* Brokhahus, 80 N. Y. 614.

Pennsylvania. — Devling *v.* Williamson, 9 Watts (Pa.) 311.

South Carolina. — Dent *v.* Bryce, 16 S. C. 1.

Washington. — Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369.

Wisconsin. — Fowler *v.* Schafer, 69 Wis. 23, 32 N. W. 292.

A letter from the records of the department of war must be authenticated in the manner prescribed by law to be admissible in evidence. Pendleton *v.* United States, 2 Brock 75, 19 Fed. Cas. No. 10,924.

An instrument purporting to be a lease of a great pond is not admissible in evidence without proof of the genuineness of the signatures of the commissioners on inland fisheries attached thereto. Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26.

The mere marking of a tax duplicate as an exhibit does not make it competent evidence of the contents— there must be some extrinsic proof of its genuineness. State *v.* Smith, 30 N. J. L. 449.

It is not error to exclude a paper offered as an assessment list where there is no evidence to identify it as the original paper and no offer to identify it as such. Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394.

A city assessment roll to be admissible should be duly authenticated and show on its face that it is the proper roll for a certain designated year. City of Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369.

Official Bond. — As to the necessity and manner of authenticating bonds see article "Bonds," Vol. 2, and Craw *v.* Abrams, 68 Neb. 546, 94 N. W. 639, 97 N. W. 296 (official bond not sufficiently authenticated by its production from proper custody and an endorsement of its approval); Hartz *v.* Com., 1 Grant (Pa.) 359 (endorsement of approval and production from proper custody held sufficient); Kello *v.* Maget, 18 N. C. 414.

41. Hall *v.* People, 21 Mich. 456; Wilson *v.* Stoner, 9 Serg. & R. (Pa.) 39, 11 Am. Dec. 664.

b. *Original of Sworn Copy.* — Where a sworn or examined copy is used, the authenticity of the original must be established either by the testimony of the witness or by other evidence.[42]

c. *Production From Proper Custody.* — **(1.) Generally** — Where a record is produced from the proper custody this fact sufficiently authenticates it without the attestation of its custodian.[43] Some authorities hold that the record to be admissible must be produced from the proper custody[44] unless exceptional circumstances excuse this,[45] though it has been held that this is only necessary when it

42. A sworn copy of the record of an ecclesiastical court is admissible where the copy is shown to have been made at the proper office and produced by the lawful keeper of the records. Gaines *v.* Relf, 12 How. (U. S.) 472, 522.

Where a sworn copy was used the court though not determining the question inclined to the opinion that the authenticity of the original record must be proved by its legal custodian. Smithers *v.* Lowrance, 35 Tex. Civ. App. 25, 79 S. W. 1088 (land office records).

43. Sumner *v.* Sebec, 3 Me. 223; Stewart *v.* Conner, 9 Ala. 803; Hebert's Succession, 33 La. Ann. 1099; Sanborn *v.* Rice County School Dist., 12 Minn. 17; Ober *v.* Blalock, 40 S. C. 31, 18 S. E. 264. See Springs *v.* Schenck, 106 N. C. 153, 11 S. E. 646; Simpson *v.* McBride, 78 Ga. 297; Cole *v.* Curtis, 16 Minn. 182; Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474. But see Lyon *v.* Bolling, 14 Ala. 753.

Original records shown to have come from the legal custodian and bearing proper marks of authenticity are admissible in evidence. Iles *v.* Watson, 76 Ind. 359.

"Where the books themselves are produced, and it is proved or admitted that they come from the proper depositary, they are received as evidence without further attestation. This is peculiarly the case with ancient records, as to which the jury may well presume many things which it would be indispensable to prove in relation to more recent documentary evidence." Little *v.* Downing, 37 N. H. 355.

A notice that one has been arrested on an execution desires to take the oath for the relief of poor debtors, purporting to be signed by a master in chancery and coming from his custody, is sufficiently proved by its production in an action upon a recognizance taken under the statute concerning imprisonment for debt. Richardson *v.* Smith, 1 Allen (Mass.) 541.

The signature of the judge, signed to an order for the sale of land, which is fifty years old and comes from the files of a case will be presumed to be genuine, although the order is not found in the minutes upon the regular records. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

A book purporting to contain proceedings of the commissioners of forfeitures but not proved ever to have been in their possession is not competent evidence to show a sale by the commissioners though found in the county clerk's office where their proceedings should have been recorded, and shown to have lain there seventeen years, there being nothing to show when or by whom it was made, or that it was in the clerk's office prior to a time eighteen years after the functions of the commissioners had ceased. Jackson *v.* Miller, 6 Cow. (N. Y.) 751.

44. Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690. See Devling *v.* Williamson, 9 Watts (Pa.) 311.

45. Herndon *v.* Casiano, 7 Tex. 322. In this case an archive which concerned the title to land was produced from the possession of the person who possessed and claimed the land. It was identified by a witness who testified that he had seen it on record amongst the archives of the former government and that later during the revolution the public records were scattered and were taken

is offered as a record and not when it is used merely to prove its existence.[46]

(2.) From Files. — The production of a document from the files of the cause to which it belongs sufficiently authenticates it,[47] unless it lacks a necessary seal[48] or the testimony or certificate of the custodian is deemed essential.[49] But the mere fact that a document is found in the files of an office does not render it admissible.[50]

d. *Entries Presumed to Have Been Properly Made.* — Entries in public books of record are presumed to have been correctly[51] made by persons authorized thereto in the course of their official duty.[52] This rule applies to amendments appearing in a record.[53]

possession of by persons interested in them, and that the archive in question was taken possession of by some one but he did not know whom. It was held that under the circumstances the fact that it did not come directly from the proper custody was no objection to its admissibility.

46. The Original Files in a judicial proceeding where offered in evidence merely to show that they exist may be admitted on any satisfactory evidence of their identity; but if offered as a judicial record to prove the facts which they purport to state they must be authenticated by the testimony of their legal custodian summoned to attend and bring them, or they may be proved by a copy certified by such custodian. Phelps *v.* Hunt, 43 Conn. 194, holding that such files were improperly excluded where offered merely to prove that a certain trial was had on a date shown by the papers, to which the party offering them was a party.

Where an execution and return thereon were produced by the sheriff, as a witness, and offered in evidence, it was held to be immaterial where it came from or whether it had ever been filed with the justice who issued it since the sheriff identified it as the execution under which he acted. Pellersells *v.* Allen, 56 Iowa 717, 10 N. W. 261, which was an action to recover personal property taken on execution and claimed to be exempt.

47. Where the name of the purchaser in the report of a judicial sale and in the deed differs from the name in the final record, the report of sale may be read in evidence for the purpose of showing to whom the sale was made and without proof of its identification by an entry in the order book, since being found amongst the papers in the case it is *prima facie* admissible. Hammann *v.* Link, 99 Ind. 279.

48. An execution found with the papers in a case and purporting to have been issued therein but not bearing the clerk's seal nor the filing mark, and not otherwise identified, is not admissible in evidence in another action in proof of its having been issued in such case. Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989.

49. See *infra,* I, 48, A, g, (1.)

50. Hardiman *v.* New York, 21 App. Div. 614, 47 N. Y. Supp. 786; West Branch Bank *v.* Donaldson, 6 Pa. St. 179; Noble *v.* Douglass, 56 Kan. 92, 42 Pac. 328.

51. Terry *v.* State, 46 Tex. Crim. 75, 79 S. W. 320.

The presumption is that clerks of courts do their duty; hence it will be presumed that the clerk of a court attended a particular term and knew what the court determined in a particular suit, and from that knowledge and the minutes made by the presiding judge that the clerk properly entered up the judgment so rendered. Palmer *v.* Emery, 91 Ill. App. 207.

52. *Ex parte* Steen, 59 S. C. 220, 37 S. E. 829. See Sutton *v.* Floyd, 7 B. Mon. (Ky.) 3.

53. Amended Record. — Since a village board has the right to amend the record of its proceedings to conform with the facts, no further proof outside of the record is required to show that an amended record is true. It stands on the same footing as the

e. *Documents on File in Public Office.* — A document properly on file in a public office is presumed to be what it purports to be.[54]

f. *Judicial Records.* — **(1.) Of Same Court.** — When other records of the court trying the cause are offered in evidence no authentication of them is necessary because a court judicially recognizes its own records.[55] The court sitting in equity judicially knows the authenticity of its records as a law court.[56]

(2.) Of Other Courts. — The records of other courts when offered in evidence do not prove themselves, but must be satisfactorily authenticated.[57] When offered to prove merely their existence, how-

record as originally made. Village of Gilberts *v.* Rabe, 49 Ill. App. 418.

54. See McCoy *v.* Lighter, 2 Watts (Pa.) 32; Miller *v.* Carothers, 6 Serg. & R. (Pa.) 215; Johnson *v.* McGehee, 1 Ala. 186.

The commissioner's books containing the tax payers' sworn lists of taxable property are admissible in evidence without direct proof that a list therein contained was given in or sworn to by the party against whom it is offered, or that he was ever actually apprised of its contents. "The presumption is that both he and the officer performed the duties enjoined upon them respectively by law, and therefore that the list was the act" of such person. The commissioner being out of the state the books were sufficiently authenticated by proof of his handwriting. Sutton *v.* Floyd, 7 B. Mon. (Ky.) 3.

A bond for the surplus purchase money of a tract of unseated land sold for taxes, filed as required by law in the prothonotary's office, may be given in evidence in an action of ejectment, without common law proof of execution. Burns *v.* Lyon, 4 Watts (Pa.) 363.

55. Robinson *v.* Brown, 82 Ill. 279; Ward *v.* Saunders, 28 N. C. (6 Ired L.) 382; Prescott *v.* Fisher, 22 Ill. 390. See "JUDICIAL NOTICE," Vol. VII, p. 1007.

Where papers, part of the records of the same court, are offered in evidence, their production as such by the clerk is sufficient *prima facie* proof of their authenticity. Wallace *v.* Beauchamp, 15 Tex. 305.

A forthcoming bond executed by the defendant in execution is one of the papers in the cause of which judicial notice is taken in a trial of a claim to the property made by a third party. Sandlin *v.* Anderson, 76 Ala. 403.

The Docket of a Justice of the Peace need not be proved in a case before himself. "The docket of a justice is evidence *per se* when the cause is before himself; just as would be an original record in a court to which it belongs." Groff *v.* Griswold, 1 Denio (N. Y.) 432, *quoting* from Smith *v.* Frost, 5 Hill (N. Y.) 431.

56. The record of a court may properly be used in evidence instead of a certified copy where the case in which it is offered is being tried in the same court which made the record, the one case was in equity and the other in law, since the court takes judicial notice of its own records. Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; *citing* 1 Greenl. Ev. § 502; Gray *v.* Davis, 27 Conn. 447.

57. Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496; Perry *v.* Mays, 1 Hill (S. C.) 76; Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989; Pryor *v.* Beck, 21 Ala. 393.

A paper purporting to be the opinion of the judge who tried a cause, but not signed by the judge or in any way authenticated is not admissible in evidence in connection with the judgment roll in such action. Wixson *v.* Devine, 67 Cal. 341, 7 Pac. 776.

The record of a witness' prior conviction for crime is not admissible to affect his credibility without preliminary proof of its genuineness. Davey *v.* Lohrmann, 14 N. Y. Supp. 922, 39 N. Y. St. Rep. 207.

An execution signed by the clerk, but not certified by him, with nothing

ever, it need not be shown that they constitute a judicial record.[58]

(3.) Official Attestation. — The official attestation appearing in a writ is presumptive evidence of its genuineness.[59]

(4.) Justice of Peace. — The original files and records of a justice of the peace are not admissible until they have been identified by competent evidence.[60] His testimony identifying them is of course sufficient.[61]

g. *Nature of the Evidence.* — **(1.) Generally.** — In the absence of some requirement of law to the contrary, a book or record may be identified as a public record by the testimony of any witness who knows the facts.[62] And the same is true of documents on file in a public office.[63] Some courts hold, however, that records or doc-

upon it to show that it has ever been in the hands of the sheriff, cannot be regarded either as the original execution or a certified copy of it, and is not admissible to prove the amount of judgment for costs. Pryor *v.* Beck, 21 Ala. 393.

58. Where the existence of original papers in a case is alleged and denied they are admissible without proof that they constitute a judicial record. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955.

59. The official attestation upon original process is *prima facie* evidence of the genuineness of its execution. Dobbs *v.* The Justices, 17 Ga. 624.

A *fi. fa.* under seal of the court requires no proof to render it admissible in evidence. State *ex rel.* Erwin *v.* Lawrence, 64 N. C. 483.

An original *fi. fa.* from the circuit court of the United States will be recognized by the state courts without other than intrinsic proof. Thomas & Co. *v.* Parker, 69 Ga. 283.

60. Wentworth *v.* Keizer, 33 Me. 367; Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271; Goodhue *v.* Grant, 1 Pin. (Wis.) 556; Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124; State *v.* Chambers, 70 Mo. 625 (not necessary to call the justice); Patterson *v.* Freeman, 132 N. C. 357, 43 S. E. 904; Reeves *v.* Davis, 80 N. C. 209 (judgment of justice not admissible without proof of his handwriting). See Hagaman *v.* Stafford, 2 Blackf. (Ind.) 351; Modisett *v.* Governor, 2 Blackf. (Ind.) 135; Burgess *v.* Sugg, 2 Stew. & P. (Ala) 341; Sandlin *v.* Anderson, 76 Ala. 403.

61. Scott *v.* McCrory, 1 Stew. (Ala.) 315 (holding that the testimony of one of the two judges who rendered a judgment was sufficient to authenticate it).

62. Hathaway *v.* Addison, 48 Me. 440 (records of town); Browning *v.* Flanagin, 22 N. J. L. 567; Gurney *v.* Howe, 9 Gray (Mass.) 404, 69 Am. Dec. 299; Acme Brew. Co. *v.* Central R. Co., 115 Ga. 494, 42 S. E. 8; Cuttle *v.* Brockway, 24 Pa. St. 145. But see Miller *v.* Hale, 26 Pa. St. 432.

The book of minutes of a municipal corporation may be proved to be such by any witness who knows the fact. Robinson *v.* State, 82 Ga. 535, 9 S. E. 528.

The identification of a tax roll was held sufficient to justify its introduction where the supervisor who made the roll so testified, and that he delivered it to the county treasurer and obtained it from the county treasurer's office for use upon the trial. Deerfield Twp. *v.* Harper, 115 Mich. 678, 74 N. W. 207.

A book in the custody of the present clerk of a school district though not received from his predecessor in office, if identified by a former clerk as the record of the district is *prima facie* sufficiently authenticated. Sanborn *v.* School Dist. No. 10, 12 Minn. 17.

63. For the purpose of identifying a statement of lien received in evidence and made a part of a loglien suit, it is competent for the witness who verified such statement to swear to such verification and also that he filed the paper with the coun-

uments which should properly remain with their custodian will not be admitted when produced by another.[64] And that they must be identified by the custodian or his deputy.[65]

(2.) Judicial Records. — The authenticity of judicial records need not be established by their custodian, but the testimony of any other competent witness is proper.[66] There is, however, authority to the contrary.[67]

ty clerk. Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601.

64. The records of a county court brought into the district court of the same county in the custody of the county clerk are admissible in evidence; but what purport to be the records of another court of the state produced by a private individual are not admissible. Hardin *v.* Blackshear, 60 Tex. 132.

65. Official books and papers must be proved by producing an exemplified copy from the proper office; or if circumstances require that the originals should be produced they must be brought from the office and verified by the officer who has the keeping of them, or his clerk, or some one specially authorized by him for that purpose. They cannot be verified by one who has no connection with the office, but who happens to know them. Hockenbury *v.* Carlisle, 1 Watts & S. (Pa.) 282. See also Devling *v.* Williamson, 9 Watts (Pa.) 311.

Judgments and the proceedings in the causes in which they were rendered can only be proved by the production of the record itself or a certified or examined copy by the clerk of the court. They are not sufficiently verified by the oath of a witness that he was at one time clerk of the court, and that certain papers exhibited to him as records of a court were issued and filed by him when he was clerk of the court, and are in his handwriting and that of his deputies, and he believes they are the records of the court; and of another witness, that he received the records from the clerk of the court as the records of the suits to which they relate. Lyon *v.* Bolling, 14 Ala. 753.

66. Browning *v.* Flanagin, 22 N. J. L. 567; State *v.* Chambers, 70 Mo. 625 (record of justice); People *v.* Alden, 113 Cal. 264, 45 Pac. 327; Browning *v.* Huff, 2 Bailey (S. C.) 174. See also Chapman *v.* Dodd, 10 Minn. 350.

Papers purporting to be the files in a criminal case in the circuit court of a certain county are sufficiently authenticated by the testimony of a witness that they came from the office of the clerk of that county as the criminal files in that case and were obtained by the witness from the clerk as such, and that they were used as such on the trial of the case, where the papers themselves are endorsed with file marks over a signature purporting to be that of such clerk. McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883.

The original book of a county court may be proved to be such by a deputy clerk, or any other person who can identify it. Ballard *v.* Thomas & Ammon, 19 Gratt. (Va.) 14.

Records of another county court brought into court by a tipstaff, but proved by the clerk, who had them in custody, the prothonotary being dead, are not to be rejected because not certified or brought into court by the proper officer. Garrigues *v.* Harris, 17 Pa. St. 344.

The docket of a justice of the peace obtained from his office during his absence from the county, and proved to be in his handwriting, is evidence although no subpoena has been taken out for his attendance. The justice not being indispensable to prove his docket, any person who knows the fact may identify the docket. Dennison *v.* Otis, 2 Rawle (Pa.) 9.

67. Hardin *v.* Blackshear, 60 Tex 132; Phelps *v.* Hunt, 43 Conn. 194 (where the court said that the files should be identified "by the testimony of the legal custodian of them summoned to attend and bring them,

(3.) Authentication by Deposition. — The identity and authenticity of an instrument forming part of the files of a public office may be proved by deposition with a certified copy attached.[68]

(4.) Testimony or Certificate of Custodian. — The testimony or certificate of the custodian of a record or document is competent and sufficient to show the official and public character of a record or document and that it comes from the proper custody.[69]

The Proper Person to Certify to the genuineness of the files and records of a court is the legal custodian thereof.[70]

or by a copy certified by such custodian as a true copy").

An original record of the superior court in another county cannot be proved by an attorney who claimed to have obtained its custody under an order of the judge of that court. The proper evidence is an exemplification of the record certified by the court. Bigham *v.* Coleman, 71 Ga. 176.

In Perry *v.* Mays, 1 Hill (S. C.) 76, the files of another court containing the file mark of the clerk whose handwriting was admitted as genuine were held inadmissible, although there was evidence that they were received from the proper custodian. The court said: "In any point of view, however, it was necessary, before it could be received in evidence, that the court should be satisfied by legal and competent evidence that it was the original. This could alone be done either by producing in court the keeper of the records, and ascertaining from him, on oath, that it was a paper of record in his office, or by a certificate to the same effect, under the seal of the court; for, independent of this, there is nothing which could enable the court to say that it was a genuine paper."

68. See article "DEPOSITIONS," Vol. IV.

The identity and execution of an instrument which has become an archive of a public office from which it cannot be removed may be proved by the deposition of a witness, a certified copy being exhibited and the witness deposing that he had inspected the original. Allen *v.* Hoxey's Admr., 37 Tex. 320.

69. See *Alabama.* — Spence *v.* Tuggle, 10 Ala. 538; Scott *v.* McCreary, 1 Stew. 315; Walling *v.* Morgan County, 126 Ala. 326, 28 So. 432.

Indian Territory. — Breedlove *v.* Dennie, 2 Ind. Ter. 606, 53 S. W. 436.

Iowa. — Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

Maine. — Hill *v.* Fuller, 14 Me. 121.

Missouri. — Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124.

New York. — Pollock *v.* Hoag, 4 E. D. Smith 473.

Pennsylvania. — Garrigues *v.* Harris, 17 Pa. St. 344.

An original muniment of title produced from the public archives in which it is required by law to be deposited, certified by the public officer who has custody of it and identified by him as a witness, is sufficiently authentic to authorize it to be introduced in evidence. Williams *v.* Conger, 125 U. S. 397.

In Allen *v.* Halsted (Tex. Civ. App.), 87 S. W. 754, certain documents on file in the office of the comptroller were held admissible as archives of that office, being supported by the testimony of the chief clerk of the comptroller's office, who, in the absence of the comptroller, had the custody of the papers of that office.

The certificate and seal which gives verity to a record, offered in evidence, unless the record itself discloses the want of jurisdiction, establishes as well the right of the court to adjudicate the matter contained therein, as that such facts were adjudicated. Dozier *v.* Joyce, 8 Port. (Ala.) 303.

70. McLanahan *v.* Blackwell, 119 Ga. 64, 45 S. E. 785, holding that in a proceedings in bankruptcy the custody of all papers after reference is in the referee, and that under § 21 subd. *d*, of the national bankruptcy act of 1898, as amended by the act

Record Consisting of Separate Papers. — Although a record consists of several separate papers it may be sufficiently authenticated by one certificate where it is bound together by some mechanical contrivance.[71]

h. *Writings Which Prove Themselves.* — The certificate of a public officer, offered alone or attached to another writing, in a court which takes judicial notice of the official character and signature of such officer proves itself.[72] So also an instrument or record under the great seal of the state needs no further proof.[73] The same is true of ancient documents.[74]

i. *Proof of Signature.* — The signature of a public officer subscribed to a public record or document need not be proved, at least where the signature itself or the seal authenticating it is one which is judicially noticed.[75]

of congress February 5, 1903, such papers may be certified either by the referee or the clerk, and that it was therefore no error to admit in evidence copies of the papers in bankruptcy proceedings certified by the referee and not by the clerk of the bankruptcy court.

Assessment Books. — In Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433, county books of assessment were authenticated by the certificate of the chairman of the county commissioners.

71. Record Consisting of Several Pieces. — The fact that papers put in evidence as constituting a court record were attached together by *brass tacks or brads,* the whole followed as a single record by proper certificate, held sufficient to create a presumption at least that they constitute the record so authenticated. Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414. See *infra,* III, 2, D, x, (4.)

72. State *v.* Potter, 52 Vt. 33; Benedict *v.* Heineberg, 43 Vt. 231; Ushers' Heirs *v.* Pride, 15 Gratt. (Va.) 190; Cox *v.* James, 1 Stew. (Ala.) 379.

A treasurer's certificate to an account against tax collector authenticates itself, entitling its admission in evidence. Milburn *v.* State, 1 Md. 1.

In Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907, a writing purporting to be a certificate of the president of the county equalizing board being a certificate required by law and in proper form was held admissible without proof of the identity of the handwriting, or who was in fact president of the board. "It does not appear, and no claim is made, that the list thus certified was not found in the hands of the proper depositary. We hold that the ruling was correct. As to town and county clerks, magistrates and other officers having prescribed statutory duties which they have to authenticate by attestation or certificate, proof of the officers' handwriting and that the person is the officer he purports to be is not required in the first instance."

When the certificate of an officer is made evidence by statute, a paper produced with his name will be *prima facie* evidence unless the name is proved not to have been signed by him. Pratten *v.* Johnson, 3 H. & J. (Md.) 487.

73. An original plat and grant from the state under the great seal of the state is admissible without further authentication, the court determining by inspection whether the seal attached is genuine. Reppard *v.* Warren, 103 Ga. 198, 29 S. E. 817.

A pardon granted by the governor of a state under the great seal is admissible without further proof. United States *v.* Wilson, Baldw. 78, 28 Fed. Cas. No. 16,730.

74. See article "ANCIENT INSTRUMENTS," Vol. I.

75. See article "JUDICIAL NOTICE," Vol. VII, p. 975, *et seq.*

B. Explanation of Mutilations, Interlineations and Alterations. — In Record. — The courts are not in accord as to the necessity of explaining mutilations, interlineations and alterations appearing on the face of a record, some holding that such changes must be explained preliminary to its introduction in evidence,[76] and others holding that no such explanation is necessary in the case of public records[77] the presumption being that all such changes were made by authority.[78] A line drawn through a judicial record is not conclusive evidence that the action shown thereby has been vacated.[79] Where the alteration does not materially affect the bear-

A copy of a city ordinance authenticated by the testimony of the city clerk is not inadmissible because the signatures of the mayor and clerk are not proved. Selma St. & S. R. Co. *v.* Owen, 132 Ala. 420, 30 So. 598.

Where an execution issued by a justice runs into a different county from that in which issued, and is endorsed by justice where levy is made, according to statute, it is not necessary, to render execution admissible in evidence, to prove signature of issuing magistrate. Burgess & Davis *v.* Sugg, 2 Stew. & P. (Ala.) 341.

Officer's Return. — The return on an execution made by an officer or his deputy is admissible without proof of the handwriting. Barron *v.* Tart, 18 Ala. 668.

76. Where a judgment with interlineations and additions appearing on its face is offered in evidence, it should not be admitted until such interlineations and additions are explained. Palmer *v.* Emery, 91 Ill. App. 207. See Coler *v.* Board of County Comrs., 6 N. M. 88, 27 Pac. 619.

Where a record offered in evidence is interlined, erased and mutilated, the interlineations, erasures, etc., should be satisfactorily explained, especially where it is sought by a record in such condition to contradict a certified copy which appears to have been formally and regularly transcribed. In order to overcome such certified copy by a record containing erasures, etc., the offer should be to prove that the certified copy was not a true copy at time it was made. Delph *v.* Barney, 5 Or. 191.

In Certified Copy. — See *infra*, III, 2, D, 0.

77. The rule which excludes papers on account of an unexplained alteration applies to papers in the possession of the party to be injured or benefited thereby, but not to official documents not in the custody or under the control of the party offering them. Devoy *v.* Mayor, etc., of New York, 35 Barb. (N. Y.) 264.

Mutilated Record. — In the absence of other suspicious circumstances it is not a sufficient ground for the exclusion of a public record, when offered in evidence, that some of its leaves are missing. People *v.* Board of Supervisors, 21 Ill. App. 271.

78. Hommel *v.* Devinney, 39 Mich. 522. Applying this rule to interlineations in the record of a deed, the court says: "I think we must presume that all alterations or interlineations made or appearing in a public record were done in a proper manner by the person having the care and custody thereof, or by some one in his office having authority to do so. In other words the mere fact that a change has been made, in the absence of evidence showing the contrary, must be presumed to have been done in a proper and legitimate manner."

79. The fact that a line has been drawn across the minutes of the judge and clerk showing the vacation of a decree is not conclusive evidence that the order evidenced by them has been revoked. It affords *prima facie* evidence to that effect but nothing more. Gillett *v.* Booth, 95 Ill. 183.

ing of the record on the issues it is not necessary to explain it.[80]

II. METHOD OF PROOF.

1. Officer's Certificate or Affidavit. — A. GENERALLY. — Except by statute[81] an officer's mere certificate as to what his records do[82] or do not contain,[83] is not competent evidence. And the same is true of his affidavit.[84]

B. STATUTES. — a. *Generally.* — Statutes in some states make the certificates of certain officers competent evidence of the contents of their records[85] but such certificates are only admissible in proof

80. An alteration in a baptismal registry, by erasing the word "natural," and writing over it the word "legitimate," has no effect in preventing the registry from being used to establish the period of birth, though the alteration be not accounted for. It would be otherwise were document offered to establish legitimacy of parties. Thatcher *v.* Camlier, 4 La. 272.

81. See *infra,* II, 1, B.

82. *United States.* — United States *v.* Lew Poy Dew, 119 Fed. 786 (certificate of United States commissioner that he had adjudged a Chinese person to be lawfully within the United States); United States *v.* Makins, 26 Fed. Cas. No. 15,710.

Connecticut. — New Milford *v.* Sherman, 21 Conn. 101.

Georgia. — Martin *v.* Anderson, 21 Ga. 301.

Illinois. — Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757; City of Chicago *v.* English, 80 Ill. App. 163.

Kentucky. — Cornelison *v.* Browning, 9 B. Mon. 50.

Louisiana. — Taylor *v.* Jeffries, 1 Rob. 1.

Maine. — English *v.* Sprague, 33 Me. 440 (justice); Atwood *v.* Inhabitants of Winterport, 60 Me. 250.

Massachusetts. — Robbins *v.* Townsend, 20 Pick. 345; Wayland *v.* Ware, 109 Mass. 248.

Missouri. — Carr *v.* Yause, 39 Mo. 346, 90 Am. Dec. 470; State *v.* Pagels, 92 Mo. 300, 4 S. W. 931.

New Hampshire. — Morse *v.* Bellows, 7 N. H. 549 (certificate of register as to grant of letters of administration).

New York. — Lansing *v.* Russell, 3 Barb. Ch. (N. Y.) 325.

North Carolina. — Drake *v.* Merrill, 47 N. C. 368; State *v.* Champion, 116 N. C. 987, 21 S. E. 700.

Pennsylvania. — Jones *v.* Hollopeter, 10 Serg. & R. (Pa.) 326.

South Carolina. — Treasurers *v.* Witsall, 1 Spears 220 (certificate of treasurer as to mere balance of sheriff's account).

A certificate of the clerk of the superior court stating two cases by name and adding "that the above said cases have been duly dismissed as appears from the dockets of said court," is not admissible in evidence to show that the cases were in fact dismissed. Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

The certificate of a probate judge is not competent evidence to prove the grant of letters of guardianship, except as appended to a transcript from the records of his court showing the appointment. Peebles *v.* Tomlinson, 33 Ala. 336.

Competent as Secondary Evidence. Coffeen *v.* Hammond, 3 Greene (Iowa) 241; Allen *v.* Read, 66 Tex. 13, 17 S. W. 115.

83. Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344; Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003; Daniel *v.* Braswell, 113 Ga. 372, 38 S. E. 829. But *contra* see *infra,* II, 2, F, k.

84. The records of courts cannot be proved by an affidavit. Kellogg *v.* Sutherland, 38 Ind. 154; Finney *v.* Davis, 113 Ga. 364, 38 N. E. 818.

85. Teel *v.* Van Wyck, 10 Barb. (N. Y.) 376; Jackson *v.* Russell, 4 Wend. (N. Y.) 543; Brewster County *v.* Presidio County, 19 Tex. Civ. App. 638, 48 S. W. 213.

By statute the certificate of the commissioner of the land office as

of the facts of which they are made evidence by law.[86] They need not contain a copy of the record or document,[87] but a certificate stating the mere conclusion of the officer is not admissible evidence even under such a statute.[88] The execution and official character of such a certificate need not be proved.[89]

b. *Records of Another State.* — A certificate by the custodian of records of one state as to the contents of such records, properly authenticated in accordance with the act of congress, is admissible in evidence in another state if by the laws of the latter such a certificate is competent; the law of the foreign state being presumed to be the same in the absence of contrary evidence.[90]

to the facts shown by his records is made competent evidence. Rogers *v.* Mexia (Tex. Civ. App.), 36 S. W. 825; Groover *v.* Coffee, 19 Fla. 61.

An early statute in New York made the certificate of a justice competent evidence of a judgment and the proceedings which led to it, but only after a judgment rendered. Townsend *v.* Chase, 1 Cow. (N. Y.) 115. See also Benn *v.* Borst, 5 Wend (N. Y.) 293; McCarty *v.* Sherman, 3 Johns. (N. Y.) 429.

Effect as Evidence. — Under a statute making a certificate of the county surveyor or his deputy of any survey made by him of any lands in the county presumptive evidence of the facts therein contained, such certificate makes a *prima facie* case as to those facts and casts the burden upon the opposite party to produce evidence to rebut the presumption. "Whenever, however, other surveys are introduced, made by competent surveyors, such survey is of no more binding force than any other." Van Der Groef *v.* Jones, 108 Mich. 65, 65 N. W. 602.

86. Groover *v.* Coffee, 19 Fla. 61.

87. To make a certificate from the executive department admissible in evidence, it is not necessary that the certificate should give a copy of that to which it relates. It is sufficient that it gives, substantially, the contents or a part of the contents of the thing to which it relates. Henderson *v.* Hackney, 16 Ga. 521, so holding under a statute making the certificate of a public officer under his hand and seal in relation to any matter or thing properly pertaining to his office admissible in evidence.

88. The best evidence of the records of the commissioner of the land office relating to titles to school land is a certified copy, and not a mere certificate of the commissioner containing his conclusions. "In pursuance of the provisions of the law upon that subject the commissioner of the land office may furnish a certified copy of his record or a certificate, stating any facts that appear from his records, which under the statute may in a proper case serve as evidence; but we know of no case that goes to the extent of authorizing the certificate of the commissioner stating his conclusion from the combination of facts that appear from records in his office to be used as evidence of title." Hamilton *v.* McAuley, 27 Tex. Civ. App. 256, 65 N. W. 205.

89. Ushers' Heirs *v.* Pride, 15 Gratt. (Va.) 190.

90. The certificate of the clerk of a probate court of another state under the seal of the court that administration on a certain estate had been granted to a certain person who had duly qualified and was then acting as administratrix, supported by the judge's certificate that the clerk's certificate was in due form, was held admissible in evidence where by the statute of the state where the evidence was offered such a certificate was competent proof of the appointment and qualification of an administrator. The laws of the other state were presumed to be similar in this respect in the absence of evidence. Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196.

2. Best and Secondary Evidence.— A. GENERALLY. — The best evidence of the contents of a public record or document is the original record or document,[91] or an authenticated copy thereof.[92] And in general the primary evidence of any fact which is required to be or is properly embodied in a public record or document is the original record or document embodying it, or an authenticated copy.[93]

91. *United States.* — Williams *v.* Conger, 125 U. S. 397.

Georgia. — Georgia R. & Bkg. Co. *v.* Hamilton, 59 Ga. 171.

Indiana. — Hamilton *v.* Schoaff, 99 Ind. 63.

Iowa. — Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571.

Nebraska — Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796.

New Jersey. — Den *v.* Pond & Pine, 1 N. J. L. 379.

North Dakota. — Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

Tennessee. — Brown *v.* Wright, 4 Yerg. 57.

Schedule of Freight Rates Filed With Interstate Commerce Commission. — The best evidence of the commissioner's printed schedule of freight rates filed with the Interstate Commerce Commission is the copy on file with the commission. Sloop *v.* Wabash R. Co. (Mo.) 84 S. W. 111.

Delivery and Acceptance of Sheriff's Bond. — A record of the county court is the best evidence. Baker County *v.* Hamilton (Or.) 79 Pac. 187.

92. See *infra,* III, 2.

93. *Alabama.* — Phillips *v.* Beene, 16 Ala. 720; Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602.

Arkansas. — Mason *v.* Bull, 26 Ark. 164.

Florida. — Adams *v.* Board of Trustees, 37 Fla. 266, 20 So. 266.

Illinois. — City of Chicago *v.* McGraw, 75 Ill. 566; Mandel *v.* Swan Land & C. Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

Kansas. — Downing *v.* Haston, 21 Kan. 178.

Kentucky. — Mt. Sterling Nat. Bk. *v.* Bowen, 19 Ky. L. Rep. 1416, 43 S. W. 483.

Maine. — Avery *v.* Butters, 11 Me. 404; McGuire *v.* Saygood, 22 Me. 230; Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Minnesota. — Hurley *v.* West St. Paul, 83 Minn. 401, 86 N. W. 427.

Missouri. — Reppy *v.* Jefferson County, 47 Mo. 66.

Nebraska. — State *ex rel.* Vale *v.* School Dist. of Superior, 55 Neb. 317, 75 N. W. 855.

New Jersey. — Myers *v.* Clark, 41 N. J. L. 486.

North Dakota. — Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

Tennessee. — Grubbs' Lessee *v.* M'Clatchy, 2 Yerg. 432.

Texas. — Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657.

Vermont. — Sherwin *v.* Bugbee, 17 Vt. 337.

West Virginia. — Hubbard *v.* Kelley, 8 W. Va. 46.

Whenever a relevant fact consists of the substance of a document or record, the writing is the best evidence. Haines *v.* Brownlee, 71 Ala. 132.

The appropriation of lands to the public use by canal commissioners cannot be proved by parol where a record of their proceedings is required to be kept by law. Jackson *v.* Daley, 5 Wend. (N. Y.) 526.

Where a state pilot act provides that pilot commissioners "may appoint a secretary" whose duty it shall be to keep the minutes and various other records, it is the absolute duty of the commissioners to appoint such secretary, and their proceedings must be proved by his record if any has been made. The California, 1 Sawy. 596, 4 Fed. Cas. No. 2,313.

The Book of Marks and Brands is the best evidence of who owns a particular brand. Lyons *v.* Reed, 2 Posey Unrep. Cas. (Tex.) 581.

The By-laws of a State Hospital for the insane cannot be proved by

B. When Record Is Alleged. — Where a record is relied upon in a pleading as proof of a particular fact, parol evidence of such fact is not admissible.[94]

C. Particular Application of Rule. — a. *Generally.* — These rules apply to all sorts of records and documents including minutes of school boards,[95] records kept by the recorder of deeds,[96] municipal or town records and proceedings,[97] the action of townships,[98] highway commissioners,[99] census records,[1] proceedings creating[2] or

parol evidence but must themselves be produced. Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

Oath of Registering Voter. — The contents of an oath made by a person when registering as a voter cannot be proved by parol without showing that the original was not a record of which a copy could be procured, or that the original could not be produced. Thompson Sav. Bank *v.* Gregory (Tex. Civ. App.), 59 S. W. 622.

Enlistment must be proved by authenticated copy from army records. Atwood *v.* Inhabitants of Winterport, 60 Me. 250.

Ancient Proceedings and Documents. — The best evidence rule applies equally to ancient records and documents as to those of more recent date. Hurley *v.* City of West St. Paul, 83 Minn. 401, 86 N. W. 427. See also Isley *v.* Boon, 109 N. C. 555, 13 S. E. 795; Mobley *v.* Watts, 98 N. C. 284, 3 S. E. 677; Davies *v.* Pettit, 11 Ark. 349.

94. Clark *v.* Oakby, 4 Ark. 236. See Jones *v.* Jamison, 15 La. Ann. 35; Henderson County *v.* Dixon, 23 Ky. L. Rep. 1204, 63 S. W. 756; Griffin *v.* Rising, 2 Cush. (Mass.) 75.

Where the plaintiff alleges in an action for a vexatious suit and malicious holding to bail that the sum demanded as bail was indorsed on the writ, the writ and the endorsement are the only evidence of this fact to which the plaintiff can resort. Ray *v.* Law, 1 Pet. C. C. 207, 20 Fed. Cas. No. 11,592.

95. German Ins. Co. *v.* Independent School Dist., 80 Fed. 366, 25 C. C. A. 492; Whitehead *v.* School Dist., 145 Pa. St. 418, 22 Atl. 991 (action dismissing a teacher for cause); Mendel *v.* School Dist., 121 Wis. 80, 98 N. W. 932.

96. Jones *v.* Melindy, 62 Ark. 203, 36 S. W. 22; Hamilton *v.* Shoaff, 99 Ind. 63; Hardin *v.* Forsythe, 99 Ill. 312; Georgia R. etc. Co. *v.* Hamilton, 59 Ga. 171; Angell *v.* Rosenbury, 12 Mich. 241.

97. Gould *v.* Hutchins, 10 Me. 145; Hencke *v.* Standiford, 66 Ark. 535, 52 S. W. 1 (resolution of town council); Duffy *v.* Beirne, 30 App. Div. 384, 51 N. Y. Supp. 626 (proceedings of village trustees).

Where a copy of the warrant for a town meeting and the return thereon are inserted in the town records with the proceedings at the meeting, those records are evidence of the holding of the meeting and the original warrant need not be produced. Com. *v.* Shaw, 7 Metc. (Mass.) 52.

Records of City Council, if existent and accessible, are the best evidence to show action taken or authorized by city. Jordan *v.* City of Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519; Childrey *v.* City of Huntington, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313; Jackson *v.* Ellis, 116 Ga. 719, 43 S. E. 73.

98. People *v.* Finley, 97 Ill. App. 214.

99. People *v.* Finley, 97 Ill. App. 214.

1. School Census Records disclosing the facts are the best evidence of whether a person has been enumerated in a census taken by a school board. State *ex rel.* Vale *v.* School Dist. of Superior, 55 Neb. 317, 75 N. W. 855.

2. Hoffman *v.* Rodman, 39 N. J. L. 252; Brander *v.* The Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 600; Hurley *v.* West St. Paul, 83 Minn. 401, 86 N. W. 427; Beaudean *v.* City of Cape Girardeau, 71 Mo. 392. See also article "Highways," Vol. VI, p. 466.

vacating highways[3] or otherwise pertaining thereto,[4] records of boards of registration,[5] boards of equalization,[6] boards of health,[7] post-office department,[8] patent office,[9] grand jury,[10] election returns,[11] military records.[12]

The rules apply to documents and records embodying the official action of all executive and administrative officers,[13] and also to

As to whether record evidence of the existence of a highway must be produced in all cases, see Nealy *v.* Brown, 6 Ill. 10, and article "HIGHWAYS," Vol. VI.

3. When an Order Vacating a Highway was made can not be shown by parol, but must be proved by the record. Whetton *v.* Clayton, 111 Ind. 360, 12 N. E. 513.

A record of the commissioner's court is the best evidence of whether a road has been changed. Knuckols *v.* State, 136 Ala. 108, 34 So. 375.

4. The records and files pertaining thereto are the best evidence to establish the existence of a grade for a city street. Nebraska City *v.* Lampkin, 6 Neb. 27.

5. Board of Registration. Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

6. Board of Equalization. — In an action to recover taxes assessed against a railroad company, parol evidence is not admissible to show that the railroad company made a complaint to the county commissioners sitting as a board of equalization of the assessor's valuation, as the law requires a record of all proceedings of such commissioners to be kept, and such record is the only proper evidence of the doings of such board. State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

7. Cooke *v.* Board of Comrs., 13 Okla. 11, 73 Pac. 270.

8. Post Office Records. — A statement in the American Encyclopaedia as to when a postoffice was established at a particular place is not competent evidence. The records of the postoffice department showing this fact should be produced. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

9. Records of Patent Office. Parol evidence as to the time when a patent was applied for is not admissible, but the record showing this fact must be produced. Wayne *v.* Winter, 6 McLean 344, 29 Fed. Cas. No. 17,304. See article "PATENTS," Vol. IX.

10. Action of Grand Jury. — In an action for malicious prosecution, as proof that the indictment was returned not a true bill and the plaintiff discharged, parol evidence is insufficient. The record must be produced. Cole *v.* Hanks, 3 Mon. (Ky.) 208.

11. Fletcher *v.* Jeter, 32 La. Ann. 401 (election commissioners' returns).

In election contest to support a charge of forgery, the contents of original tally sheets or returns of commissioners of election cannot be shown by parol until non-existence of those tally sheets has been shown. Knight *v.* Rogan, 31 La. Ann. 289.

In the absence of a showing that the original returns of election from the different precincts had been destroyed, or that they could not be procured, testimony of election commissioners is clearly incompetent. State *v.* Sanger (Ark), 88 S. W. 903. See article "ELECTIONS," Vol. V.

12. Gale *v.* Currier, 4 N. H. 169 (roll of military company); Lacy *v.* Sugarman, 12 Heisk. (Tenn.) 354 (limits of military occupation as shown by published order of commanding general must be shown by the order, though the actual occupation may be shown by parol); Whitney *v.* Balkan, 24 Me. 406.

13. Pardon. — Redd *v.* State, 65 Ark. 475, 47 S. W. 119; Hunnicutt *v.* State, 18 Tex. App. 498; Mass *v.* Bromberg, 28 Tex. Civ. App. 145, 66 S. W. 468. See article "COMPETENCY," Vol. III, p. 210.

The Executive Minutes are not evidence that a pardon was granted. The pardon itself or a certified copy must be produced. Cox *v.* Cox, 26 Pa. St. 375, 67 Am. Dec. 432; Spalding *v.* Saxton, 6 Watts (Pa.) 338.

bonds,[14] reports,[15] petitions,[16] statements of mechanic's lien,[17] certificates,[18] maps and plats,[19] and other documents on file in public offices.

b. *Land Office Records.* — The best evidence of the records of the federal land office is the original or an authenticated copy thereof.[20] The same rule applies to the state land offices.[21]

c. *Official Character or Status.* — Ordinarily official character or status may be proved by parol because it is usually sufficient to show a *de facto* capacity.[22] The result of an election, however,

Condemnation by Building Inspector. — Parol evidence that an inspector of buildings has condemned certain walls is not admissible. The record of his judgment should be produced. Nesbit *v.* Bendheim, 15 N. Y. Supp. 300, 39 N. Y. St. Rep. 109.

14. Driesbach *v.* Berger, 6 Watts & S. (Pa.) 564.

15. A Written Report by a policeman in pursuance of his official duty is better evidence than a record thereof not shown to be authorized by law. Lorig *v.* Davenport, 99 Iowa 479, 68 N. W. 717.

16. Carpenter *v.* Fulmer, 118 Wis. 454, 95 N. W. 403.

17. The Original Statement for Mechanic's Lien, filed with the clerk, is the best evidence of the fact that such a statement was made and filed. Wheelock *v.* Hull, 124 Iowa 752, 100 N. W. 863.

18. Weber *v.* Ohio & M. R. Co., 108 Ill. 451.

The Public Weigher's Certificate as to the weight of certain wheat is the best evidence of its contents, and cannot be proved by parol. Commerce Milling & Grain Co. *v.* Morris, 27 Tex. Civ. App. 553, 65 S. W. 1118.

19. The Plan of a Street made by a proper officer, or a copy thereof, showing designated place for hydrant, is the best evidence of what place was designated. Bean *v.* Water Co., 92 Me. 469, 43 Atl. 22.

The plat and report of the commissioners who platted the city, together with the act of legislation confirming them, is the only competent evidence to prove the purpose for which the reservation of Lincoln City Block was made. State Historical Assn. *v.* City of Lincoln, 14 Neb. 336, 15 N. W. 717.

20. See article "Public Lands."

The best evidence of an order of the commissioner of the general land office reinstating a cancelled entry of land is an authenticated copy of the original order. Cornelius *v.* Kessel, 53 Wis. 395, 10 N. W. 520.

A certified copy of a certificate from the proper land office is the best evidence to establish the contents of a lost certificate of entry. Martin *v.* Brand, 182 Mo. 116, 81 S. W. 443.

Parol evidence is inadmissible to establish whether land was or was not an Indian reservation, as higher evidence exists of the fact, at the general land office. Mitchell *v.* Cobb, 13 Ala. 137.

21. Norris *v.* Hamilton, 7 Watts (Pa.) 91.

Texas State Land Office. — The testimony of the land commissioner as to the contents of the archives of his office is not competent. Either a certified copy or the commissioner's certificate as to the contents of such writings should be produced. Meyer *v.* Hale (Tex. Civ. App.), 23 S. W. 990; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Bass *v.* Mitchell, 22 Tex. 285.

The original certificate of location on file in the land office, or a certified copy thereof, is the best evidence of its existence and contents; other evidence is not admissible without properly accounting for the original. Giddings *v.* Luckett Land & L. S. Co. (Tex. Civ. App.), 33 S. W. 879.

22. Conner *v.* Nevada, 188 Mo. 148, 86 S. W. 256. See article "Officers," Vol. IX.

A county officer may testify as to his official character. The record of his appointment or election need not

must be proved by the record thereof.[23] This subject is fully treated elsewhere.[24]

When Officer Qualified. — The best evidence of the date at which an officer qualified is the record showing the facts duly qualifying him.[25]

d. *Appointment to Private Office or Trust When a Matter of Record.* — Where the appointment to a private office or trust is a matter of public record it cannot be proved by parol.[26]

e. *Official Action Presumptively Recorded.* — Where a record of official action is required or would be proper under certain conditions it is presumed to have been made, and before parol evidence is admissible it must either be shown that no record was in fact made or the record must be properly accounted for.[27]

f. *The Territorial Limits of Political and Administrative Subdivisions* must be proved by the proper record of the official action creating them,[28] unless such action is judicially noticed[29] or its

be produced. Hall *v.* Bishop, 78 Ind. 370.

In a suit brought to recover amount of judgment rendered by a justice of the peace in another state, parol proof is admissible to show that the individual purporting to have rendered the judgment was a justice of the peace, as the inquiry is not whether he is such officer *de jure*, but whether *de facto*, as it is not necessary to prove that the justice is legally invested with the authority he exercises. Johnson *v.* Hale, 2 Stew. & P. (Ala.) 331.

23. Matter of mandamus in case of Prickett, 20 N. J. L. 134. See more fully article "ELECTIONS," Vol. V.

24. See article "OFFICERS," Vol. IX.

25. The bond of a tax collector with the approval thereof required by law is the best evidence of the time when the officer qualified as such. Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781.

26. The Appointment of a Guardian being a matter of record cannot be proved by parol. Bryan *v.* Walton, 14 Ga. 185.

Contra. — Appointment of the guardian of a minor may be proved *aliunde* than by original petition and record entry on the minutes of the orphans' court. Fink's Appeal, 101 Pa. St. 74.

27. Jackson *v.* Ellis, 116 Ga. 719, 43 S. E. 73 (action of city council presumptively recorded). See also Holt *v.* Maverick, 5 Tex. Civ. App. 650, 24 S. W. 532, 23 S. W. 751, and article "EXAMINATION BEFORE COMMITTING MAGISTRATE," Vol. V, p. 332, n. 69.

The report of viewers of the highway to the county court presumptively contains an agreement between them and a land owner giving the latter the right to maintain gates across a particular road, and is the best evidence of such agreement. Parol evidence of the agreement is therefore inadmissible without properly accounting for the report or showing that the agreement was not reduced to writing. Allen *v.* Hopson, 26 Ky. L. Rep. 1148, 83 S. W. 575.

Where the county superintendent is required by law to keep a record of his official proceedings, oral evidence of his proceedings on an application for license to teach is not admissible without showing whether or not there was a record of the same, and if so laying a proper foundation for secondary evidence. The presumption in such case is that a record was kept as required by law. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197.

28. Montpelier S. B. & T. Co. *v.* School Dist., No. 5, 115 Wis. 622, 92 N. W. 439 (territorial limits of school district).

29. See article "JUDICIAL NOTICE," Vol. VII.

the non-production of the record is satisfactorily accounted for.[30]

g. Taxation and Taxes. — **(1.) Generally.** — The best evidence of official action of taxing officers is the record thereof.[31]

(2.) Return Made by Taxpayer. — The best evidence of what property was returned for taxation by a taxpayer is the assessment books made from the sworn lists filed by taxpayers where such lists are not required to be kept.[32]

(3.) Assessment. — The best evidence of the fact and amount of assessment is the record or a certified copy, consisting of the assessment roll[33] or duplicate thereof.[34]

30. See *infra*, "Nature and Admissibility of Secondary Evidence."

31. In a suit by a county to recover amount of taxes assessed by board of equalization against a railroad, the state auditor's certificate to county court is incompetent to prove action of board. Record required to be kept by board, or certified copy thereof is the only proper evidence for that purpose when attainable. Washington Co. *v.* St. Louis & I. M. R. Co., 58 Mo. 372.

Whether a tract of land is seated or unseated, and has been assessed, taxed and sold by the treasurer as such, must depend upon the records of the commissioner's office, and not parol evidence or the private duplicates of an assessor. McCall *v.* Lorimer, 4 Watts (Pa.) 351.

32. Anniston City Land Co. *v.* Edmonston, 141 Ala. 366, 37 So. 424.

33. Robbins *v.* Townsend, 20 Pick. (Mass.) 345; Marlborough *v.* Sisson, 23 Conn. 44; Carlisle *v.* Chehalis Co., 32 Wash. 284, 73 Pac. 349; Averill *v.* Sanford, 36 Conn. 345; Pittsfield *v.* Barnstead, 38 N. H. 115. See also Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864.

The best evidence of the amount of assessment against land is the assessment roll and not the tax roll. Montpelier S. B. & T. Co. *v.* School Dist. No. 5, 115 Wis. 622, 92 N. W. 439.

Parol evidence is not admissible to prove the levy of taxes. The record of the levy is the best evidence. Fagan *v.* Rosier, 68 Ill. 84.

The assessment roll or tax duplicate is the best evidence of what lands are assessed to particular individuals, where this fact is one of the issues in the case. Bright *v.* Markle, 17 Ind. 308.

The Date on which the assessment roll is completed and certified to by the assessor, is the sole and exclusive evidence as to the date of the assessment, and parol evidence of the assessor is not admissible to show that he made the assessment at an earlier date. Allen *v.* McKay & Co., 139 Cal. 94, 72 Pac. 713.

The Official Tax Books of the city of Washington made up by the register from the original returns or lists of the assessors and laid before the court of appeals, it being empowered by the ordinances of the corporation to correct the valuations made by the assessors, are competent evidence; and it is not necessary that the assessors' original lists should be produced to prove the assessment. Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349.

Testimony of an ex-tax collector is not the best evidence of the assessment and payment of a special tax during his term of office. Hickman *v.* Dawson, 35 La. Ann. 1086.

34. Lessee of Simon *v.* Brown, 3 Yeates (Pa.) 186, 2 Am. Dec. 368.

The copy of the tax duplicate retained by the county auditor is admissible the same as the original delivered to the treasurer as required by statute. It is not a copy in the ordinary sense. "Where a duplicate list is made out, each of the lists has all the force and effect of an original instrument and differs in that respect from a mere copy." Standard Oil Co. *v.* Bretz, 98 Ind. 231.

Copy Delivered to Tax Collector. The original and only assessment roll is the one prepared by the asses-

(4.) Amount Due. — The best evidence of the amount of taxes due from a particular person is the tax roll.[35]

(5.) Payment of Taxes. — The payment of taxes is a fact which may be proved by parol; the record or the tax receipt need not be produced.[36] The latter are, however, both competent evidence.[37]

A Tax Receipt is the best evidence of its contents.[38]

(6.) Tax Sale and Redemption. — The proper records are the best evidence to prove a tax sale[39] and redemption therefrom.[40]

h. *Bankruptcy and Insolvency.* — The best evidence of an adjudication of bankruptcy or insolvency is the record thereof or an authenticated copy.[41] And the existence of an unsatisfied judg-

sors and transmitted to the board of supervisors. And where a statute provides that the supervisors after correcting any errors and omissions and equalizing the assessed valuations shall extend the taxes and cause "the corrected assessment roll or a fair copy thereof to be delivered to the collector," such "fair copy" is not competent primary evidence. Oswego County Sav. Bank *v.* Genoa, 28 Misc. 71, 59 N. Y. Supp. 829.

35. Tax roll is the best evidence of taxes due by party, in suit by state for recovery of same. State *v.* Edgar, 26 La. Ann. 726.

36. McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490; Davis' Admx. *v.* Hare, 32 Ark. 386; Dennett *v.* Crocker, 8 Me. 239. But see Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17; Wood *v.* State, 8 Heisk. (Tenn.) 329.

The receipts or books of the tax collector are not the only competent primary evidence of the payment of taxes, but this may be established by the oral testimony of any one who knows the fact; and although a statute provides that tax payers shall take duplicate receipts, file one with the county judge and take his signature and endorsement of "duplicate surrender" on the other, and that "no receipt for taxes shall be held as evidence of the payment thereof without such signature of the county judge," oral evidence is still admissible even if the statute has not been complied with, since it has reference only to one class of primary evidence and does not serve to exclude any other. Adams *v.* Beale, 19 Iowa 61.

"Such evidence is received as independent proof of the fact of payment and not for the purpose of establishing the contents of the receipt." Hinchman *v.* Whetstone, 23 Ill. 185; Irwin *v.* Miller, 23 Ill. 401.

The certificate of the comptroller of the state is neither the best nor the only evidence of the payment of taxes. This fact may be shown by direct or circumstantial evidence as any other fact. Ochoa *v.* Miller, 59 Tex. 460, *following* Deen *v.* Wills, 21 Tex. 643.

37. See Lessee of Simon *v.* Brown, 3 Yeates (Pa.) 186, 2 Am. Dec. 368; Robbins *v.* Townsend, 20 Pick. (Mass.) 345.

38. Under an indictment for registration in two election districts, the testimony of the inspector of elections was held inadmissible to show whether the tax receipt offered by the voter was stamped on the day of registration; the receipt itself is the best evidence. State *v.* Caldwell, 1 Marv. (Del.) 555, 41 Atl. 198.

39. Tax Sale. — Original record of a tax sale is of a higher grade of evidence than the deposition of the auditor who testified as to the contents of a certified copy sent to his office by the county clerk. Thweatt *v.* Black's Exr., 30 Ark. 732.

40. A Redemption of Land From a Tax Sale by minor heirs should be proved by records in the auditor's office, they being the best evidence which the nature of the case would admit. Lane *v.* Sharpe, 4 Ill. 566.

41. Files *v.* Harbison, *et al.*, 29 Ark. 307; Pargand *v.* Morgan, 2 La. 100.

The best evidence of a discharge

ment against the alleged insolvent cannot be shown by parol.[42] But the fact of insolvency may be shown by parol independent of any record evidence thereof.[43] The presentation of claims to commissioners of insolvency must be proved by their report to the court.[44]

D. Judicial Records and Proceedings. — a. *Generally.* — The best evidence of judicial records and proceedings is the original records or a properly authenticated copy thereof.[45]

in bankruptcy is the certificate of the same. Regan *v.* Regan, 72 N. C. 195.

A Certificate of Discharge of a bankrupt obtained by another person than the bankrupt is as valid for the purposes of evidence as the one given to the bankrupt himself, as the certificate on the record is regarded as the original decree of the court, and the certificate granted the bankrupt but a copy of that record. Pennell *v.* Percival, 13 Pa. St. 197.

The discharge of an insolvent can only be proved by record, unless a proper foundation for secondary evidence has been laid. Karch *v.* Com., 3 Pa. St. 269.

A report of an assignee in bankruptcy is not admissible to show when the bankruptcy proceedings terminated. "The record and files of the court, or copies thereof, would be better evidence for that purpose." Holmes *v.* Burwell, 30 Ill. App. 445.

42. Bizard *v.* Moody, 117 Ga. 67, 43 S. E. 426. *Contra.* — On the issue of insolvency a sheriff may properly testify that at a particular time he held a *fieri facias* against the person in question, that he failed to find property belonging to that person on which to levy, and that he returned the process unsatisfied with an entry of *nulla bona.* It is not necessary to produce the record and the return because the matters shown thereby are not in dispute. Fountain *v.* Anderson, 33 Ga. 372.

43. In an action by the assignee of a note against the assignor, the maker's insolvency may be proved by parol evidence in addition to the record evidence of insolvency. Bryan *v.* Perry, 5 Mon. (Ky.) 275. See article "Insolvency," Vol. VII.

The insolvency of the principal, in an action against the guarantor, may be shown otherwise than by judgment with return of *nulla bona.* Cates *v.* Kittrell, 7 Heisk. (Tenn.) 606.

44. Report of Commissioners of Insolvency. — Where the commissioners of insolvency are required to report to the probate court a list not only of all claims allowed by them but also of such as have been *presented* and disallowed, the fact that the claim sued on has been presented to the commissioners must be proved by their report forming part of the probate records. Franklin, Robinson & Co. *v.* Brownson, 2 Tyler (Vt.) 103. See Randall *v.* Preston, 52 Vt. 198.

45. *Alabama* — Donegan *v.* Wade, 70 Ala. 501.

Arkansas. — Williams *v.* Brummell, 4 Ark. 129; Alexander *v.* Foreman, 7 Ark. 252.

California. — Leviston *v.* Henninger, 77 Cal. 461, 19 Pac. 834.

Colorado. — Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891.

Connecticut. — Northrop *v.* Chase, 76 Conn. 146, 56 Atl. 518; Waterbury Lumb. Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739.

Georgia. — Groover *v.* King, 46 Ga. 101; Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975.

Illinois. — McIntyre *v.* People, 103 Ill. 142; Rockford etc. R. Co. *v.* Lynch, 67 Ill. 149; McGuire *v.* Goodman, 31 Ill. App. 420.

Indiana. — Cline *v.* Gibson, 23 Ind. 11; Harlan *v.* Harris, 17 Ind. 328; Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670.

Indian Territory. — Schwab Cloth. Co. *v.* Cromer, 1 Ind. Ter. 661, 43 S. W. 951.

Kansas. — Pulsifer *v.* Arbuthnot, 59 Kan. 380, 53 Pac. 70.

Kentucky. — Cynthiana & R. C. Tpk. Co. *v.* Hutchinson, 22 Ky. L. Rep. 1233, 60 S. W. 378.

Louisiana. — State *v.* Smith, 12 La. Ann. 349; State *v.* Brooks, 39 La. Ann. 817, 2 So. 498; Driggs *v.* Morgan, 2 La. Ann. 151.

Maine. — Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627.

Maryland. — Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670.

Massachusetts. — Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182; Sheldon *v.* Frink, 12 Pick. 568.

Missouri. — Milan *v.* Pemberton, 12 Mo. 598; Dennison *v.* St. Louis Co., 33 Mo. 168; Wynne *v.* Aubuchon, 23 Mo. 30.

Montana. — Spencer *v.* Spencer, 31 Mont. 631, 79 Pac. 320.

Nebraska. — Nelson *v.* Brisbin, 98 N. W. 1057.

Nevada. — Davis *v.* Noteware, 13 Nev. 421.

New Jersey. — Tyrrel *v.* Woodbridge Twp., 27 N. J. L. 416.

New York. — McVity *v.* Stanton, 10 Misc. 105, 30 N. Y. Supp. 934; Wright *v.* Maseras, 56 Barb. 521.

North Carolina. — Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2.

Ohio. — Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609; Smiley *v.* Dewey, 17 Ohio 156.

Oregon. — Bowick *v.* Miller, 21 Or. 25, 26 Pac. 861.

Pennsylvania. — Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786.

South Dakota. — Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069.

Tennessee. — Brady *v.* White, 4 Baxt. 382; Williamson *v.* Anthony, 4 Heisk. 78.

Texas. — Green *v.* White, 18 Tex. Civ. App. 309, 45 S. W. 389; State *v.* Cardinas, 47 Tex. 250.

Virginia. — Buford *v.* Buford, 4 Munf. 241, 6 Am. Dec. 511.

West Virginia. — Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

Verbal testimony as to when a suit was brought, when the declaration was filed and the judgment rendered is not competent. Sherman *v.* Smith, 20 Ill. 351.

The primary evidence of the indebtedness shown by the record of another suit is a certified copy thereof. Mills *v.* Howeth, 19 Tex. 257, 17 Am. Dec. 331.

Where a declaration in slander charges that defendant had said that plaintiff as a witness was guilty of perjury, defendant in justification cannot give parol evidence of what plaintiff swore to, unless it be shown by the *best* evidence (the record of that trial) how it applied to matter in question. Kirtley *v.* Dick, 3 H. & M. (Va.) 388.

In an action against a sheriff for damages for a false return to an execution against a person, the best evidence of the fact that an order of arrest was issued in such other action is the order itself. Secondary evidence is not admissible unless the original is sufficiently shown to be lost or destroyed. Josuez *v.* Conner, 7 Daly (N. Y.) 448.

Verdict. — Abrams *v.* Smith, 8 Blackf. (Ind.) 95.

By statute in Illinois when property levied upon by the sheriff is claimed by a third person, the sheriff must summon a jury to try the question of title; and a written verdict signed by the jurymen must be returned. This writing is the best evidence of its contents and must be produced. Lawrence *v.* Sherman, 2 McLean, 488, 15 Fed. Cas. No. 8,144.

The record of the suit is the best evidence of the foreclosure of a mortgage and the sale of mortgaged premises. Kennedy's Heirs *v.* Reynolds, 27 Ala. 364.

A sale of land under a decree to enforce a vendor's lien must be proved by the record of the proceedings, or a certified copy thereof. Phillips *v.* Costley, 40 Ala. 486.

That an Award, Made Pendente Lite, Was Afterwards Set Aside on exceptions taken, an authenticated copy is the only competent evidence. Buford *v.* Buford, 4 Munf. (Va.) 241, 6 Am. Dec. 511.

The Indexing of an Abstract of Judgment being a matter of record cannot be proved by the mere certificate of the clerk. Glasscock *v.* Stringer (Tex. Civ. App.), 32 S. W. 920.

The Minutes of the Clerk or Judge cannot be proved by parol. Gillett *v.* Booth, 95 Ill. 183.

Costs. — The costs incurred in a suit cannot be proved by parol. Gates *v.* Hunter, 13 Mo. 511.

In an action on an appeal bond, a copy of the tax bill covering costs incurred, certified to by the clerk of the court and under the seal

This general rule applies equally to courts of criminal[46] as well as civil jurisdiction and to courts of equity[47] as well as law.

b. *Ministerial Acts.* — It has been held that the ministerial acts of a court may be proved by parol[48] and that the record thereof may be impeached by parol.[49]

thereof, is the best evidence of the amount of such costs. Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

Presentation and Allowance of Claim. — Crenshaw County *v.* Sikes, 113 Ala. 626, 21 So. 135.

Elements of Damages Awarded. Parol evidence that the cost of fencing a railroad was included in the assessment of damages for the right of way is not admissible. The record is the best evidence. Rockford, R. I. & St. L. R. Co. *v.* Lynch, 67 Ill. 149.

Who Were Parties to particular probate proceedings is best shown by the record thereof. Williams *v.* Duer, 14 La. 523.

In Same Court. — Parol proof is not admissible to show the action of the judge or the proceedings on the trial, for the information of another judge presiding at a subsequent term. Williamson *v.* Anthony, 4 Heisk. (Tenn.) 78.

Records of Federal Courts in State Courts. — City Sav. Bank *v.* Kensington Land Co. (Tenn.), 37 S. W. 1037; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

46. Flynn *v.* Merchants' Ins. Co., 17 La. Ann. 135; Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425; Newcomb *v.* Griswold, 24 N. Y. 298; Cherry *v.* McCants, 7 S. C. 224; Kirschner *v.* State, 9 Wis. 140.

Preliminary Examination of Accused. — An examination of a prisoner made before a magistrate, being required to be recorded within two days, under the law, parol evidence of it cannot be received. State *v.* Grove, 3 N. C. 36.

The record or a copy of it is the best evidence of the fact that a person has been bound over for his appearance at court to answer charges of perjury. It is not competent to inquire of the witness orally concerning that fact. Smith *v.* Smith, 43 N. H. 536.

Warrant and Arrest. — Oral evidence of the issuance of a warrant and the arrest of a person thereon is incompetent unless it is shown that neither the warrant nor a copy of it can be produced. Hackett *v.* King, 6 Allen (Mass.) 58.

Under a prosecution for aiding the escape of a prisoner, to show that person liberated was lawfully confined, the best evidence is the warrant of arrest under which arrest was made and defendant therein was held at time of trial. DuBose *v.* State, 115 Ala. 70, 22 So. 613.

On Indictment for Perjury. — A record of the trial in which the false swearing is charged to have been committed must be produced, if in existence, under an indictment for perjury. Whittle *v.* State, 79 Miss. 327, 30 So. 722.

Discharge of Surety on Bail Bond. The only legal evidence of the discharge of the surety on a bail bond is the record of an *exoneretur* entered on the minutes of the court. Griffin *v.* Moore, 2 Ga. 331.

47. Account by a Master in Chancery. — Sutton *v.* Mandeville, 1 Cranch C. C. 2, 23 Fed. Cas. No. 13,648.

Referee's Award. — Tyler *v.* Dyer, 13 Me. 41.

48. Ayres *v.* Clinefelter, 20 Ill. 465; Wardwell *v.* McDowell, 31 Ill. 364, in which the proceedings of a probate court, which under the statute was not a court of record, consisting of proof of the execution of a will, refusal of part of the executors named to accept and qualify, and granting letters testamentary, were held to be of a ministerial character and provable by other than record evidence.

49. County courts approving official bonds act in a ministerial capacity, and parol evidence is competent to show that the court when so acting had knowledge that the name of one of the sureties on a tax collect-

c. *Institution, Pendency, Subject-Matter and Disposition of Suit or Action.* — Neither the institution[50] nor pendency[51] of another suit or action, the subject-matter or issues thereof,[52] nor the disposition made of it[53] and the grounds of the court's action therein[54] can be shown by parol, the record itself or an authenticated copy thereof must be produced in the absence of a showing to justify the introduction of secondary evidence.

d. *Pleadings.* — The pleadings in the case, or certified copies, are the best evidence of their contents.[55]

or's bond had been erased, and that, too, without the knowledge or consent of the other sureties. Such evidence is not offered to show an order or judgment of court. State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735.

50. Collins & Son *v.* Bullard, 57 Ga. 333. But see File *v.* Springel, 132 Ind. 312, 31 N. E. 1054 (holding that the fact that a suit of foreclosure was begun might be shown by parol).

An action by an attorney to recover compensation for instituting suits in another court, the fact that the suits were commenced cannot be proved by parol. Hughes *v.* Christy, 26 Tex. 230.

When a Suit Was Commenced. Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067.

51. Alexander, Admr., *v.* Foreman, 7 Ark. 252; Wright *v.* Maseras, 56 Barb. (N. Y.) 521; Davis *v.* Noteware, 13 Nev. 421; Lumley *v.* Dewey, 17 Ohio 156.

To support allegation of pending contest before the land department, the record thereof is the best evidence. Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496.

52. Tuck *v.* Rottkowsky, 47 Misc. 386, 93 N. Y. Supp. 1112; Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; Stillman *v.* Palis, 23 Ill. App. 408; Chattanooga Groc. Co. *v.* Livingston (Tenn.), 59 S. W. 470; West *v.* Cavins, 74 Ind. 265. But see Shelton *v.* Ward, 1 Call (Va.) 538.

The Grounds of the Recovery in Another Suit cannot be proved by parol testimony as to the evidence given in such suit, but the record must be produced to show what the pleadings and the issue were. Cooper *v.* Watson, 10 Wend. (N. Y.) 202; Glenn *v.* Lopez, Harp. (S. C.) 105. But see Helfrich *v.* Stem, 17 Pa. St. 143.

Where a justice has produced his minutes of a judgment in which there is an ambiguity as to the form of the action, he cannot testify as to the ground of action as shown by the declaration but must produce the original instrument. Dygert *v.* Coppernoll, 13 Johns. (N. Y.) 210.

The Opinion of the Appellate Court is not admissible in evidence to prove facts in issue in an action. Work Bros. *v.* Kinney, 8 Idaho 771, 71 Pac. 477.

53. Stillman *v.* Palis, 23 Ill. App. 408; Chattanooga Groc. Co. *v.* Livingston (Tenn.), 59 S. W. 470; Collins & Son *v.* Bullard, 57 Ga. 333.

The Dismissal of an action cannot be shown by parol, the primary evidence of this fact is an entry on the record. Armstrong *v.* Lewis, 61 Ga. 680.

Termination of Prosecution. — In an Action for Malicious Prosecution where the prosecution was before a justice of the peace, his docket is the best evidence to show the termination of the prosecution, and oral evidence is not admissible. "This interpretation of the opinion in Skidmore *v.* Bricker, 77 Ill. 164, has been adopted in several instances, and we think it is correct." Knecht *v.* Lehr, 81 Ill. App. 208.

54. Grounds upon which a court proceeded in rendering judgment upon demurrer, cannot be shown by parol. Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2.

55. Hardin *v.* Blackshear, 60 Tex. 132; Parker *v.* Ballard, 123 Ga. 441, 51 S. E. 465; Mandelbaum *v.* New York City R. Co., 90 N. Y. Supp. 377; Nelson *v.* Solomon, 112 Ga. 188,

e. *Writs and Process.* — (1.) **Generally.** — Judicial writs and process or an authenticated copy thereof are the best evidence of their issuance and contents.[56] The time when they issued may, however, be shown by parol,[57] though it has been held that where the law requires the officer receiving the writ to endorse upon it the time of its receipts, this endorsement and not the docket entry is the best evidence.[58]

The Service of such writs or process must be shown by the record thereof.[59] But parol evidence is competent to show who directed service to be made.[60]

(2.) Execution. — A writ of execution though delivered to an officer is to be returned, and it is the best evidence of its existence and contents.[61]

37 S. E. 404; Nims *v.* Johnson, 7 Cal. 110; Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77; Howe *v.* Fleming, 123 Ind. 262, 24 N. E. 238.

The Complaint in a criminal action is the best evidence of what it charges. Tacy *v.* Starks, 67 App. Div. 422, 73 N. Y. Supp. 225.

56. The process issued out of court cannot be proved by parol, but either the original or a sworn copy thereof must be produced. Foster *v.* Trull, 12 Johns. (N. Y.) 456. See Baldwin *v.* Ryan, 3 Thomp. & C. (N. Y.) 251.

The Contents of a Certiorari or Other Writ cannot be proved by parol, but the original or a sworn copy of it must be produced. Brush *v.* Taggart, 7 Johns. (N. Y.) 19.

Writ of Attachment. — Potter *v.* Tyler, 2 Metc. (Mass.) 58.

The writ whereby an officer seizes property is the best evidence of the officer's authority. Glasscock *v.* Nave, 15 Ind. 457.

An Original Citation requiring an administratrix to give additional security and the return of the sheriff thereon are the best evidence of its issuance and service, and such facts cannot be proved by parol. Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389.

57. Crosby *v.* Stone, 3 N. J. L. 988; Jenkins *v.* Cockerham, 23 N. C. (1 Ired. L.) 309. See also Duff *v.* Ivy, 3 Stew. (Ala.) 140.

58. It being the duty of the officer receiving an execution from a justice of the peace to endorse thereon the time of its receipt, the docket of the justice cannot be received as evidence to show the date of receipt of the execution by the constable. Gott *v.* Williams, 29 Mo. 461.

59. Pendexter *v.* Carleton, 16 N. H. 482. But see Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013, holding that in an action for services rendered in serving writs the plaintiff may testify as to his service of the writs without producing them.

The best evidence of the service of summons or original notice giving jurisdiction is the summons or original notice itself with the return thereon; but in case of the loss or destruction of the original the testimony of the officer who made the service is competent secondary evidence. Bridges *v.* Arnold, 37 Iowa 221.

Defective Service of Process. Where damages were asked against an attorney for the consequences of his unskillfulness in taking a judgment upon insufficient service of process, it was held that the fact of the alleged defective service could only be proved by the record. Reilly *v.* Cavanaugh, 29 Ind. 435.

60. Williams *v.* Cheesebrough, 4 Conn. 356.

61. Smelser *v.* Drane, 1 Ala. 245; Howell *v.* Shands & Co., 35 Ga. 66; Luck *v.* Zapp, 1 Tex. Civ. App. 528, 21 S. W. 418. See also Bowick *v.* Miller, 21 Or. 25, 26 Pac. 861. But see Supples *v.* Lewis, 37 Conn. 568, holding that issuance of an execution may be shown by parol where no attempt is made to prove its contents.

An Execution though it passes

(3.) Action Taken Under Writ. — Officer's Return. — (A.) Generally. The best evidence of the action taken under a judicial writ is the return thereon or an authenticated copy thereof.[62] But one not a

into the hands of an officer to be executed should be returned to and filed with the clerk of the court which issued it, and is therefore an office paper which is presumed to be on file. And to justify secondary evidence thereof it should be shown that unavailing search has been made in the clerk's office and that it is not in the possession of the sheriff or other person who might have it. Doe ex d. Vaughn *v.* Biggers, 6 Ga. 188.

A memorandum of the justice upon the record of a judgment that an execution had issued and returned, no property found, is not competent primary evidence. The execution itself is the best evidence and must be accounted for. Williams *v.* Case, 14 Ind. 253. *Contra.* — Burke *v.* Miller, 46 Mo. 258.

The Issuance of an Execution by a Justice of the Peace when in issue cannot be proved by a transcript from the justice's docket; but the execution itself or a certified or sworn copy thereof must be produced. Snyder *v.* Norris, 6 Blackf. (Ind.) 33; Henkle *v.* German, 6 Blackf. (Ind.) 423.

Contra. — Burke *v.* Miller, 46 Mo. 258; Franse *v.* Owen's, 25 Mo. 329 (but see Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470).

Execution Docket. — An execution cannot be proved by entries from the execution docket; the original or certified copy should be produced. Ayers *v.* Roper, 111 Ala. 651, 20 So. 460. But see *supra*, I, 46, O. *Compare* Duff *v.* Ivy, 3 Stew. (Ala.) 140.

62. Meyers *v.* Smith, 27 Md. 91. But see Bryant *v.* Dana, 8 Ill. 344; Perryman *v.* Morgan, 103 Ga. 555, 29 S. E. 708; Spiller *v.* Lessee of Nye, 16 Ohio 16; McKnight *v.* Sessions, 8 Rich. L. (S. C.) 210.

The official return of a sheriff is the best evidence of his action. Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389 (service of citation requiring administratrix to give additional security).

But parol testimony may be received from a sheriff to authenticate the entries endorsed on an execution and to prove that property levied upon had not been sold. National Bank *v.* Kinard, 28 S. C. 101, 5 S. E. 464.

The Return of an Officer on an Execution constitutes the best evidence of what property was levied on thereunder. Flannigan *v.* Althouse, Wheeler & Co., 56 Iowa 513, 9 N. W. 381; West *v.* St. John, 63 Iowa 287, 19 N. W. 238; Howell *v.* Shands & Co., 35 Ga. 66; Farmers' & Drovers' Bank *v.* Fordyce, 1 Pa. St. 454. See also Rollins *v.* Henry, 78 N. C. 342. Snyder *v.* Snyder, 6 Bin. (Pa.) 483, 6 Am. Dec. 493.

Parol evidence that property was seized and sold by an officer is generally inadmissible without producing the officer's authority for the seizure or accounting for its nonproduction. Shiver *v.* Bentley, 78 Ga. 537, 3 S. E. 770.

Returns on executions being required to be in writing, oral evidence in relation thereto is inadmissible when the non-production is not accounted for. Wells *v.* Bourne, 113 N. C. 82, 18 S. E. 106; McDade *v.* Mead, 18 Ala. 214.

Return on Writ of Attachment. Potter *v.* Tyler, 2 Metc. (Mass.) 58.

The sheriff's return is the best evidence that certain property was sold by him under an order of court. Dawson *v.* Quillen, 61 Mo. App. 672.

The return of a sheriff on a writ of attachment containing an inventory of the attached property is a matter of record, and parol evidence is not admissible to show what goods were taken under the attachment. Gottlieb *v.* Barton (Colo.), 57 Pac. 754.

In an action between an attaching officer and his bailees or receipters the attachment need not be proved by the writ and return, but the receipt reciting the attachment "is the appropriate and proper evidence for that purpose." Lowry *v.* Cady, 4 Vt. 504.

party to the suit in which such action was taken is not bound by such return.[63] The officer's failure to make a return may, however, be shown by parol.[64]

(B.) Sale on Execution. — A return by the officer is not essential to the validity of a sale on execution and therefore need not be produced or proved in support of such a sale.[65]

(C.) When Return Has Not Been Made or Has Been Lost or Destroyed. — Where no return has been made, or the one made has been lost or destroyed, parol evidence is admissible to show the action taken by the officer.[66]

f. *Orders of the Court* must be proved by the record thereof unless a proper foundation for secondary evidence has been laid.[67]

g. *Judgment or Decree.* — **(1.) Generally.** — The best evidence to establish the existence and terms of a judgment[68] is the record itself or a properly authenticated copy of such record and of course

63. Perry *v.* Stephens, 77 Tex. 246, 13 S. W. 984; Riethmann *v.* Godsman, 23 Colo. 202, 46 Pac. 684.

64. Anderson *v.* Cunningham, 1 Minor (Ala.) 48.

65. Hill *v.* Kendall, 25 Vt. 528; Rham *v.* North, 2 Yeates (Pa.) 117. See Lessee of Armstrong *v.* McCoy, 8 Ohio 128, 31 Am. Dec. 435.

66. Demint *v.* Thompson, 80 Ky. 255; McBurnie *v.* Overstreet, 8 B. Mon. (Ky.) 300; State *v.* Daggett, 2 Aik. (Vt.) 148; Gaither *v.* Martin, 3 Md. 146.

Although the return upon an execution is the best evidence of the reply to the officer made by the person upon whom it was served, nevertheless if the original execution has been lost secondary evidence of its contents is admissible; and so also even though a formal return is impossible because of the loss of the execution; the officer who levied it may testify as to what the return should have been. Dailey *v.* Coleman, 122 Mass. 64.

67. *Connecticut.*—State *v.* Thresher, 77 Conn. 70, 58 Atl. 460.

Illinois. — McIntyre *v.* People, 103 Ill. 142.

Iowa. — Bristol Sav. Bank *v.* Judd, 116 Iowa 26, 89 N. W. 93.

Mississippi. — Eakin *v.* Vance, 10 Smed. & M. 549, 48 Am. Dec. 770.

Missouri. — Cummings *v.* Brown, 181 Mo. 711, 81 S. W. 158.

New Jersey. — Michener *v.* Lloyd, 16 N. J. Eq. 38; Tyrrel *v.* Twp of Woodbridge, 27 N. J. L. 416.

North Carolina. — State *v.* Voight, 90 N. C. 741.

Texas. — International & G. N. R. Co. *v.* Moore (Tex. Civ. App.), 32 S. W. 379.

When No Record Has Been Made. Competency of parol evidence, see *infra*, "Where Required or Authorized Record Has Not Been Made."

68. *Alabama.* — Williams *v.* State, 130 Ala. 31, 30 So. 336.

Arkansas. — Wilson *v.* Spring, 38 Ark. 181.

Colorado. — Watson *v.* Hahn, 1 Colo. 385.

Connecticut. — Waterbury Lumb. & Coal Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739.

Delaware. — Downs *v.* Rickards, 4 Del. Ch. 416.

Georgia. — Cody *v.* First Nat. Bank, 103 Ga. 789, 30 S. E. 281.

Illinois. — Walter *v.* Kirk, 14 Ill. 55; Weis *v.* Tiernan, 91 Ill. 27; Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55. See Carbine *v.* Morris, 92 Ill. 555.

Indiana. — Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670.

Iowa. — Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178.

Louisiana. — Graves *v.* Hunter, 23 La. Ann. 132; Lockhart *v.* James, 9 Rob. 381.

Missouri. — State *v.* Scott, 31 Mo. 121.

Nevada. — Davis *v.* Noteware, 13 Nev. 421.

the same rule is equally applicable to the proof of a judicial decree.[69]

A Writ of Execution is not primary evidence of a judgment[70] nor of the amount due under it.[71]

(2.) Payment or Satisfaction of Judgment. — The payment or satisfaction of a judgment where entered upon the record cannot be proved by parol.[72] But it has been held to the contrary.[73]

(3.) Former Adjudication. — A plea of a former judgment or adjudication must be supported by record evidence,[74] although parol

New Jersey. — Lomerson *v.* Hoffman & Risher, 24 N. J. L. 674.

New York. — Whitman *v.* Seaman, 61 N. Y. 633; Sutton *v.* Dillaye, 3 Barb. 529.

Oregon. — Bowick *v.* Miller, 21 Or. 25, 26 Pac. 861.

South Dakota. — Miller *v.* Durst, 14 S. D. 587, 86 N. W. 631.

Texas. — Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532; Valentine *v.* State, 6 Tex. App. 439.

Vermont. — Nye *v.* Kellam, 18 Vt. 594.

Oral testimony of the plaintiff that he has a judgment against the garnishee's creditor is not competent evidence of such judgment. McNeill *v.* Donohue, 44 Ill. App. 42.

The recovery of a judgment in a court of record must be proved by the record itself. "This rule embraces every case where a party would for any purpose prove the recovery of a judgment." Graham *v.* Gordon, 1 Chip. (Vt.) 115.

The only legal evidence of a judgment in the clerk's entry in the record provided by law, and the abstract of the same in the judgment docket. Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889.

The fact that a judgment has been recovered in a justice court and a transcript thereof filed with the county clerk cannot be proved by parol. Pollock *v.* Hoag, 4 E. D. Smith (N. Y.) 473.

69. Clark *v.* Cassidy, 64 Ga. 662; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Signed But Not Enrolled. — By statute, a decree being a record from the time of signing as fully as if enrolled is itself the highest evidence. Smith *v.* Valentine, 19 Minn. 452.

Divorce. — The record of the decree or duly authenticated copy thereof, is the only competent evidence of divorce. Reynolds *v.* State, 58 Neb. 49, 78 N. W. 483; Tice *v.* Reeves, 30 N. J. L. 314; State *v.* M'Elmurray, 3 Strobh. (S. C.) 33.

In an action for breach of promise the plaintiff cannot testify that she was divorced from her former husband at a certain time, if objection be interposed. Carhart *v.* Oddenkirk (Colo.), 79 Pac. 303.

70. Smallwood *v.* Violet, 1 Cranch C. C. 516, 22 Fed. Cas. No. 12,962. See also Waterbury Lumb. & Coal Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739.

71. Parsons *v.* Hedges, 15 Iowa 119.

72. Williams *v.* Jones, 12 Ind. 561; Ellis *v.* Madison, 13 Me. 312; Hall *v.* Hall (Tenn.), 59 S. W. 203.

Parol evidence that judgment was satisfied before sale is incompetent to impeach purchaser's title at sheriff's sale. Nichols *v.* Disner, 29 N. J. L. 293.

73. Hayden *v.* Rice, 18 Vt. 353, holding that in an action by a surety against his co-surety for contribution, the payment by the plaintiff of a judgment against the principal although endorsed upon the execution could be proved by parol. See Downes *v.* Rickards, 4 Del. Ch. 416.

74. Jones *v.* Walker, 5 Yerg. (Tenn.) 427; Nunan *v.* Jenkins, 3 Ohio 271; Rosenberg *v.* Goldstein, 38 Misc. 753, 78 N. Y. Supp. 831; Fowler *v.* Williams, 3 Brev. (S. C.) 414.

A mere certificate of a United States commissioner that he had adjudged a Chinese person to be lawfully within the United States after a complaint and hearing, is not admissible in proof of a prior adjudication of such person's right to re-

evidence in explanation of matters adjudicated may be admissible.[75]

(4.) Conviction or Acquittal of Crime — (A.) GENERALLY. — The best evidence of a conviction[76] or acquittal of crime is the proper record thereof.[77]

(B.) CONVICTION OF INFAMOUS CRIME. — The authorities are conflicting upon the question whether, for the purpose of impeaching an offered witness, the record of his conviction of an infamous crime must be produced.[78] This question is elsewhere discussed.[79]

h. *Appeal.* — **(1.) Generally.** — The fact that an appeal has been taken in a certain proceeding cannot be shown by parol without accounting for the record,[80] though it has been held to the contrary.[81]

(2.) Action of Appellate Court. — The best evidence of the action of an appellate court is the proper record thereof or an authenticated copy.[82]

main in the United States, since it is not and does not purport to be either the decision itself or a copy thereof. United States *v.* Lew Poy Dew, 119 Fed. 786.

75. Parol evidence is admissible to show what was adjudicated upon, but not what the adjudication was. Zimmerman *v.* Zimmerman, 15 Ill. 85. See also Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22, 25 Atl. 234; Hughes *v.* Jones, 2 Md. Ch. 178; Estill *v.* Taul, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627, and *infra,* this article "Parol Evidence."

76. On the trial of an accessory, parol evidence of the conviction of the principal is not admissible until the loss or destruction of the best evidence, which is the record, is shown. Williams *v.* United States, 1 Ind. Ter. 560, 45 S. W. 116.

The record of his conviction and sentence is the best evidence of the guilt of an escaped convict, although the fact of his escape may be established by parol. Harris *v.* Atlanta, 62 Ga. 290.

The record of an indictment, trial and judgment are the best evidence of a conviction, and it is therefore error to allow oral testimony of a plea of guilty. Baltimore & O. R. Co. *v.* Rambo, 59 Fed. 75.

Former Conviction. — Where a person is fined before one justice and arrested and brought before another justice for the same offense, the former conviction can only be proved by a transcript from the docket of the justice who assessed the fine. Robbins *v.* Budd, 2 Ohio 16.

77. Pohalski *v.* Ertheiler, 18 Misc. 33, 41 N. Y. Supp. 10.

78. See following cases:

United States. — United States *v.* Biebusch, 1 Fed. 213. See Baltimore & O. R. Co. *v.* Rambo, 59 Fed. 75.

Arkansas. — Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425.

Maryland. — Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500.

New York. — Rathbun *v.* Ross, 46 Barb. 127. See Peck *v.* Yorks, 47 Barb. 131.

South Carolina. — McCullough *v.* Kervin, 49 S. C. 445, 27 S. E. 456.

Texas. — Baldwin *v.* State, 39 Tex. Crim. 245, 45 S. W. 714.

Wisconsin. — Paulson *v.* State, 118 Wis. 89, 94 N. W. 771.

79. See article "IMPEACHMENT OF WITNESSES," Vol. VII, p. 216.

80. Appeal. — Parol Evidence is not competent to prove that an appeal was claimed from the decree of a judge of insolvency disallowing a claim presented for proof against an insolvent estate and that notice of such appeal was given to the assignee. "The record of the claim and notice is the foundation of the appeal without which it cannot be maintained." Lund *v.* George, 1 Allen (Mass.) 403.

81. State *v.* Benson, 70 Ind. 481.

82. Barbour *v.* Archer, 2 A. K. Marsh. (Ky.) 9; Draughan *v.* Tom-

The Published Opinions of the court are not competent primary evidence of its judgments.[83]

The Affirmance or Reversal of a case is best shown by the remittitur or other proper record thereof and not by the printed opinion.[84]

i. *Contracts Merged in Judgment.* — Where contracts or other documents have been merged in a judgment the rights of which they were the evidence can only be proved by the record of the judgment.[85]

j. *Title Through Judicial Proceedings.* — Title acquired through the course of judicial proceedings must be proved by the record of such proceedings.[86]

k. *Probate Court.* — **(1.) Generally.** — The records and proceedings of a probate court cannot be proved by parol, but the original records or properly authenticated copies of them must be produced.[87] This rule applies to proof of the administration or dis-

beckee Bank, 3 Stew. (Ala.) 54; Donnellan *v.* Hardy, 57 Ind. 393. See *infra*, "Certified Copies—Judicial Records."

Transcript or Record in Court Below. — See *supra*, I, 46, M.

83. Printed Reports. — The printed report of a decision of the supreme court issued by authority of law is not competent original evidence of such judgment. Donnellan *v.* Hardy, 57 Ind. 393; Barbour *v.* Archer, 2 A. K. Marsh. (Ky.) 9.

On a claim for professional services as attorney in prosecuting a case through an appeal, the opinion of the appellate court stating the reasons for its decisions is not competent evidence, the judgment being the best evidence of what was decided; and an extract from such opinion cannot therefore be incorporated in a hypothetical question to an expert as a basis for his opinion as to the value of the services rendered. Crawford *v.* Tyng, 2 Misc. 469, 21 N. Y. Supp. 1041.

As Secondary Evidence. — See Taylor *v.* Com. 29 Gratt. (Va.) 780.

Where a certified copy of the opinion of the supreme court of the United States differs from the official printed report, the latter is to be followed. Gamewell F. A. Tel. Co. *v.* Municipal Signal Co., 77 Fed. 490, 23 C. C. A. 250; *citing* 131 U. S., Append. xvii, xviii.

84. The published volumes of supreme court reports do not furnish the highest evidence of the judgment of affirmance or reversal in a particular case. The remittitur is the best evidence thereof. Freeman *v.* Bigham, 65 Ga. 580.

85. Notes Merged in Judgment. Williams *v.* Brummell, 4 Ark. 129; Standefer *v.* Bush, 8 Smed. & M. (Miss.) 383.

86. See Ayles *v.* Hawley, 9 La. Ann. 363; Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; and fully the article "TITLE."

Probate Court. — Parol evidence will not be received to show that husband purchased certain property for his wife at the probate sale of his mother-in-law's succession. Stokes *v.* Shackleford, 12 La. 170.

87. Judge of Probate *v.* Briggs, 3 N. H. 309 (although not technically a court of record); Dosche *v.* Nette, 81 Tex. 265, 16 S. W. 1013 (that certain claims were not paid because not presented in time).

The testimony of the register of probate as to the contents of papers forming part of the probate records is secondary; the primary evidence being the papers or records themselves or certified copies. Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182.

The time of filing a claim is best shown by the docket entry required by law to be made, and not by the testimony of the judge. Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36.

Where grounds of protest to probate of will are required to be in

tribution of an estate,[88] to the orders of the court,[89] and to proof of the personal representative's discharge,[90] the facts shown by his accounting,[91] and the incapacity of an estate to pay debts.[92]

(2.) Appointment and Authority of Representative. — The appointment and authority of the personal representative may be proved either by the record thereof or an authenticated copy, or by the letters testamentary or letters of administration,[93] but not by paro.

writing and become part of the record, a copy of the record is the best evidence. A certificate of the probate judge attached to a transcript which purports to contain a full, true and correct copy of all the proceedings, which does not include any written grounds of contest, is not sufficient to authorize the admission of secondary evidence thereof, without proof of search for the missing paper. Donegan *v.* Wade, 70 Ala. 501.

88. Hay *v.* Bruere, 6 N. J. L. 212; Williams *v.* Davis, 56 Tex. 250 (holding that papers and orders of the probate court or copies thereof are the best evidence to show that an administration is not closed, and that oral evidence to that effect was secondary).

The distribution of an estate is presumed to have been made in the usual lawful manner, and a return of it to the ordinary is presumed to exist. Hence such return is the best evidence of the terms of the distribution, unless it appears that no return was made or some other excuse is shown for its non-production. Roe *v.* McKee, 48 Ga. 332.

Contra. — A witness may properly be asked whether an estate has been already settled up. "The fact that the estate was settled might exist and the proceedings in the probate court might not show it." Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

89. Steele *v.* Steele, 89 Ill. 51 (order requiring additional security); State *v.* Thresher, 77 Conn. 70, 58 Atl. 460; Eakin *v.* Vance, 10 Smed. & M. (Miss.) 549, 48 Am. Dec. 770; Groover *v.* King, 46 Ga. 101.

90. Wright's Exr. *v.* Gilbert's Exr., 51 Md. 146; Steele *v.* Steele, 89 Ill. 51.

91. The settled final account of the administrator is the proper evidence to show that realty acquired by levy at suit of administrator will not be necessary for the payment of debts. Pierce *v.* Strickland, 26 Me. 277.

92. Semple *v.* Fletcher, 13 Mart. N. S. (La.) 382.

But the inventory and appraisement of an estate is not as high a grade of evidence to show the insolvency of the estate, as the testimony of the administrator and appraisers. McPeters *v.* Phillips, 46 Ala. 496.

93. *England.* — Elden *v.* Keddell, 8 East 187.

Georgia. — Roe *v.* Sellars, 46 Ga. 550.

Illinois. — Williams *v.* Jarrot, 6 Ill. 120.

Kansas. — Davis *v.* Turner, 21 Kan. 131.

Missouri. — State *v.* Price, 21 Mo. 434.

New Hampshire. — Farnsworth *v.* Briggs, 6 N. H. 561; Morse *v.* Bellows, 7 N. H. 549.

South Carolina. — Browning *v.* Hoff, 2 Bailey 174.

Texas. — Outler *v.* Elam, 1 White & W. § 1003 (*distinguishing* Werbiskie *v.* McManus, 31 Tex. 116).

See article "EXECUTORS AND ADMINISTRATORS," Vol. V.

The record of the probate court appointing an executor or administrator need not be produced, but "letters testamentary and letters of administration may, perhaps, be regarded as in the nature of the commissions issued to civil and military officers, which seem to be always regarded as competent evidence that the appointments have been duly made according to the provisions of the constitution, or of the laws. . . . Such commissions constitute

except where a proper showing is made for the admission of secondary evidence.[94]

1. *Courts Not of Record.* — **(1.) Generally.** — It has been held that the rule requiring judicial records and proceedings to be proved by the record does not apply to courts not of record,[95] but the general rule is otherwise.[96]

(2.) Record of Justice of Peace and Inferior Magistrates. — Although the minutes, docket or other records kept by a justice of the peace or other inferior magistrate are not a "record" in the technical sense of that term, nevertheless they are the best evidence of his official action.[97]

an exception to the ordinary rule, that the best evidence must be produced, since they presuppose and depend on an appointment as much as an execution does upon a judgment." Remick *v.* Butterfield, 31 N. H. 70.

94. Smith *v.* Wilson, 17 Md. 460. Whether defendant was administratrix at time suit was commenced, the record of the county court showing time of appointment is evidence of a higher grade than the statement of the time of her appointment, in a bond executed by her as administratrix. The record is the best evidence. Elliot, Admx., *v.* Eslava, 3 Ala. 568.

95. See Wardwell *v.* McDowell, 31 Ill. 364.

Since the jail commissioners are not regarded as a court of record their proceedings may be proved by parol. Richardson *v.* Hitchcock, 28 Vt. 757, holding admissible parol evidence of the fact that the defendant had taken the poor debtor's oath before the jail commissioners, such evidence being offered to show the defendant's insolvency. Richardson *v.* Hitchcock, 28 Vt. 757.

96. See section following.

Although a Court of Probate Is Not a Court of Record in the common law sense of the term, yet the record of its proceedings which it keeps is the best evidence. Judge of Probate *v.* Briggs, 3 N. H. 309.

97. *United States.* — United States *v.* Chenault, 2 Cranch C. C. 70, 25 Fed. Cas. No. 14,791.

Alabama. — Watson *v.* State, 63 Ala. 19; Bullock *v.* Ogburn, 13 Ala. 346; Blackman *v.* Dowling, 57 Ala. 78; Ware *v.* Robison, 18 Ala. 105.

Florida. — Bellamy *v.* Hawkins, 17 Fla. 750.

Georgia. — Fitzgerald *v.* Adams, 9 Ga. 471.

Illinois. — Walter *v.* Kirk, 14 Ill. 55; Zimmerman *v.* Zimmerman, 15 Ill. 85.

Indiana. — Williams *v.* Case, 14 Ind. 253.

Kentucky. — Stromberg *v.* Earick, 6 B. Mon. 578.

Massachusetts. — Whitton *v.* Harding, 15 Mass. 535.

Mississippi. — Standifer *v.* Bush, 8 Smed. & M. 383.

Missouri. — Bogard *v.* Green, 8 Mo. 115.

New York. — Whitman *v.* Seaman, 61 N. Y. 633; Pollock *v.* Hoag, 4 E. D. Smith 473.

Ohio. — Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

South Carolina. — State *v.* Rice, 49 S. C. 418, 27 S. E. 452, 61 Am. St. Rep. 816; Etters *v.* Etters, 11 Rich. L. 413; Cherry *v.* McCunts, 7 Rich. 224; McCullough *v.* Kervin, 49 S. C. 445, 27 S. E. 456.

South Dakota. — Miller *v.* Durst, 14 S. D. 587, 86 N. W. 631.

Tennessee. — Jones *v.* Walker, 5 Yerg. 427.

Texas. — Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532.

Vermont. — Nye *v.* Kellam, 18 Vt. 594.

A warrant of Arrest issued by a justice of the peace cannot be proved by parol without proof of its loss. United States *v.* Wary, 1 Cranch C. C. 312, 28 Fed. Cas. No. 16,645; Webb *v.* Alexander, 7 Wend. (N. Y.) 281.

On Appeal. — On appeal from a justice's judgment the certified transcript is the best evidence of the proceedings in the lower court.[98]

m. *Where a Case Has Been Transferred From One Court to Another.* — Where a case instituted in one court has been transferred by a change of venue or otherwise to a court of another jurisdiction where it is prosecuted to its final termination, the records in the latter court although consisting in part of a transcript of the previous proceedings in the court from which the case was removed are the best evidence of the proceedings in the case.[99]

E. Foreign Records and Documents. — a. *Generally.* — Foreign records and documents are no exception to the rule requiring the best evidence, although the fact that they are outside the jurisdiction and control of the court may justify a resort to secondary evidence.[1]

Although a Statute Provides that "the proceedings in any cause had before a justice may also be proved by the oath of the justice," it is held that parol evidence of such proceedings is not admissible. "No more is meant than that the *docket* may be proved by the justice in the manner that justices' judgments were proved previous to the provision making transcripts evidence; i. e., by the production of the docket verified by the oath of the justice; and not that the justice may give parol evidence of the contents of the docket." Boomer *v.* Laine, 10 Wend. (N. Y.) 525, *citing* Posson *v.* Brown, 11 Johns (N. Y.) 166, where it was held that the testimony of the justice himself was not admissible under this statute. To the same effect, Dorr *v.* Troy, 19 Hun (N. Y.) 223.

98. Upon petition in error to reverse judgment of a justice of a peace for want of jurisdiction of person, defendant's bill of particulars of his set-off filed, constituting his voluntary appearance, can only be shown by a transcript of the proceedings and judgment from the justice's docket; the record cannot be aided or varied by parol. Godford *v.* Godford, 30 Ohio St. 53.

99. Southern R. Co. *v.* Seymour, 113 Tenn. 523, 83 S. W. 674. In this case it appeared that an action had been begun in a state court and removed to a federal court, a transcript of the papers and proceedings in the former being filed in the latter. To prove the proceedings in the case there was offered in evidence a certified copy of the federal court judgment of dismissal together with parol evidence of the contents of the original papers in the state court which had been lost. The admission of this evidence was held error. The court said: "The record in the federal court is the primary evidence of the former suit, and all other evidence of it is secondary. The record of the court where the final judgment in any case is entered, whether that court obtained jurisdiction by a change of venue, transfer from some other court on account of the incompetency of the presiding judge, removal from a state court under the act of Congress, as in this case, or by proceedings in error, is the primary evidence of the contents of the whole record, and a transcript of it must be produced, or its absence accounted for, before any other evidence, even the original papers in the court where the suit was brought, can be introduced to establish or prove its contents."

1. See *infra*, "Foreign Records and Documents."

Testimony of a register of another state is incompetent to show the record of a chattel mortgage in his office. Jones *v.* Melindy, 62 Ark. 203, 36 S. W. 22.

Foreign Statutes. — The competency of parol evidence of foreign statutes is elsewhere discussed. See articles "Foreign Law," Vol. V, and "Statutes."

b. *Judicial Records.* — The best evidence of a foreign judicial record or proceeding is the original or a properly authenticated copy thereof.[2]

Opinion of Court of Sister State. — The best evidence of the opinion of a court of a sister state and the law therein laid down is the official printed report of the same.[3]

F. Limitations of Rule. — a. *To Show Existence But Not Contents of Record or Document.* — Parol evidence may be admissible to show the existence of a document or record where no attempt is made to show the contents thereof.[4]

b. *Facts Connected With or Incident to Record.* — Although parol testimony is not competent to prove the contents of a record

Parol evidence is not competent to prove statute law of another state. McNeill *v.* Arnold, 17 Ark. 154.

2. *United States.* — Zimpelman *v.* Hipwell, 54 Fed. 848, 4 C. C. A. 609.

Illinois. — Atwood *v.* Buck, 113 Ill. 268.

Indiana. — Teter *v.* Teter, 88 Ind. 494; Anderson *v.* Ackerman, 88 Ind. 481.

Louisiana. — Jones *v.* Jamison, 15 La. Ann. 35.

South Carolina. — State *v.* M'Elmurray, 3 Strobh. 33.

South Dakota. — Mears *v.* Smith, 102 N. W. 295.

Washington. — Kentzler *v.* Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21.

In an action upon a judgment of another state the judgment cannot be proved by parol evidence. Schwab Cloth. Co. *v.* Cromer, 1 Ind. Ter. 661, 43 S. W. 951.

3. St. Louis, I. M. & S. R. Co. *v.* Stewart, 68 Ark. 606, 61 S. W. 169 (construction of statute — oral evidence incompetent). See article "Foreign Law," Vol. V.

4. The simple fact that two decrees of partition were made in a certain estate and were lost or destroyed may be shown by parol, because such testimony does not involve the contents of the decrees, and this is true even though a full transcript of the record in such case has been previously introduced in evidence. Hendricks *v.* Huffmeyer, 15 Tex. Civ. App. 93, 38 S. W. 523. But see State *v.* Scott, 31 Mo. 121.

A justice of the peace who issued a warrant upon a written affidavit made before him may testify to the fact that such written affidavit was made, although he cannot state the contents thereof until the loss of the affidavit has been shown. Ashley *v.* Johnson, 74 Ill. 392.

The facts that an appeal was taken from a decision of the board of county commissioners and that a transcript of the proceedings of the board was made within twenty days from the filing of an appeal bond and delivered to the clerk of the circuit court, are simple facts which may be proved by parol testimony of the auditor of the county. State *v.* Benson, 70 Ind. 481. *Contra,* Lund *v.* George, 1 Allen (Mass.) 403.

Where it is not sought to prove the contents of certain depositions, but simply to establish the fact that they had been properly taken and used in a former suit touching the same subject-matter and between the same parties, this may be done by parol without introducing the record of the prior suit. Ayers *v.* Chisum, 3 N. M. 52, 1 Pac. 856.

Issuance of Execution. — Parol evidence is admissible to show the mere fact that an execution issued in another case where no effort was made to prove the contents of such execution. Supples *v.* Lewis, 37 Conn. 568.

Institution of Suit. — Although the contents of a record and a deed cannot be proven by parol, it is competent for a witness to testify to the fact that he held a mortgage, that he commenced a suit of foreclosure, and afterwards accepted a deed for the property. File *v.* Springel, 132 Ind. 312, 31 N. E. 1054.

it may be admissible to prove facts connected with and resulting from or incident to a record.[5]

c. *When Collateral to Issue.* — When the facts shown by a record or document are merely collateral to the issue and the regularity and sufficiency of the proceedings are not in dispute they may be proved by parol.[6]

d. *Introductory or Preliminary Evidence.* — Merely introductory

5. French *v.* Frazier, 7 J. J. Marsh. (Ky.) 425, holding that while an endorsement upon an execution could not be proved by parol, such evidence was competent to show that certain bank notes had been received in discharge of an exception and paid over to a particular person. "These were facts growing out of the record, but not necessary to be verified by it."

In an action for services rendered in serving writs in actions to which the defendant was a party, the plaintiff may testify as to his services of the writs without producing them. Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

6. *Alabama.* — Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Curtis *v.* Parker & Co., 136 Ala. 217, 33 So. 935; Davis *v.* Walker, 125 Ala. 325, 27 So. 313.

Georgia. — Fountain *v.* Anderson, 33 Ga. 372.

Missouri. — State *v.* Scott, 31 Mo. 121.

Pennsylvania. — Helfrick *v.* Stein, 17 Pa. St. 143.

South Carolina. — Lamar *v.* Raysor, 7 Rich. L. 509.

Tennessee. — Stewart *v.* Messengale, 1 Overt. 479.

Where the destination of a ship is not the point in issue but only collaterally material, it may be proved by parol evidence without the production of the clearance papers in the custom house. Hadden *v.* People, 25 N. Y. 373; *citing* Robertson *v.* French, 4 East (Eng.) 130; Thomas *v.* Foyle, 5 Esp. (Eng.) 88.

Where under the issues of the cause on trial it becomes material whether a certain sale has been made, the validity of which is not in question, such fact may be proved by parol, even where the sale was made on a execution or a decree. Stanley *v.* Sutherland, 54 Ind. 339, 353; *citing* Board, etc., of Wabash etc., Canal *v.* Rhinehart, 22 Ind. 463.

Where it becomes only collaterally material to show that certain lands are in a particular school district, the boundaries of such district may be proved by parol without introducing maps or other documentary evidence. Brooks *v.* Fairchild, 36 Mich. 231.

Where the only question in issue was whether the proceeds of the sale of an estate had been invested in a certain house and lot by the administrator and the legality of the sale and investment were not material, parol evidence of this fact was held competent without producing the letters of administration or record evidence of a legal sale. Morgan *v.* Marshall, 62 Ga. 401.

Where the existence of a judgment is not at issue, as where the assignment of a judgment is proved to be the consideration of a sale of goods, the production of the record or a copy is unnecessary. State *v.* Scott, 31 Mo. 121.

Where a constable testified that he went to a designated place to look for and arrest defendant; that he made inquiry for him, stating "that he had a warrant for him," it was held that the last clause was not incompetent on the ground that the warrant was the best evidence as it related to a merely collateral matter. Huskey *v.* State, 129 Ala. 94, 29 So. 838, citing Griffin *v.* State, 129 Ala. 92, 29 So. 783.

Where it is sought to show that assault under indictment was made while executing process of court, it is competent for witnesses to testify to the existence of such process and that an attempt was being made to levy upon property of defendant at time of assault was made without producing process or records of court, the existence of the process

or preliminary matters may be shown by parol even though a record of them exists.[7]

e. *Result of Examination of Voluminous Papers and Records.* The rule that the results of an examination of voluminous books and papers may be proved by parol where their production and examination in court would be inconvenient or impossible, applies to public records and documents.[8]

f. *Records Kept for Information of Official and Not for Public Use.* — Some records though required or authorized by law are intended merely for the information and convenience of public officials and not for the public generally; for this reason the facts ap-

being merely collateral to the matter in issue. Griffin *v.* State, 129 Ala. 92, 29 So. 783.

Where the gravamen of the action was the tortious removal of property to another state, where it was converted, a witness may testify that property was levied upon and sold under process there, without producing the process or a certified copy, the matter being merely incidental or collateral and not falling within the best evidence rule. East *v.* Pace, 57 Ala. 521.

7. It is the practice to admit parol evidence of purely introductory collateral matters for the sake of convenience although written evidence may be in existence. Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157.

The fact that a trial involving a certain subject-matter was held before a justice may be proved by parol when it is material only for the purpose of explaining the fact that the plaintiff in the action in which the evidence is offered was present and testified in a certain manner. Phelps *v.* Hunt, 43 Conn. 194.

Until it has been shown to the court that there is such a suit, it is impossible for the court to say that there is a record and direct its production. Johnston *v.* Hamburger, 13 Wis. 175.

8. See State *v.* Rhoades, 6 Nev. 352, and article "Best and Secondary Evidence," Vol. II.

Result of Examination of Voluminous Records. — A witness having testified as to his having examined the records in the offices of a number of county recorders to ascertain how many water-right contracts and deeds, executed by a certain water company, were of record, may testify as to the number in order to show that there were a large number of records at the time a deed of trust was executed by the company issuing such contracts, and in such case it is not necessary to produce certified copies of such deeds and contracts. The court said: "When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination." New La Junta & Lamar Canal Co. *v.* Kreybill, 17 Colo. App. 26, 67 Pac. 1026.

Testimony of attorney employed by county supervisors as to the results of his examination of records of the court is proper as secondary evidence where the papers are voluminous and examination cannot be made in court. Schumacher *v.* Pima County, 7 Ariz. 269, 64 Pac. 490.

Summary of Weather Bureau Records. — Records of United States Weather Bureau as to amount of rainfall, or velocity of the wind, are competent evidence of facts stated therein; and under the rule that a summary of many accounts or documents may be presented in lieu of originals, where only the general result is desired as evidence (Comp. Laws) an officer of the United States Weather Bureau may state the general result of the observations made at stations for a series of years com-

pearing therein may always be established by parol evidence.[9]

g. *When Portion of Record Has Been Unnecessarily Produced.* Although a record or a copy thereof has been introduced to prove a merely collateral fact as to which parol evidence would be equally competent, other related portions of the same record need not be produced on rebuttal, but the facts shown thereby may be proved by parol.[10]

h. *Facts Not Required to Appear of Record.* — **(1.) Generally.** Facts which are not required to appear of record although connected with recorded proceedings, and official action of which no record need be made are provable by parol.[11] Records are fre-

piled from entries made officially in the required records by the various persons who have been in charge of stations. Scott *v.* Astoria R. Co., 43 Or. 26, 72 Pac. 594.

9. An action to recover upon a promise made by the defendant that he would pay a certain sum for the purpose of raising money to procure substitutes for men who had been drafted into the army, it is competent for the plaintiff to prove by parol evidence that substitutes were received into the service. The entry of that fact by a recruiting officer is not a record, nor is it evidence between other parties than the government and the person received as a soldier. "The object of keeping a journal or making entries in reference to a draft and the quotas of the various townships, was not to afford evidence, but simply for the convenience of the officers of the army, and to show the authority under which they were acting. It was not intended to govern or control parties who were not connected with the service. Again, it would impose great delay, hardship, inconvenience and expense to compel parties connected with such a draft, to prove that a person was in the service of the government as a soldier, or that he had gone into the service as a substitute." Wilson *v.* McClure, 50 Ill. 366.

Journal of Warden of Penitentiary. — Although the warden of a penitentiary is required to keep a journal in which the reception and discharge of prisoners is entered, it is competent to prove by parol when a prisoner was received and discharged as the main purpose of keeping it is to inform the inspectors of prisons of the name, age, condition and circumstances of each prisoner, and the statute does not make the warden's journal a record nor declare that it shall be evidence of facts therein entered. Howser *v.* Com., 51 Pa. St. 332.

Where it is the duty of a prison official to ask prisoners certain questions when they are committed, and to keep a record of the answers made, such record is not one which precludes oral evidence of the facts stated therein. Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014.

10. Where certified copies of indictments against a witness have been introduced to attack his credibility, his discharge may be shown by parol without producing the record of the order of acquittal and discharge. While the indictments were competent, being offered merely for a collateral purpose the facts shown thereby could have been proved by parol, and his acquittal and discharge could be proved in the same way. Heath *v.* White (Tex. Civ. App.), 39 S. W. 123.

11. *California.* — Jolly *v.* Foltz, 34 Cal. 321.

Illinois. — Fowler *v.* Donovan, 79 Ill. 310.

Massachusetts. — Wayland *v.* Ware, 104 Mass. 46; Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014.

New Hampshire. — Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895; Pierce *v.* Richardson, 37 N. H. 306.

Utah. — Peay *v.* Salt Lake City, 11 Utah 331, 40 Pac. 206.

Vermont. — Manchester Bank *v.* Allen, 11 Vt. 302.

Attendance and Examination of Witnesses. — The non-attendance of a duly subpoenaed witness may be proved by parol. The records of the court need not be produced. "The record does not prove anything as to the attendance of the witnesses" since it is not necessary for the clerk to make any entry on his minutes as to their attendance or non-attendance. Cogswell *v.* Meech, 12 Wend. (N. Y.) 147.

In an action by a witness for his fees, the plaintiff may show his attendance and examination as a witness by parol evidence without producing the record or minutes of the court. Baker *v.* Brill, 15 Johns. (N. Y.) 260.

The return of a sheriff is not the only evidence to show that a witness cannot be found, so as to prove his handwriting. Dismukes *v.* Musgrove, 8 Mart. N. S. (La.) 197.

An application to a probate judge to renew the commission on an insolvent estate if not followed by any proceeding of the court upon it may be proved by parol. "Had the application been followed by any proceeding of the probate court upon it the record of that court would have been the proper evidence of both, but the object was merely to establish the fact that application was made to the probate judge, and not to show any step taken or proceeding had which would necessarily have become a matter of record." Harrington *v.* Rich, 6 Vt. 666.

Delivery of Execution. — Parol evidence is admissible to show the delivery of an execution to a sheriff and the time of that delivery, although the officer make no minute on the execution of the time of serving it as directed by statute. "Were this a new question, we should have no doubt of the legality of such evidence to establish the point, inasmuch as the issuing of execution and the delivery to the sheriff are mere matters *in pais*. The record, generally speaking, terminates with the judgment; and although in some cases, the execution and return are treated as matters of record, as in case of a levy of lands, yet the facts to be proved in this case are not, from their nature, susceptible of proof by record; the execution itself shows not when it was issued; it has a date, but in this case, even that furnishes no evidence when it was issued; and as to the delivery to the sheriff, it is a fact as foreign to the record as any fact imaginable. The minute directed to be made by the officer, of the date of the reception of the execution, is intended for the benefit and security of others, and not for his; and should such minute appear on the execution, it would, by no means, be conclusive in his favor." Lowry *v.* Walker, 5 Vt. 181.

A justice of the peace is not required to keep a record of the issuing and filing of a certificate in the clerk's office prior to the issuing of an execution on a judgment, a transcript of which has been filed with the clerk. And oral testimony of such fact is therefore admissible. Dehority *v.* Wright, 101 Ind. 382.

In an action against a sheriff for conversion plaintiff may show by parol evidence that defendant's deputy, as such, levied upon and sold the goods in controversy by virtue of an execution against a third person. The statute requires a sheriff to indorse an exception at the time when he received it, but not to return an inventory of property which he levies upon and sells. Sprague *v.* Brown, 40 Wis. 612.

Where the law does not require turnpike inspectors to make a record of their official actions, parol evidence is competent to show what they have done. State *v.* Shrewsbury, 15 Vt. 283.

Under the Code, § 2899 Providing for an offer in court to confess judgment for part of the amount claimed, the offer may be oral and is not required to be recorded, and therefore parol evidence is admissible to show the amount of the offer. Barlow *v.* Buckingham, 8 Iowa 169, 26 N. W. 58.

The number of terms of a circuit court in a certain year, when judge presided, and whether juries were in attendance, though they are facts which might appear from the record, are matters *in pais* and susceptible of proof by parol evidence. Massey *v.* Westcot, 40 Ill. 160.

quently competent to prove facts of which they are not the only or the best evidence because such facts exist independent of and outside the record which merely tends to prove them.[12]

(2.) Former Testimony. — Where the testimony of a witness at a former trial is sought to be proved the record in such case need not be produced, but any witness who heard the testimony may relate it.[13] Where, however, the testimony of a witness has been reduced to writing, as required by law, the record or a certified copy is the best evidence.[14]

i. *Testimony Based on Records.* — The conclusion or opinion of a witness as to what a record contains or shows is not admissible,[15] nor is testimony based wholly on an examination of a record,[16] yet the fact that a witness' knowledge has been partly acquired from an examination of a record does not necessarily render it inadmissible.[17]

In Other States. — Campbell *v.* Home Ins. Co., 1 Rich. (S. C.) 158.

12. See Gale *v.* Salas, 11 N. M. 211, 66 Pac. 520; Howser *v.* Com., 51 Pa. St. 332; Grady *v.* Desobry, 21 La. Ann. 132; Wabash etc. Canal *v.* Rhinehart, 22 Ind. 463; and *supra*, this article, the sections dealing with the competency of various non-judicial records.

13. Watt *v.* Greenlee, 9 N. C. 186; Weinhandler *v.* Eastern Brew. Co., 46 Misc. 584, 92 N. Y. Supp. 792; Sebring *v.* Stryker, 10 Misc. 289, 24 Civ. Proc. 126, 30 N. Y. Supp. 1053.

The Stenographic Reporter is not the only competent witness. State *v.* McDonald, 65 Me. 466.

Where the testimony given by a witness on a former trial is offered for the purpose of impeaching the witness, it is not necessary to produce the record on a former trial, but the testimony may be shown by any one who heard it. Nasanowitz *v.* Hanf, 17 Misc. 157, 39 N. Y. Supp. 327; citing numerous New York cases. See also article "Impeachment of Witnesses," Vol. VIII, p. 132, *et seq.*

Production of Record. — As to the necessity of producing the record of the case in which former testimony was given, to show the prerequisites to its competency, see article "Former Testimony," Vol. V, p. 940.

14. See articles, "Coroner's Inquest," Vol. III, p. 575, and "Examination Before Committing Magistrate," Vol. V, pp. 319, 321.

Where an examination before a United States commissioner was taken in writing, the deposition, or a certified copy, under the seal of the court, was the only admissible evidence of the witness' testimony in that case. Talbot *v.* Wilkins, 31 Ark. 411.

The testimony of a party on the preliminary examination taken down by a justice is the best evidence, and testimony of witnesses as to what party's testimony was is inadmissible. Powell *v.* State (Miss.) 23 So. 266; Peter *v.* State, 4 Smed. & M. (Miss.) 31; Wright *v.* State, 50 Miss. 332.

15. Quinby *v.* Ayres (Neb.), 95 N. W. 464. See article "Expert and Opinion Evidence," Vol. V.

The opinion of a witness as to what the record of an internal revenue collector shows is inadmissible. Thurman *v.* State, 45 Tex. Crim. 569, 78 S. W. 937.

The opinion of a solicitor in chancery based upon proceedings in his court that due diligence had been exercised in an action to vacate a conveyance, is incompetent without producing the record. Duvall *v.* Peach, 1 Gill (Md.) 172.

16. City of St. Louis *v.* Arnot, 94 Mo. 275, 7 S. W. 15.

17. The fact that the testimony of the attorney who managed deceased's estate was based on knowledge derived in part from probate

j. *Knowledge Acquired Outside the Record.* — Although there is record evidence of a fact, a witness may testify to his knowledge of that fact acquired from sources outside the record,[18] unless the fact be one of which the record is the only appropriate evidence.[19]

k. *What Record Does Not Show.* — The testimony of any witness who has examined a record is competent to show that such record does not contain a particular entry or document; the record need not be produced,[20] though of course it is competent for

proceedings does not make the same secondary evidence in proof of deceased's pecuniary standing in action of damages for his death. Phelps *v.* Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

18. While a deputy clerk of the court who has examined the record and has the papers in a particular cause in his possession cannot testify from his examination of the record as to who were the attorneys in the case and how long the case was on the docket, he may, nevertheless, testify to these things as facts of his own knowledge. Aston *v.* Wallace, 43 Ind. 468.

Although by statute certified copies from the treasurer's cash book might be used to prove payments of money to a public officer in his official capacity, the state is not precluded from proving them by testimony of any witness who saw them made. Clough *v.* State, 7 Neb. 320.

The testimony of the deputy surveyor-general who made the survey of logs in question is competent to prove the number of feet in said logs, for the record of his survey would not be exclusive evidence of this fact. Antill *v.* Potter, 69 Minn. 192, 71 N. W. 935.

19. See *infra*, "When Required or Authorized Record Has Not Been Made."

The testimony of a county trustee showing knowledge of the nature of a fund and property assessed, acquired outside of the tax books in his hands, is incompetent, though his knowledge is gained directly and is not the result of hearsay. Thompson *v.* Evans, 2 Tenn. Ch. App. 61.

20. *Connecticut.* — Smith *v.* Richards, 29 Conn. 232.

Georgia. — Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003.

Illinois. — Beardstown *v.* Virginia, 81 Ill. 541; Bartlett *v.* Board of Education, 59 Ill. 364.

Indiana. — Lacey *v.* Marnan, 37 Ind. 168.

Louisiana. — Simpson *v.* Hope, 23 La. Ann. 537 (that judgment was rendered without legal citation).

Michigan. — Maxwell *v.* Paine, 53 Mich. 30, 18 N. W. 546.

Nebraska. — Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796; Gutta-Percha & R. Mfg. Co. *v.* Ogalalla, 40 Neb. 775, 59 N. W. 513, 42 Am. St. Rep. 696.

Texas. — Johnson *v.* Skipworth, 59 Tex. 473.

Virginia. — Atkinson *v.* Smith 24 S. E. 901.

Parol evidence of those within whose knowledge the matter falls is admissible to show that there has been no administration on an estate. "We know of no better method of proving what is *not* on the record than to prove this negative by those who were and are keepers of the records, and who are presumed to be familiar with their contents. The record would not *affirmatively* prove *what was not on it*, and we think parol proof competent for that purpose." Cowan *v.* Corbett, 68 Ga. 66.

As evidence of a party's insolvency a witness may testify that upon examination of the records of the tax collector they contained no entry of any tax return by the defendant. "Under the ruling of this court in Hines *v.* Johnston, 95 Ga. 629, and Greenfield *v.* McIntyre, 112 Ga. 691, it would seem that the evidence as to the failure of the books

this purpose.[21] It has been held, however, that the record is the best evidence of whether it contains a particular entry or paper,[22] and that if oral evidence is proper for any reason it must be by the legal custodian after showing diligent search.[23]

The Custodian's Certificate is not competent evidence to prove that a particular entry does not appear in a record,[24] though it has been held to the contrary.[25]

l. *Proof by Admissions.* — The competency and sufficiency of admissions as evidence of public records and documents is elsewhere discussed.[26]

m. *Effect of Statute Making Certain Evidence Competent.* — The fact that a statute provides a method for proving a particular fact does not render inadmissible other competent evidence of the same fact.[27]

to show any tax returns by the defendant was admissible to prove that no such returns were in fact made." Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426. But see Georgia R. & Bkg. Co. *v.* Hamilton, 59 Ga. 171; Williams *v.* Goodall, 60 Ga. 482; Adams *v.* Fitzgerald, 14 Ga. 36.

The Official Custodian of records may properly testify that certain records are missing. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; People *v.* Clingan, 5 Cal. 389; Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

21. Public books and records or certified copies thereof are competent evidence to prove that a certain fact is not recorded therein, or that certain action which would be shown thereby was not taken because no record of it exists therein. "When it becomes material, as it often does, to prove that a paper does not appear of record, this fact can be proved by any one who has examined the records where the paper would appear if it had been recorded, and who will swear to the fact of the examination of the record and that the paper in question does not appear to have been recorded. The officer who is the custodian of the records may himself be a witness to the fact of the absence of the paper from the record. While the method above indicated can be followed in any case, it is not the exclusive method of proving that the paper does not appear upon the records where the law would permit it to be recorded or require it to be recorded, in the event the record of the paper was in existence. A book which would contain an entry if such an entry existed is admissible for the purpose of examination by the court or jury to show that such entry is not in existence." Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003.

22. Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844. See also Williams *v.* Davis, 56 Tex. 250; Cannon *v.* Lebarre, 13 La. 399.

23. Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844. See also Norris *v.* Russell, 5 Cal. 249.

24. Cash *v.* Pendix, 11 Mo. App. 597; Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003; Daniel *v.* Braswell, 113 Ga. 372, 38 S. E. 829; Beardstown *v.* Virginia, 81 Ill. 541; Stoner *v.* Ellis, 6 Ind. 152; Wilcox *v.* Ray, 2 N. C. 410; and *supra*, "Official Certificates and Affidavits."

25. Struthers *v.* Reese, 4 Pa. St. 129; Ruggles *v.* Gaily, 2 Rawle (Pa.) 232. Hanna *v.* His Creditors, 12 Mart. O. S. (La.) 32.

26. See articles "Admissions," Vol. I, p. 600, "Best and Secondary Evidence," Vol. II, p. 303.

27. State *v.* Rosenthal (Wis.), 102, N. W. 49; Jackson *v.* Russell, 4 Wend. (N. Y.) 543.

A statute providing that the affidavit of an executor or administrator filed of record in the court with a copy of the notice of his appointment required to be posted by him shall be evidence of the time, place and

n. *Effect of Statute Making Documents Prima Facie Evidence.* Where a statute provides that a party may make a *prima facie* case by the introduction of certain documents in evidence, the rules of best and secondary evidence nevertheless apply and such documents may be proved by secondary evidence in a proper case.[28]

o. *Illegible or Abbreviated Record.* — Where a record is illegible or contains abbreviations, parol evidence supplemental thereto is admissible.[29]

p. *When Copy is Best Evidence.* — Where an original document has been altered so that it differs from a certified copy, the latter is the better evidence.[30]

G. Admissibility of Secondary Evidence. — a. *Generally.* After a proper preliminary showing[31] secondary evidence of the contents of public records and documents is admissible[32] in ac-

manner of such notice does not render inadmissible the testimony of the executor or administrator that he posted the prescribed notice. Green *v.* Gill, 8 Mass. 111; Estes *v.* Wilkes, 16 Gray. (Mass.) 363.

But where the statute points out the method of preserving the evidence of the day upon which tax sales are advertised to take place, by requiring copies of the newspaper publishing the lists of delinquent lands and lots to be filed in the office of the clerk of the county court and for the preservation thereof as part of the records of the court rendering judgment for sale, such records afford the best evidence of the day upon which the sale is advertised to take place. And a recital in the record of the tax judgment sale, redemption and forfeiture, and in the certificates of sale, that the sale opened upon a certain day, is not competent evidence of the latter fact because it is not a statement of fact authorized by statute to be made and certified to by the county clerk. Tifft *v.* Greene, 211 Ill. 389, 71 N. E. 1030.

Where a statute requiring a clerk of a court to keep a docket containing a record of the proceedings of the court makes the docket and transcript thereof competent evidence, this does not serve to exclude any other competent evidence to prove a judgment. Carpenter *v.* Simmons, 1 Rob. (N. Y.) 360, 28 How. Pr. 12.

28. Crane *v.* Waldron, 133 Mich. 73, 94 N. W. 593.

29. **Illegible Record.** — Where a record has become illegible by lapse of time, the testimony of a witness, who had examined and copied it while legible, is properly received to supply the defect. Little *v.* Downing, 37 N. H. 355.

Illegible Writing or One Containing Abbreviations. — A custodian of a book or document, or one in charge of any writing filed or lodged by law in his keeping, is authorized to tell a jury *ore tenus* when the original is offered in evidence, what is the true entry, if the writing cannot be easily read, or if by custom of office some sign be used to supply place of an omitted word. In such case the jury cannot inspect the book or writing. Springs *v.* Schenck, 106 N. C. 153, 11 S. E. 646.

30. If one party, after laying sufficient ground, offer a certified copy of a grant, and the opposite party thereupon produce what they say is the original, but altered so as to show a different number of acres from the copy, the copy would be the best evidence. McClellan's Lessee *v.* Dunlap, 2 Overt. (Tenn.) 183.

31. See *infra*, "Preliminary Showing."

32. *Alabama.* — Lyon *v.* Balling, 14 Ala. 753, Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Kilgore *v.* Stanley, 90 Ala. 523, 8 So. 130.

Arkansas. — Mason's Admr. *v.* Bull, Ellis & Co., 26 Ark. 164.

cordance with the general rules governing that class of evidence.[33] So also the facts, of which the lost or destroyed record is evidence, may be proved by parol without showing the contents of the record[34] unless the facts be such that they can only be proved by a record[35] in which case the evidence must be directed to proving the contents of the lost or destroyed record.[36]

Colorado. — Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.

Connecticut. — St. Peter's Church *v.* Beach, 26 Conn. 355.

Georgia. — Headman *v.* Rose, 63 Ga. 458.

Illinois. — Gage *v.* Schroder, 73 Ill. 44.

Indiana. — Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174.

Iowa. — District Twp. of Corwin *v.* Morehead, 51 Iowa 99, 49 N. W. 1052.

Kentucky. — Com. *v.* Logan, 5 Litt. 286.

Louisiana. — Surget *v.* Newman, 42 La. Ann. 777, 7 So. 731; State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143 (oath of office).

Maine. — Prentiss *v.* Davis, 83 Me. 364, 22 Atl. 246.

Massachusetts. — Com. *v.* Roark, 8 Cush. 210; Thayer *v.* Stearns, 1 Pick. 109.

Mississippi. — Martin *v.* Williams, 42 Miss. 210.

Michigan. — People *v* Clarke, 105 Mich. 169, 62 N. W. 1117.

Missouri. — Faulk *v.* Colburn, 48 Mo. 225; Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670 (lost city ordinance); Addis *v.* Graham, 88 Mo. 197.

New Hampshire. — Wills *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

North Carolina. — Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501.

Pennsylvania. — Clark *v.* Trindle, 52 Pa. St. 492; Barnet *v.* School Directors, 6 Watts & S. 46.

South Carolina. — Howard *v.* Quattlebaum, 46 S. C. 95, 24 S. E. 93.

Texas. — Grace *v.* Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158.

Vermont. — Spear *v.* Tilson, 24 Vt. 420 (grand list of taxable property.)

An Act of Incorporation may be proved by oral evidence where the record thereof has been lost. Stockbridge *v.* West Stockbridge, 12 Mass. 399.

Naturalization Records. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Strickley *v.* Hill, 22 Utah 257, 62 Pac. 893, 83 Am. St. Rep. 786; People *v.* Smith, 10 Misc. 100, 31 N. Y. Supp. 199. See also Pierce *v.* Jacobs, 7 Mack. (D. C.) 498.

A county treasurer having testified that he had searched his office, where tax executions were generally filed, for the executions issued by his predecessor, but could not find them, there was no error in receiving as evidence the county treasurer's execution book to show that the taxes on the lands sold, and in dispute, were unpaid, and that execution therefor had been issued and returned unsatisfied. Dent *v.* Bryce, 16 S. C. 1.

33. See article "Best and Secondary Evidence," Vol. II.

34. Young *v.* Buckingham, 5 Ohio 485; Bridges *v.* Arnold, 37 Iowa 221 (service of summons may be shown by testimony of server when the record has been lost or destroyed); Maxcy *v.* County Court, 72 Ill. 207 (notice of election); Sherwin *v.* Bugbee, 16 Vt. 439. See also Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086.

Where the minutes of a parish meeting taken by the clerk had not been copied into the regular book of records and had been lost, oral evidence of the proceedings of the meeting was held properly admitted. Wallace *v.* First Parish in Townsend, 109 Mass 263.

35. When the book of record of the board of township trustees has been destroyed by fire, the making of a certain order may be shown by one of the trustees. State *v.* Durham, 121 N. C. 546, 28 S. E. 22.

36. See *infra,* II, 2, G, e, (2.)

b. *Record Partially Lost or Destroyed.* — Where only part of a record or document has been lost or destroyed or is otherwise unavailable, secondary evidence is admissible in connection with the available portion thereof.[37]

c. *Records of Municipal Corporation.* — Whether parol evidence is admissible to prove the facts which should appear in municipal records when the records have not been made is elsewhere discussed.[38]

d. *Judicial Records and Documents.* — (1.) Generally. — Judicial records and documents are no exception to the rule admitting secondary evidence, and when they have been lost or destroyed their contents may be proved by parol[39] even though they form the basis

37. Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305; Miltimore *v.* Miltimore, 40 Pa. St. 151. See Rhea *v.* McCorkle, 11 Heisk. (Tenn.) 415.

A petition and writ of dower endorsed "executed" is evidence to be submitted in connection with other facts *dehors* the record in determining an issue whether dower had been assigned, proof having been offered that the remaining part of the record had been dstroyed. Clifton *v.* Fort, 98 N. C. 173, 3 S. E. 726.

38. See article "Municipal Corporations." Vol. VIII.

39. *Alabama.* — Davidson *v.* Kahn, 119 Ala. 364, 20 So. 583; Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600.

Arkansas. — Davies *v.* Pettit, 11 Ark. 349.

California. — *In re* Warfield, 22 Cal. 51, 83 Am. Dec. 49.

Georgia. — Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838; Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457.

Indiana. — Jones *v.* Levi, 72 Ind. 586; Jackson *v.* Cullum, 2 Blackf. 228, 18 Am. Dec. 158.

Kansas. — Davis *v.* Turner, 21 Kan. 131.

Louisiana. — State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143.

Maine. — Angier *v.* Smalley, 56 Me. 515.

Massachusetts. — Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148.

Michigan. — Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42.

Minnesota. — Smith *v.* Valentine, 19 Minn. 452.

Mississippi. — Eakin *v.* Doe, 10 Smed. & M. 549, 48 Am. Dec. 770; Redus *v.* State, 54 Miss. 712.

Missouri. — Davis *v.* Peveler, 65 Mo. 189; Holladay-Klotz Land Co. *v.* Moss Tie Co., 87 Mo. App. 167.

Nebraska. — Keller *v.* Amos, 31 Neb. 438, 48 N. W. 59.

New York. — Jackson *v.* Crawfords, 12 Wend. 533.

North Carolina. — Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472, *s. c.* 129 N. C. 73, 39 S. E. 732; Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. 199.

Pennsylvania. — McFate's Appeal, 105 Pa. St. 323.

South Carolina. — Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70; McQueen *v.* Fletcher, 4 Rich. Eq. 152.

Texas. — Smith *v.* Ridley, 30 Tex. Civ. App. 158, 70 S. W. 235; Houston & T. C. R. Co. *v.* De Berry, 34 Tex. Civ. App. 180, 78 S. W. 736.

Vermont. — Brown *v.* Richmond, 27 Vt. 583.

Wisconsin. — Bartlett *v.* Hunt, 17 Wis. 214.

Exhibits to bill in equity may be proved *viva voce*, at hearing, when shown to be lost. Dawson *v.* Bussus & Williams, 73 Ala. 111.

Divorce. — Where the records in a divorce proceeding are shown to have been destroyed, secondary evidence thereof is admissible. *In re* Estate of Edwards, 58 Iowa 431, 10 N. W. 793; Belcher's Admr. *v.* Belcher, 21 Ky. L. Rep. 1460, 55 S. W. 693.

Files of a case. Regier *v.* Shreck, 47 Neb. 667, 66 N. W. 618; Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55; Trumble *v.* Williams, 18 Neb. 144, 24 N. W. 716; Drake *v.* Kinsell, 38 Mich. 232; Isley *v.* Boon, 109 N. C. 555, 13 S. E. 795; Conway *v.* John,

of the action[40] or defense,[41] or a plea of *nul tiel record* has been interposed.[42]

(2.) **Application of Rule.** — This rule applies to writs and process[43] and the proceedings thereunder,[44] the pleadings,[45] the judg-

14 Colo. 30, 23 Pac. 170; People *v.* Gordon, 39 Mich. 259.

Parol evidence is admissible to establish the probate and recording of a will, where the court records are burned. Cox *v.* Beufort County Lumb. Co., 124 N. C. 78, 32 S. E. 381.

Execution Sale of Personalty. Kennedy & Co. *v.* Clayton, 29 Ark. 270; Norton *v.* Wallace, 1 Rich. L. (S. C.) 507; People *v.* Gordon, 39 Mich. 259 (police court); Woods *v.* Halsey, 9 Pa. St. 144; Jones *v.* Levi, 72 Ind. 586; Richards' Appeal, 122 Pa. St. 547, 15 Atl. 903.

Lost Affidavit on which warrant of justice issued. Ashley *v.* Johnson, 74 Ill. 392. See also Wise *v.* Loring, 59 Mo. App. 269.

Secondary evidence of an affidavit charging a crime, upon which a plea of guilty is based, is admissible when the original or a certified copy cannot be produced. Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

Lost Docket of a justice of the peace. Scott *v.* Loomis, 13 Smed. & M. (Miss.) 635.

40. In an Action Upon a Judgment, if the judgment roll has been lost or destroyed secondary evidence may be given of its contents. Mandeville *v.* Reynolds, 68 N. Y. 528. But see Smith *v.* Dudley, 2 Ark. 60.

41. Schwartz *v.* Osthimer, 4 Ind. 109.

42. Kenan *v.* Carr, 10 Ala. 867.

43. Laloy *v.* Leonard, 15 La. Ann. 391; Fowler *v.* More, 4 Ark. 570; Gracie *v.* Morris, 22 Ark. 415; Richardson *v.* Vice, 4 Blackf. (Ind.) 13 (distress warrant and return thereon); Linsee *v.* State, 5 Blackf. (Ind.) 601 (copies *ad satisfaciendum*); Stuart *v.* Fitzgerald, 6 N. C. 255.

The Loss of an Original Writ of Error may be proved by parol evidence, and the oath of the clerk together with an endorsement on the record "W. E., issued in May, 1839," is sufficient for this purpose. Hawkins *v.* Craig, 1 B. Mon. (Ky.) 27.

Execution. — Bartlett *v.* Hunt, 17 Wis. 214; Ellis *v.* Huff, 29 Ill. 449; Ryan *v.* Martin, 91 N. C. 461; Underwood *v.* Lane, 12 N. C. 173; Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086; Dailey *v.* Coleman, 122 Mass. 64; Ravenscroft *v.* Giboney, 2 Mo. 1.

Where an execution is lost, the execution docket kept by the clerk and the entries therein of the date and amount of the execution are admissible as evidence of the facts stated therein, where the clerk testifies to the regularity of the docket. Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413.

After proof from the records in the clerk's office of the recovery of a judgment and the issuing of an execution thereon, the contents of the execution and the officer's return showing a levy thereof upon land may be proved by a copy from the records in the registry of deeds if the execution has been lost after having been duly returned. Dooley *v.* Wolcott, 4 Allen (Mass.) 406.

A lost alias execution may be proved by parol. Smith *v.* Ridley, 30 Tex. Civ. App. 158, 70 S. W. 235.

Writ of Attachment. — Brown *v.* Richmond, 27 Vt. 583; Miller *v.* Babcock, 29 Mich. 526; Derrett *v.* Alexander, 25 Ala. 265.

Summons. — Johnson *v.* State, 80 Ind. 220.

44. Bridges *v.* Arnold, 37 Iowa 221 (service of summons); Stuart *v.* Fitzgerald, 6 N. C. 255; Laloy *v.* Leonard, 15 La. Ann. 391 (action of constable under writ); Ravenscroft *v.* Giboney, 2 Mo. 1.

When the files of the court are lost, secondary evidence is admissible to prove an execution, the return of the officer thereon and a levy and sale thereunder. Cilley *v.* Van Patten, 68 Mich. 89, 35 N. W. 831.

45. Farmers' Bank of Reading *v.* Gilson, 6 Pa. St. 51 (lost declaration); Estes *v.* Farnham, 11 Minn. 423.

The original petition in a foreclosure suit being lost, the original

ment,[46] verdict,[47] orders,[48] and depositions used in the case.[49]

e. *Where Required or Authorized Record Has Not Been Made.*

(1.) Generally. — Although a record of a particular fact is required or authorized by law, if no record has been made the fact may be proved by parol unless the record is essential to the validity of the act or proceeding, or is made by law the only competent evidence.[50]

citation in the suit is competent secondary evidence of the contents of the petition. Oppermann *v.* McGown (Tex. Civ. App.), 50 S. W. 1078.

46. Jackson *v.* Cullum, 2 Blackf. (Ind.) 228; Underwood *v.* Lane, 12 N. C. 173; Maxham *v.* Place, 46 Vt. 434; Forsyth *v.* Vehmeyer, 55 Ill. App. 223; Smith *v.* Valentine, 19 Minn. 452; Dickermann *v.* Chapman, 54 Vt. 506.

47. A Lost Verdict like any other paper forming a part of the record may be supplied by a proved copy. Sanders *v.* Sanders, 24 Ind. 133.

48. McLaren *v.* Birdsong, 24 Ga. 265.

Where it may be fairly inferred from the proofs that an order of the probate court allowing a claim against an estate has been lost, secondary evidence of its contents is admissible. Howd *v.* Breckenbridge, 97 Mich. 65, 56 N. W. 221; *citing* Drake *v.* Kinsell, 38 Mich. 232.

49. Where a deposition taken in a former suit is admissible in evidence in a subsequent suit between the same parties, a copy may be read upon proof of loss of original. Finney *v.* St. Charles College, 13 Mo. 266.

50. *Alabama.* — Williams *v.* Colbert County, 81 Ala. 216, 1 So. 74.

Connecticut. — Bethlehem *v.* Waterman, 51 Conn. 490.

Georgia. — Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715; Price *v.* Douglas Co., 77 Ga. 163, 3 S. E. 240.

Illinois. — School Directors *v.* Kimmel, 31 Ill. App. 537; Bryant *v.* Dana, 8 Ill. 343.

Indiana. — Jay County *v.* Brewington, 74 Ind. 7.

Iowa. — Powesheik County *v.* Ross, 9 Iowa 511; Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344.

Kansas. — Gillett *v.* Lyon County Comrs., 18 Kan. 410.

Louisiana. — Donnelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738.

Maryland. — Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560.

Massachusetts. — Henry *v.* Estey, 13 Gray 336.

Minnesota. — Antill *v.* Potter, 69 Minn. 192, 71 N. W. 935.

Missouri. — State *v.* Shires, 39 Mo. App. 560.

New Jersey. — Board of Justices *v.* Fennimore, 1 N. J. L. 242.

Ohio. — Albright *v.* Payne, 43 Ohio St. 8, 1 N. E. 16.

Oregon. — Stout *v.* Yamhill County, 31 Oregon. 314, 51 Pac. 442.

Pennsylvania. — Roland *v.* Reading School Dist., 161 Pa. St. 102, 28 Atl. 995.

Tennessee. — McLean *v.* State, 8 Heisk. 22 (revenue docket).

Texas. — Corder *v.* Steiner (Tex. Civ. App.), 54 S. W. 277.

Wisconsin. — Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614 (resolution of museum board).

Where no record of the joint official action of the boards of school inspectors of two townships has been made, such action may be proved by parol. School Dist No. 1 *v.* Union School Dist., 81 Mich. 339, 45 N. W. 993.

Although by law the superintendent of schools is required to furnish the trustees of school districts with a "trustees' record book," the appointment of a treasurer and collector for a district may be proved by parol where it has not been recorded in such book; an entry in the record not being essential to the validity of the appointment. Sweeney *v.* Cook, 19 Ky. L. Rep. 1422, 43 S. W. 434.

Time of Filing Instrument for Record. — The hour at which a deed of trust was delivered to the

Incomplete Record. — Where a record of official action is incomplete it may be supplemented by the testimony of any witness who knows the facts.[51]

(2.) Records and Proceedings of Courts. — (A.) GENERALLY. — The judicial acts and proceedings of a court as such can be proved only by the proper record thereof, even though they may have an existence separate and distinct from the record. And the fact that the required record of such action has not been made does not render admissible other evidence although a party is thereby debarred from showing what the court's action was.[52] The remedy is to have the record made up or amended where this is possible.[53]

This rule of course does not exclude parol evidence of the contents of a record which has been made but is not available because

register for registration may be shown by parol, where the officer failed to indorse the date on the deed or register as required. Metts *v.* Bright, 20 N. C. 173.

Delivery and Acceptance of Sheriff's Bond. — Baker Co. *v.* Huntington (Or.), 70 Pac. 187.

Oath of Office. — Hale *v.* Cushing, 2 Me. 218.

51. German Ins. Co. *v.* Independent School Dist., 80 Fed. 366, 25 C. C. A. 492 (minutes of school board).

52. *United States* — Weatherhead *v.* Baskerville, 11 How. 329.

Connecticut. — Davidson *v.* Murphy, 13 Conn. 213.

Georgia. — Armstrong *v.* Lewis, 61 Ga. 680; Clark *v.* Cassidy, 64 Ga. 662.

Iowa. — Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178.

Louisiana. — State *v.* Smith, 12 La. Ann. 349.

Maine. — Moody *v.* Moody, 11 Me. 247.

Maryland. — Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665.

Ohio. — Soforth *v.* Longworth, 4 Ohio 129, 19 Am. Dec. 588.

Pennsylvania. — Baskin *v.* Seechrist, 6 Pa. St. 154.

Texas. — Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532.

Vermont. — But see Lowry *v.* Cady, 4 Vt. 504.

"The proceedings, orders, judgments, decrees of such courts, do not rest in parol. It is by their records they speak, and there is but one mode, as a general rule, known to the law, by which their acts can be proved, and this is by the record itself. True, there are cases where, after the loss or destruction of a record, you may prove its contents. In such cases all has been done by the court which could be done; a record, which is the legal evidence to prove its acts, has been made. The rights of all parties concerned are fixed, and those rights ought not to be affected by time or accident. But before the contents of a record can be proved, it must be shown that it once existed, and had been lost by time or accident. This shows that the evidence is not introduced to prove the proceedings of a court as resting in parol, but as they once existed of record. But to introduce parol testimony to prove the proceedings of a court of record, and then substitute this testimony for the record itself, would be a novel proceeding. It would be equally absurd as to sustain an action of debt upon bond, upon proof that the defendant promised to make such an instrument as is set forth in the declaration, although the fact should be admitted that the instrument was never executed." Ludlow *v.* Johnson, 3 Ohio 553, 17 Am. Dec. 609, 631

53. McIntyre *v.* People, 103 Ill. 142; Steele *v.* Steele, 89 Ill. 51.

An order *nunc pro tunc* cannot be founded upon mere parol proof of what was ordered to be done at a previous term where there is no written minute to sustain it, and the court no longer has jurisdiction over the subject-matter. Heirs of Ludlow *v.*

lost or destroyed.[54] Nor does it apply to facts which are not required to be recorded.[55]

(B.) Incomplete Record. — A record which is not complete because it does not show all the orders made or proceedings taken cannot be supplemented by parol, but the proper procedure is to have it amended to show the facts.[56]

(C.) Orders. — The orders of a court must ordinarily be a matter of record and cannot be shown by parol when no record thereof has been made.[57]

(D.) Where Record Has Not Been Made Up From Minutes or Docket. In those states where the minutes or docket entries are competent evidence until the formal record has been made therefrom,[58] the loss or destruction of such minutes or docket before the record has been extended warrants the admission of secondary evidence of their contents.[59]

Johnson, 3 Ohio 553, 17 Am. Dec. 609.

54. Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55. See *supra*, II, 2, G, d.

55. Van Kleek *v.* Eggleston, 7 Mich. 511; Cogswell *v.* Meech, 12 Wend. (N. Y.) 147; Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58; Dehority *v.* Wright, 101 Ind. 382. See also People *v.* Manning, 48 Cal. 335; State *v.* Pike, 65 Me. 111; Maybin *v.* Virgin, 1 Hill (S. C.) 420, and *supra*, II, 2 F, h.

56. State *v.* McAlpin, 26 N. C. 140; Ramsey *v.* Cole, 84 Ga. 147, 10 S. E. 598 (holding that an incomplete justice's record offered in evidence could not be amended by the justice who was present in court, but that a proper application to the justice in his official capacity was necessary); Ezell *v.* Justices of Giles County, 3 Head (Tenn.) 583.

An order of the judge, fixing the amount of bail, which clerk had omitted to enter on the minutes, cannot be supplied by parol proof. State *v.* Longiman, 6 La. Ann. 700.

Dismissal of Action. — The only primary evidence that a suit was dismissed is an entry on the proper docket or on the minutes of the court. "If an entry ought to have been made but was omitted it may yet be made *nunc pro tunc* . . . . But until the appropriate entry is supplied the suit must be regarded as still pending." Armstrong *v.* Lewis, 61 Ga. 680.

57. State *v.* Thresher, 77 Conn. 70, 58 Atl. 460; Eakin *v.* Vance, 10 Smed. & M. (Miss.) 549, 48 Am. Dec. 770; Gilbert *v.* McEachern, 38 Miss. 469; McIntyre *v.* People, 103 Ill. 142.

Orders Made in Vacation. Where a statute provides that the orders of a judge in vacation are to be forthwith filed and entered by the clerk in the journal of the court it is doubtful whether any other evidence than the record would be admissible. "Possibly it would be too strict a construction of the statutes to hold that orders made by a judge in vacation may only be proved by the record. But we have no hesitation in saying even then that the record is the best evidence of such orders, and when not so entered very strict proof if admissible at all should be exacted." Bristol Sav. Bank *v.* Judd, 116 Iowa 26, 89 N. W. 93; *citing* Baker *v.* Baker, 51 Wis. 538, 8 N. W. 289.

Paper Signed by Judge But Not Recorded. — A paper signed by the ordinary purporting to grant an administrator leave to sell land of the estate, which order had never been recorded or entered upon the minutes of the court was held inadmissible in the absence of proof that it had been granted at a regular term of the court. Groover *v.* King, 46 Ga. 101.

58. See *supra*, "Judicial Records —Minutes and Docket Entries."

59. The minutes entered by the

(E.) Justice Court. — Although a justice of the peace court is not a court of record, its judgments and judicial proceedings cannot be proved by parol where the proper record has not been made.[60]

(F.) Non-Judicial Acts and Proceedings of Court and Its Officers. The non-judicial acts of a court, as to its action on other business of a legislative or executive character entrusted to it by law, may be shown by parol when no record thereof has been made.[61] So also facts and proceedings though connected with the action of the court and properly recorded in the records thereof but not judicial in their nature may be shown by parol when not recorded.[62]

And of course as to those facts of which the record is not regarded as the primary evidence parol evidence is admissible whether they are recorded or not.[63]

clerk of a court upon its docket are the records of such court until the full record is made up from these minutes; and if in the meantime the docket be lost it is to be deemed a loss of the record and secondary evidence of its contents is admissible. Pruden *v.* Alden, 23 Pick. (Mass.) 184, 34 Am. Dec. 51; *citing* Evans *v.* Thomas, 2 Str. (Eng.) 833; Dayrell *v.* Bridge, 2 Str. (Eng.) 1264.

60. Ramsey *v.* Cole, 84 Ga. 147, 10 S. E. 598 (original summons containing endorsement of service and of entry of judgment is not competent evidence of the judgment in place of the required record which had not then been made); Sayle *v.* Briggs, 4 Metc. (Mass.) 421; Stromberg *v.* Earick, 6 B. Mon. (Ky.) 578; Poor *v.* Dougharty, Quincy (Mass.) 1; Godfred *v.* Godfred, 30 Ohio St. 53; Niles *v.* Totman, 3 Barb. (N. Y.) 594. *Contra,* Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

Where by law a justice is required to keep a docket and enter his judgments therein, this docket is the only legal method of proving a judgment unless it has been lost or destroyed, in which case its contents must be proved. "While the entry of the judgment would not be necessary to its validity, being merely a ministerial act and the omission to enter it does not destroy it, yet the record entry of the judgment is indispensable to furnish evidence of it when it is made the basis of a claim or defense in another court." Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532.

By Statute in Connecticut (Gen. Stat. p. 440, § 34) where a justice of the peace has failed to make a record of a case tried before him, his files and minutes thereof are admissible in all actions upon the judgment rendered therein after his decease or removal from the state. Under this statute it is not necessary that the minutes should be technically full and accurate, but it is sufficient that they show that a judgment for a certain amount was actually rendered. West *v.* Hayes, 51 Conn. 533. But see Davidson *v.* Murphy, 13 Conn. 213.

61. Parol evidence is admissible to supplement the records of a county court as to the proceedings of such court when sitting for the transactions of county business. Stout *v.* Yamhill County, 31 Or. 314, 51 Pac. 1011.

62. A witness cannot testify that certain claims against an estate were not paid because not presented within the statutory time if the records or files of the probate court in the administration show this fact, but if they do not show it such testimony is competent Dosche *v.* Nette, 81 Tex. 265, 16 S. W. 1013.

63. See Jerkins *v.* Cockerhans, 23 N. C. 309, and *supra,* "Best and Secondary Evidence—Judicial Records and Proceedings."

Issuance and Return of Execution. — Where neither the record in the case nor the entries in the judgment docket show that any execu-

Where the Officer's Return on an attachment, execution, or other writ has not been made or is incomplete, parol evidence is competent to show the action taken thereunder.[64]

H. NATURE AND SUFFICIENCY OF PRELIMINARY SHOWING. — a. *Generally.* — Before secondary evidence of the contents of a record or document is admissible there must be a sufficient preliminary showing of its existence and loss or destruction or other legal excuse for the failure to produce it.[65] And where a certain class of secondary evidence is offered the facts essential to its competency must appear.[66]

b. *Excuses For Non-Production.* — **(1.) Generally.** — Secondary evidence is admissible when the record or document is shown to be lost or destroyed,[67] out of the jurisdiction of the court,[68] an

tions had been issued or returned, parol evidence of the issuance and return of executions was held improperly rejected, conceding that the entries in the judgment docket would be the next best evidence to the writ and the return thereon. Conger *v.* Converse, 9 Iowa 554.

64. State *v.* Daggett, 2 Aik. (Vt.) 148; Frost *v.* Shapleigh, 7 Me. 236; Cockerell *v.* Nichols, 8 W. Va. 159.

65. *Alabama.* — Roach *v.* Privett, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819.

Arkansas. — Halliburton *v.* Fletcher, 22 Ark. 453; Mason *v.* Bull, Ellis & Co., 26 Ark. 164.

Iowa. — Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

Kentucky. — Penny *v.* Pindell, 7 Bush 571.

Maryland. — Smith *v.* Wilson, 17 Md. 460.

Massachusetts. — Stockbridge *v.* West Stockbridge, 12 Mass. 399.

Mississippi. — Martin *v.* Williams, 42 Miss. 210.

North Carolina. — Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Isley *v.* Boon, 109 N. C. 555, 13 S. E. 795.

South Carolina. — De Loach *v.* Sarrat, 33 S. E. 2.

See also Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421; Tillotson *v.* Warner, 3 Gray (Mass.) 574; Blair *v.* Flack, 21 N. Y. Supp. 754, 50 N. Y. St. Rep. 479; Hair *v.* Melton, 47 N. C. 59; Davidson *v.* Murphy, 13 Conn. 213.

Secondary evidence of the contents of a document required to be filed in a public office is not admissible without showing that the document cannot be found in such office. Deerfield Twp. *v.* Harper, 115 Mich 678, 74 N. W. 207.

A tabulated sheet containing the votes for and against a certain constitutional amendment is sufficiently accounted for to warrant the introduction of secondary evidence of its contents where the testimony clearly tends to show that while the book containing it was temporarily out of the possession of its legal custodian the sheet had been abstracted therefrom by some unknown person and had not been seen since by the legal custodian of the book. People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117.

The Previous Existence of a record or document may be shown by parol. Ponca *v.* Crawford, 18 Neb. 551, 26 N. W. 365; Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740 (judgment.)

66. Where a statute provides that abstracts of title, made in the regular course of business prior to the destruction of the originals, shall be admissible as secondary evidence there must be proof by a witness personally cognizant with the fact that they were made in the regular course of business. Chicago & A. R. Co. *v.* Keegan (Ill.), 31 N. E. 505. See article "ABSTRACTS OF TITLE," Vol. I, p. 69.

67. See article "BEST AND SECONDARY EVIDENCE," Vol. II.

68. Carpenter *v.* Bailey, 56 N. H. 283 (record of Navy Department at Washington).

But a certified copy of the record

archive of a public office,[69] or when, after due notice, the opposite party refuses to produce a document in his possession.[70]

The mere fact that the original cannot be produced without much trouble and effort does not justify the admission of secondary evidence.[71]

(2.) Loss of Certified Copy. — Although a certified copy is by law primary evidence, proof of the loss of such a copy does not warrant the introduction of parol evidence where there is nothing to show the loss or destruction of the original.[72]

c. *Nature and Sufficiency of Proof of Loss.* — **(1.) Generally.** The loss or destruction of a document or record may of course be shown by parol evidence.[73]

The general rules relating to the sufficiency of the proof of the loss or destruction of primary evidence to justify the introduction of secondary evidence, elsewhere discussed,[74] apply to public records and documents.[75]

of a deed is not admissible merely because the original has been attached to depositions filed in a court in another jurisdiction, where the only efforts to obtain the original was the writing of several letters to the clerk of that court to which no replies had been received. Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850.

69. Where it is impossible for a party to produce an original, which is on file in the land office as part of the archives, a copy is admissible in evidence. Beanous *v.* Wall, 14 La. Ann. 199.

70. Maxwell *v.* Light, 2 Call. (Va.) 117.

71. DeLoach *v.* Sarratt (S. C.), 33 S. E. 2 (original returns of property made to county auditor). But see "Authenticated Copies."

72. Where it is not shown that the record of a decree in a court of another state is lost or destroyed, the loss of a certified copy thereof which plaintiff had obtained will not permit the admission of parol proof to show the nature and contents of the decree. Kentzler *v.* Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21.

73. See *supra* "Admissibility of Secondary Evidence." and Reed *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740; Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831.

74. See article "BEST AND SECONDARY EVIDENCE," Vol. II.

75. *Alabama.* — Johnson *v.* Powell, 30 Ala 113; Stewart *v.* Conner, 9 Ala. 803; Hamilton *v.* Maxwell, 133 Ala. 233, 32 So. 13; Poe *v.* Darrah, 20 Ala. 288, 56 Am. Dec. 196.

Colorado. — Bruns *v.* Clase, 9 Colo. 225, 11 Pac. 79.

Georgia. — Fretwell *v.* Doe, 7 Ga. 264.

Illinois.—Sturges *v.* Hart, 45 Ill. 103.

Iowa. — Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500; Decorah First Nat. Bank *v.* Doon Dist. Twp., 86 Iowa 330, 53 N. W. 301, 41 Am. St. Rep. 489.

Kentucky. — Doty *v.* Deposit Bldg. etc. Assn., 103 Ky. 710, 20 Ky. L. Rep. 625, 46 S. W. 219, 47 S. W. 433, 43 L. R. A. 551.

Louisiana. — Knight *v.* Ragan, 31 La. Ann. 289.

Maine.—Wing *v.* Abbott, 28 Me. 367.

Maryland. — Basford *v.* Mills, 6 Md. 385.

Michigan. — Howd *v.* Breckenridge, 97 Mich. 65, 56 N. W. 221.

New Jersey. — Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

North Carolina. — McKesson *v.* Smart, 108 N. C. 17, 13 S. E. 96; Smith *v.* Garris, 131 N. C. 34, 18 S. E. 501.

Oregon. — Harmon *v.* Decker, 41 Or. 587, 68 Pac. 11, 93 Am. St. Rep. 748.

Pennsylvania. — Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22, 25 Atl. 234.

Texas. — Ramsey *v.* Hurley, 72 Tex. 194, 12 S. W. 56.

Where it is claimed that a record or document is lost it must be shown that a thorough and unsuccessful search has been made in the office or place where such document should ordinarily or under the particular circumstances be found.[76] A document filed in a public office where it is required to be kept is presumed to remain there.[77]

Where the evidence indicates that a record or document not found in its proper place is in the hands of some third person the testimony of such person must be produced or there must be some other sufficient showing that he has not the possession of the writing in question.[78] But the fact that a record or document was once in the hands of a person not its proper custodian does not necessitate a showing that he has not retained it since it is presumed to have been returned to its proper place.[79]

76. Davenport *v.* Harris, 27 Ga. 68; Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301; Howe *v.* Fleming, 123 Ind. 262, 24 N. E. 238; Adams *v.* Fitzgerald, 14 Ga. 36; Hogsett *v.* Ellis, 17 Mich. 351, 374 (testimony of the justice that he was certain he had not received the files from his predecessor, but that he had not searched for them in his office, held insufficient); Murphy *v.* Lyons, 19 Neb. §89, 28 N. W. 328; Rhea *v.* McCorkle, 1 Heisk. (Tenn.) 415.

Secondary evidence of the amount of an account filed in another prior suit is not admissible where the deputy clerk testifies that he has examined the files in the county court and cannot find the papers in such other case, that they are not in the office, but that he thinks they are in the possession of one of the attorneys in that case. Such showing is not sufficient because it does not appear how extensive or diligent the search was and because there is no showing that any attempt was made to ascertain whether the papers were in the possession of the attorney in the other case. Williams *v.* Case, 79 Ill. 356.

Parol evidence of the contents of an alleged lost record is not admissible where the evidence as to the loss of the original merely shows that the building containing it had been destroyed by fire and that the witness had been informed at the proper office that many of the records and nearly all of the office papers had been burned, but that no inquiry for the particular record had been made. Bray *v.* Aikin, 60 Tex. 688.

Where certain papers constituting a part of the file of a case are lost, and the probate judge, the proper custodian, caused a search to be made, a predicate for secondary evidence of contents of paper is laid. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555.

Search Need Not Be Recent. Secondary evidence of the contents of an execution is admissible upon proof that it has been returned to the clerk's office, and that search has been made. The presumption of its loss being once established will continue, until there is some evidence that it has been found since the search. Poe, Sheriff *v.* Darrah, 20 Ala. 288.

77. Where a chattel mortgage has been filed with the recorder of deeds the presumption of law is, in the absence of evidence to the contrary, that it remained on file in his office. Vanarsdale *v.* Hax, 107 Fed. 878, 47 C. C. A. 31. See Poe, Sheriff *v.* Darrah, 20 Ala. 288.

78. Williams *v.* Case, 79 Ill. 356; Whitehall *v.* Smith, 24 Ill. 166; McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

Before secondary evidence of a lost writ of injunction is competent the person in whose possession it is shown to have been should be called, and a search amongst his papers should be proved. Sturgess *v.* Hart, 45 Ill. 103.

79. It is not necessary as prelimi-

And where reasonable diligence has been used in making the proper search or inquiry secondary evidence is admissible.[80] The destruction of a record may be proved by any witness who knows the fact.[81]

(2.) Affidavits. — At common law owing to the rule disqualifying a party as a witness in his own behalf his affidavit was admitted to prove the loss or destruction of a paper, the contents of which he desired to prove by secondary evidence.[82] And this rule has been continued by statute in some instances notwithstanding the removal of the disqualification.[83] But the affidavit of a third person is never admissible for this purpose,[84] and it would seem that the rules permitting the use of a party's affidavit has no application to proof of the loss or destruction of public documents and records.[85]

(3.) Certificates. — The certificate of the custodian of a record or document is not admissible to prove its loss or destruction[86] though

nary to secondary proof of the contents of a lost execution to show a search among the papers of an attorney who once produced and read it on a trial before the justice in whose legal custody it then was, since there is no presumption that the attorney afterwards retained possession of it. Rash *v.* Whitney, 4 Mich. 494.

80. *Georgia.* — Fretwell *v.* Morrow, 7 Ga. 264.

Illinois. — Carr *v.* Miner, 42 Ill. 179.

Indiana. — Steel *v.* Williams, 18 Ind. 161.

Massachusetts. — Tillotson *v.* Warner, 3 Gray 574.

New York. — Leland *v.* Cameron, 31 N. Y. 115; Teel *v.* Van Wyck, 10 Barb. 376.

North Carolina. — McKesson *v.* Smart, 108 N. C. 17, 13 S. E. 96.

Texas. — Hunnicutt *v.* State, 18 Tex. App. 498.

Testimony of a county clerk that there was not in his office, or, so far as he knew, in the county, any record or written evidence of the persons elected to the different county offices, is sufficient foundation for the admission of secondary evidence to prove who was elected to a particular office. People *v.* Clingan, 5 Cal. 389.

The testimony of the clerk of the court that he had made diligent search for certain writs of execution belonging to the files of his office, is sufficient to let in secondary evidence of their contents. Stewart *v.* Conner, 9 Ala. 803.

81. But the loose statement of a party that he had heard that the records of a court were destroyed, or had read it in a newspaper, is not sufficient to warrant the admission of secondary evidence. Weis *v.* Tiernon, 91 Ill. 27.

82. See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 325.

83. State *v.* Rosenthal (Wis.), 102 N. W. 49; Jackson *v.* Russell, 4 Wend. (N. Y.) 543. See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 325.

84. The *ex parte* affidavits of the clerk of the court and other persons are not admissible to prove that proper search has been made for a lost execution for the purpose of laying a foundation for secondary evidence. The persons making the affidavits should be called as witnesses. A rule which from necessity allowed a party to a suit, when he was not a competent witness, to make an *ex parte* affidavit as to the loss of the paper so as to permit secondary evidence of its contents has no application to third persons who are competent to testify. Becker *v.* Quigg, 54 Ill. 390.

85. See the discussion immediately following as to the character of evidence necessary in such cases.

86. See *supra*, "Certificates and Affidavits," and Wilcox *v.* Rea, 2 N. C. 410; Young *v.* Mackall, 3 Md. Ch. 398.

the contrary has been held in at least one of the states.[87]

(4.) Necessity of Search by Custodian. — While it is not an indispensable requisite to the admission of secondary evidence of a record to show that unavailing search had been made by the custodian of the record in the place where it should be found,[88] this is the most satisfactory evidence of its absence from the files; and when the search has been made by a private person it must appear that he had equal opportunity with the custodian for making the search and has done all that the latter could have done.[89]

It has been held, however, that the testimony of the custodian must be produced.[90]

87. Weidman *v.* Kohr, 4 Serg. & R. (Pa.) 174.

88. See Johnson *v.* Skipworth, 59 Tex. 473; Hill *v.* Fitzpatrick, 6 Ala. 314; Weis *v.* Tiernan, 91 Ill. 27.

Where a will is required by law to be deposited in the surrogate's office, the testimony of a witness that a search was made in the office for the will under the direction of the surrogate and that it could not be found, is sufficient preliminary showing to warrant the introduction of an exemplification of the will from the surrogate's office, although the witness is not a clerk in the office, Jackson *v.* Russell, 4 Wend. (N. Y.) 543.

A witness on whose request a search for a document filed in the land office was made and who assisted in making the search with the clerk in that office, designated by the commissioner for that purpose, was held properly permitted to testify that the search was unavailing. It appeared that the clerk took down the packages of papers to be examined and that the witness examined the same. "While it might have been more satisfactory to have produced also the evidence of the clerk as to the search in addition to that of the witness, still that would not render the evidence objected to inadmissible." The witness "was present and aided in the search and we know of no principle of law that would preclude him from testifying as to the result of that search; true, he was not the custodian of the records, but he was permitted by the commissioner to make the search with one whom it is supposed was well acquainted with the routine of the office and familiar with the records." Chalk *v.* Foster, 2 Posey Unrep. Cas. (Tex.) 704.

A statute permitting the certificate of a custodian to prove loss of record does not exclude the testimony of a witness, who has searched the records, that a specific docket or entry did not exist in public records. State *v.* Rosenthal (Wis.), 102 N. W. 49; Jackson *v.* Russell, 4 Wend. (N. Y.) 543.

89. Josuez *v.* Conner, 7 Daly (N. Y.) 448. In this case the evidence showed that when an order of arrest was last seen it was in the hands of a judge of the court from which it issued, that the judge had since died, that the witness, an attorney, had searched as he testified "with great care" the files and indices of the clerk's office and had not found the clerk's order, and that it should be there and that the witness did not know where it was. This was held an insufficient showing to warrant the admission of secondary evidence. The witness' statement "that he examined the files and books of indices in the clerk's office with great care amounts to little more than his opinion of the nature of his search. What acquaintance he had with the mode of keeping papers in the clerk's office is not shown; nor what he really did except the general statement that he examined the files and books of indices." See also Howe *v.* Fleming, 123 Ind. 262, 24 N. E. 238, holding that the search must have been made by one so fully acquainted with the office that he probably would have found the document if it had been there.

90. The loss of an original con-

(5.) Presumption as to Existence and Loss of Record. — (A.) GENERALLY. Where an officer is required by law to file a document, make a record or retain the custody thereof, the presumption is that he has performed his duty in this respect, and upon a showing that such document or record once existed and cannot be found in its proper place secondary evidence of its contents is admissible.[91]

But if a paper is not found where if in existence it ought to be deposited or recorded, the presumption arises that no such document has ever been in existence.[92]

(B.) JUDICIAL RECORDS. — It has been said that the existence of a judicial record can never be presumed.[93] The contrary has, however, been held where the existence of the judicial act on which

tract forming part of the files in another action must be proved by the legal custodian of the record in that case. Land Mtg. Bank *v.* Quanah Hotel Co. (Tex. Civ. App.), 32 S. W. 573.

An attorney who has examined the records of deeds in a particular county cannot testify that a particular deed was not recorded therein. The proper manner of showing this fact is by the testimony of the custodian of the record. Edwards *v.* Barwise, 69 Tex. 84, 6 S. W. 677, (*following* Bullock *v.* Wallingford, 55 N. H. 619). But see Johnson *v.* Skipworth, 59 Tex. 473.

The loss of a document from the files of the land office should be proved by the testimony of the commissioner, the legal custodian of the record, and not by the testimony of a clerk in that office. Rhodus *v.* Sansom (Tex.), 6 S. W. 849.

But the destruction of the records of a county may be shown by the testimony of any person who knows the fact. The testimony of the county clerk is not necessary. Hendricks *v.* Huffmeyer (Tex. Civ. App.), 27 S. W. 777.

91. See Penny *v.* Pindell, 7 Bush (Ky.) 571; *In re* Webster, 106 App. Div. 360, 94 N. Y. Supp. 1050; Marks *v.* Hastings, 101 Ala. 165, 13 So. 297; and article "EXAMINATION BEFORE COMMITTING MAGISTRATE," Vol. V, p. 322, n. 69.

The county board of commissioners are presumed to have filed a report with the clerk of the court of common pleas as required by law. And where it appears that the clerk of that court after diligent search was unable to find such report in the records of his office, secondary evidence of its contents is admissible. *In re* Webster, 106 App. Div. 360, 94 N. Y. Supp. 1050.

Loss of Judgment. — Since it is by law the duty of the county clerk to keep the judgment roll on deposit in his office, if it cannot be found in the particular place provided for such deposit the presumption is that it is lost or destroyed. Mandeville *v.* Reynolds, 68 N. Y. 528.

92. Platt *v.* Stewart, 10 Mich 260. See also Hall *v.* Kellogg, 16 Mich 135.

Where notices, affidavits, etc., are directed to be preserved in a particular office, a failure to find them there raises a presumption that no such documents ever existed, but this presumption is by no means conclusive. Morrill *v.* Douglas, 14 Kan. 293.

93. Judicial Records Not Presumed. — Properly speaking, the records of courts are never presumed. "The existence of an ancient record of another kind may sometimes be established by presumptive evidence. But that is not done without very probable proof that it once existed, and until its loss is satisfactorily accounted for. The rule in respect to judicial records is, that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced; or that its

the record rests has been shown.[94] And the existence of such a record may sufficiently appear from the other records and proceedings in the same case.[95]

(6.) Tradition or Reputation. — The existence of lost ancient judicial records which is indicated by other papers still in the record may be shown by proof of a tradition or reputation to this effect among the lawyers of the court in question.[96]

(7.) Rests in Discretion of Court. — The sufficiency of the preliminary proof of the loss or destruction of a record to warrant the introduction of secondary evidence of its contents is a matter resting in the sound discretion of the trial court.[97]

I. Nature and Sufficiency of Secondary Evidence. — a. *Oral Evidence.* — The testimony of any witness who knows the contents of a lost or destroyed record or document is competent and

mutilation from time or accident has made it illegible. . . . Inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court, or some other entry, though short of the judgment or record, which shows that it has been judicially made. The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the foundation for the inferior evidence." Weatherhead *v.* Baskerville, 11 How. (U. S.) 329, 360.

94. Existence of Judgment Presumed. — Where it appears that a judgment was rendered by a justice and execution issued and payments made upon it, that the justice has since deceased, that there is no record of the judgment or files in the case in the county clerk's office or in the hands of the administrator of the justice's estate, it will be presumed that the justice made a record of the judgment. The plaintiff, objecting to parol evidence, insisted that it was necessary that it should first appear that a record was actually made and that the court could not presume that one was made. "The judgment having been rendered it was the duty of the justice to have made a record. 'All persons are presumed to have duly discharged any obligation imposed upon them either by written or unwritten law.' And especially is this true of public officers. The law, therefore, presumes that the record was made, and its loss having been shown the evidence was properly admitted." Dickerman *v.* Chapman, 54 Vt. 506.

95. See *infra*, "Presumptions as to Contents of Document or Record Imperfectly Kept." "Records and Documents of Courts."

96. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002, holding that the county clerk was properly permitted to testify that it was a fact well known to attorneys at that bar that the record of the court for certain years was missing, and that he had been informed when elected that such records were missing. "From the nature of the fact to be proved and time inquired about (over 55 years ago), the difficulty of establishing it by the testimony of living witnesses is apparent. The best evidence attainable would probably be that of reputation, or what was commonly understood by those who would be most conversant with the subject. It was a matter of public interest, and upon this ground would be admissible; and it would be more valuable and reliable, as coming from persons most interested, and who would be expected to have the best information attainable at the time upon the subject."

97. Mays *v.* Moore, 13 Tex. 85, holding that "parol evidence to supply record testimony should be received with great caution." See also Waggoner *v.* Alvord, 81 Tex. 365, 16 S. W. 1083; Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241; and article

sufficient secondary evidence thereof.[98] But the witness must have read the lost writing or otherwise have acquired actual knowledge of its contents and must state at least the substance thereof,[99] though it is not necessary for him to give the exact words.[1] So also the facts evidenced by such a record or document may be shown by the testimony of any witness who is acquainted with them,[2] unless the fact is one which has no legal existence except as embodied in a record.[3] The testimony of the person who made the record or executed the document is not essential.[4]

b. *Record in Recorder's Office.* — Where an original public document has been properly recorded in the recorder's office the record so made is competent secondary evidence of the original.[5]

c. *Copy.* — **(1.) Generally.** — Either a certified[6] or a sworn or examined[7] copy is competent secondary evidence of a record or document.

(2.) Partial Copy. — A copy of a portion of the lost original is competent.[8]

(3.) Use of Blank Form. — A witness may testify that the lost document was made by filling out a blank form and may use that form to refresh his recollection as to the contents of the lost paper.[9]

"Best and Secondary Evidence."

98. Wallace *v.* First Parish in Townsend, 109 Mass. 263; State *v.* Durham, 121 N. C. 546, 28 S. E. 22; Gage *v.* Schroder, 73 Ill. 44; St. Peter's Church *v.* Beach, 26 Conn. 355.

99. Richards' Appeal, 122 Pa. St. 547, 15 Atl. 903.

1. Com. *v.* Roark, 8 Cush. (Mass.) 210.

2. The service of a summons may be sworn by the testimony of the server. Bridges *v.* Arnold, 37 Iowa 221.

3. In which case the testimony must be confined to the contents of the lost or destroyed record, as in the case of certain judicial records. See *supra* II, 2, G, e, (2).

4. A decree being lost, the making and signing of it by the judge may be proved by the clerk, although the testimony of the judge is attainable Smith *v.* Valentine, 19 Minn. 452.

5. McFate's Appeal, 105 Pa. St. 323.

Where the original schedule of a drainage assessment has been lost, the record thereof in the record books of the county recorder's office may be read in evidence. Bate *v.* Sheets, 50 Ind. 329.

A lost execution and return may be proved by a copy from the records of the register of deeds. Dooley *v.* Wolcott, 4 Allen (Mass.) 406.

An appraisement of damages made by township trustees and required by law to be filed with the township clerk and kept of record in his office and shown to have been lost, may be proved by the record copy thereof made by the clerk. Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500.

6. Pierce *v.* Gray, 7 Gray (Mass.) 67. See fully *infra*, "Authenticated Copies."

7. Maxwell *v.* Light, 2 Call (Va.) 117; Jones *v.* Levi, 72 Ind. 586; Sanders *v.* Sanders, 24 Ind. 133. See fully *infra*, "Authenticated Copies."

8. On the indictment of a school teacher for swearing to a false report where the original report had been lost, a portion of a former indictment against the defendant containing a list of names was held admissible after testimony that it was a copy of a part of the original report. Thompson *v.* State, 120 Ga. 132, 47 S. E. 566.

9. A witness testified that he made an affidavit in a certain action before a justice of the peace, and that same was filed therein; also that a sum-

(4.) Necessity of Producing Available Copy. — The general rule supported by the weight of authority is that there are no degrees in secondary evidence;[10] nevertheless, in the case of public records and documents, at least, an available copy is preferred to oral testimony and must be produced. This is certainly the rule in the case of existing records of which a certified or examined copy may be procured,[11] and it is held to be the rule also where the original record is lost or destroyed.[12]

d. *Presumption as to Contents of Document or Record.* — **(1.) Generally.** — Where the contents of a lost document have been

mons contained the printed form of affidavit in use at the time in all such actions before that justice. *Held,* that this summons could be used to aid the memory of the witness in regard to contents of paper. Wise *v.* Loring, 59 Mo. App. 269.

10. See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 382.

11. See *supra,* II, 2.

12. Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305; Wilson *v.* Spring, 38 Ark. 181. See Luce *v.* Lively, 4 Watts (Pa.) 396, 28 Am. Dec. 725.

Where by statute the official oaths of executors and administrators and all inventories must be copied at length in the record of the court and it is further provided that certified copies of the record of all papers required to be recorded shall have the same effect as copies directly from the originals, a lost inventory must be proved by a certified copy from the record and not by parol. Roberts *v.* Connellee, 71 Tex. 11, 8 S. W. 626.

Although the statute does not in express terms require the secretary of state to keep a record book, it does require him to keep a fair register of all the official acts of the governor, which is tantamount to a requirement that he shall keep a record of all such official acts. And where a pardon, which is an official act of the governor, has been lost, a certified copy of the record thereof kept by the secretary of state is better evidence than parol testimony. Hunnicutt *v.* State, 18 Tex. App. 498.

The conviction of a witness for felony cannot be proved by parol evidence, although it is shown that the county clerk's office had been burned and the record probably destroyed, there being higher evidence capable of production, namely, the transcript delivered into the court of exchequer by the district attorney. Hilts *v.* Colvin, 14 Johns. (N. Y.) 182.

Where suit begun in a state court has been transferred to a federal court and a transcript of the original papers filed in the latter, such transcript is the next best evidence of the originals after their loss or destruction, and parol evidence is inadmissible. "When it appears that a transcript of a lost record, previous to its loss, in a proceeding authorized by law, has been filed in another court, and this is known or should be known to the party offering to prove the record, the presumption is that it remains in that court, and it is the best secondary evidence of the contents of the original record, and must be produced, or its absence explained, before parol evidence can be heard. Rhea *v.* McCorkle, 11 Heisk. 416; Lane *v.* Jones, 2 Cold. 322." Southern R. Co. *v.* Seymour, 113 Tenn. 523, 83 S. W. 674.

Where a Recorded Deed Has Been Lost the non-production of the record or a certified copy thereof must be accounted for before other parol evidence of its contents is admissible. Mariner *v.* Saunders, 10 Ill. 113; Brotherton *v.* Mart, 6 Cal. 488; Aurora Bank *v.* Linzee, 166 Mo. 496, 65 S. W. 735; Colby *v.* Kennistón, 4 N. H. 262; Sexsmith *v.* Jones, 13 Wis. 565; Grafton *v.* Land & Lumb. Co., 189 Mo. 322, 87 S. W. 37. But see Blackburn *v.* Blackburn, 8 Ohio 81.

shown it may be presumed to have contained an endorsement which the law required to be made.[13]

Records Imperfectly Kept. — Strong presumptions are allowed after a great lapse of time in favor of judicial records irregularly and loosely kept.[14]

(2.) Where Law Prescribes Contents of Documents of Which Blank Forms Are Used. — Where the law or the practice of the court prescribes the contents of a document of which a printed form embodying those requirements is in common use, and the persons who made the instrument and acted under it were familiar with what it must contain, the court may infer or assume that such a lost document conformed to the law.[15]

13. Although the law requires an entry by the officer of "no personal property to be found" on an execution before levying upon land, where the contents of a lost execution levied upon land has been proved, it will be presumed that it contained such an entry since it was the officer's duty to make one. Doe ex d. Vaughn *v.* Biggers, 6 Ga. 188.

14. Shaw *v.* Boyd, 12 Pa. St. 215; Cromwell *v.* Bank of Pittsburg, 2 Wall, Jr. 569, 6 Fed. Cas. No. 3,409, holding that a judgment might be presumed under such circumstances where the original or rough docket upon which judgments were customarily entered had been lost, and it appeared that the defendant had filed a signed confession of judgment among the papers of the case which was immediately followed by the issuance of final process reciting a judgment by an agreement of the parties endorsed upon the final process expediting the sale, and by an actual sale unquestioned by the defendant during a term of thirty years, and this notwithstanding the fact that the date of the judgment recited in the final process was different from the date on which the judgment was alleged to have been entered, and that no entry had been made upon a larger and more formal docket into which it was the custom to copy the entries of the original rough docket. See Jackson *v.* Crawfords, 12 Wend. (N. Y.) 533; Burke *v.* Tregre, 28 La. Ann. 437.

Although no commission appointing a guardian is produced or can be found on the probate records, his appointment may be sufficiently shown by other papers produced from the probate records showing that he was treated by the court as the lawful and regular guardian after the lapse of many years, where it appears that the records at the time of the appointment were very loosely kept. Thomas *v.* Hatch, 3 Sumn. 170, 23 Fed. Cas. No. 13,899.

15. "Where the lost paper is of a kind which is usually drawn up in accordance with the statute and usually follows a form devised for that kind of instrument—so much so that the form is put into type and printed copies are furnished to attorneys—we may from the circumstances infer that the attorneys who had the drafting of it would not have made any but a paper in legal form and substance, and that those who had to base their official action upon it would not have proceeded by virtue of it had it not to their judgment and scrutiny been agreeable in its contents to the the requirements of the statute." Mandeville *v.* Reynolds, 68 N. Y. 528. See Shove *v.* Wiley, 18 Pick. (Mass.) 558; Wise *v.* Loring, 59 Mo. App. 269.

In arriving at the contents of a lost execution the court will consider the facts that its contents were prescribed either by statute or by the practice of the courts, and with the exception of a description of the judgment all executions against property were alike, that the person who issued it was a lawyer conversant with such instruments, and the sheriff to whom it was delivered knew what such process must contain in

e. *Records and Documents of Court.* — The lost or destroyed records and documents of a court may be shown by oral testimony,[16] the docket entries[17] and other records and files in the same case,[18] and other documents in which they are properly recited.[19]

order to authorize him to sell. "In view of these facts and after a lapse of over thirty years we must assume that the execution was in due form, containing all such directions as the statute or practice required such process to contain." Leland *v.* Cameron, 31 N. Y. 115.

16. Rhodus & Fleming *v.* Heffernan, 47 Fla. 206, 36 So. 572; Ryan *v.* Martin, 91 N. C. 461, holding competent the testimony of the sheriff as to the existence of an execution. But see Ellis *v.* Huff, 29 Ill. 449, holding that the next best proof of the existence of an execution is the execution docket.

Where the original execution has been lost and the execution docket shows that one was issued, oral evidence as to the issuance, levy and return of the execution is proper. Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086.

The contents of a lost deposition in another case may be proved by any person who knows and can testify as to its contents. Aulger *v.* Smith, 34 Ill. 534.

17. Ellis *v.* Huff, 29 Ill. 449; Richards *v.* Williams, 3 Baxt. (Tenn.) 186 (docket entries competent to prove lost execution); Harvey *v.* Thomas, 10 Watts (Pa.) 63, 36 Am. Dec. 141.

Where it is proved that a *fi. fa.* and *venditioni* existed and are lost, the execution docket of the court of common pleas is evidence to prove their contents and proceedings had upon them. Buchanan *v.* Moore, 10 Serg. & R. (Pa.) 275.

18. Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42; Reynolds *v.* Fees, 23 S. C. 438 (docket and journal entries together with oral testimony), *distinguishing* Brown *v.* Coney, 12 S. C. 144. See Smith *v.* Allen, 112 N. C. 223, 16 S. E. 932; Hare *v.* Holloman, 94 N. C. 14.

Where the records have been partially destroyed, the appointment of a guardian may be sufficiently shown by the remaining records containing an order authorizing him to sell land, his return and an order dismissing him from administration. Bush *v.* Lindsey, 24 Ga. 245, 71 Am. Dec. 117. See Thomas *v.* Hatch, 3 Sumn. 170, 23 Fed. Cas. No. 13,899.

Execution. — In the absence of an execution among the records of the court, the issuance will be presumed after the lapse of sixteen years, where it is shown that there was a judgment of a proper date upon which an execution might have issued, that a charge had been made by the clerk for issuing an execution, and that the sheriff had made a sale, executed a certificate and deed reciting the judgment and execution. Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421.

The existence and contents of a petition for the probate of a will may, if the original be lost or destroyed, be shown by an order of the court as appearing in the minutes, entries in an account book kept by the clerk, affidavit of publication and testimony of the executor named in the will. In Matter of Will of Warfield, 22 Cal. 51.

19. See Irvin *v.* Clark, 98 N. C. 437, 4 S. E. 30.

The sheriff's certificate of sale is competent secondary evidence to show the existence and contents of the execution under which the sale was made. Conger *v.* Converse, 9 Iowa 554. See also Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421.

Recitals in Deeds by sheriffs and other public officers. See article "Title," "Vendor and Purchaser," "Sales," "Taxation."

A recital in an administrator's deed of an order of sale is sufficient presumptive proof of such an order forty or fifty years after the date of the deed, where the possession is in conformity with the deed. Baeder *v.* Jennings, 40 Fed. 199.

But an alias writ is not admissible in place of the writ under which the official action in question was taken.[20]

Memoranda kept by a sheriff in the discharge of his duty have been held competent secondary evidence of the execution and the proceedings thereunder.[21]

f. *Burnt Records Acts.* — Statutes sometimes provide for proof of records which have been destroyed by some great fire or catastrophe[22] and the several kinds of evidence provided for under such an act are of an equal grade and one is admissible without accounting for the other.[23] Abstract books are sometimes made competent evidence under such statutes.[24]

3. Restoration of Lost or Destroyed Records or Documents. — A. GENERALLY. — Statutes frequently provide a method for restoring lost or destroyed records and documents, but independent of such a statute courts have authority to restore their own records.[25]

20. Alias Fi. Fa. as Evidence of Lost Original. — Where a sheriff's sale has been made under an original tax execution, an alias *fi. fa.* issued under section 892 of the Political Code is not admissible in evidence in lieu of the original for the purpose of supporting such sale. That section provides for the issuance of an alias tax *fi. fa.* in place of the lost or destroyed original for the purpose of enforcing by levy a sale, and not for the purpose of being used in evidence as an established copy of the original under which a sale has been made. Carr *v.* Georgia L. & T. Co., 108 Ga. 757, 33 S. E. 190.

21. Memoranda made by a sheriff in discharge of his official duty, describing an execution, its levy, and the sale of lands under it, are competent secondary evidence of facts therein stated, when a proper predicate for introduction of secondary evidence has been laid. Bancum & Jenkins *v.* George, 65 Ala. 259.

22. Butler *v.* Grand Rapids & I. R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84.

23. Under the Illinois Burnt Records act after a proper foundation is laid it is competent to prove title by an abstract of title or letter-press copy thereof, made in the ordinary course of business prior to the loss or destruction of the records, or by any copy, extract or minutes from the destroyed records, or from the originals thereof at the date of such destruction or loss, in the possession of persons then engaged in the business of making abstracts of title for others for hire. Both the abstract of title, and a copy, extract or minutes from the destroyed records or from the originals are secondary evidence, and either is competent without accounting for the other. Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314.

24. See article "ABSTRACTS OF TITLE," Vol. I.

Under a statute providing that "all land titles or land abstract books . . . shall hereafter be competent evidence of the truth of the data or memoranda therein contained" where the original records have been destroyed by fire, an abstract has the same force and effect as a certified copy and would not be competent proof of a deed unless it showed that the deed was properly acknowledged for record. Robins *v.* Ginocchio (Tex. Civ. App.), 33 S. W. 747. But see *contra*, article "ABSTRACTS OF TITLE," Vol. I, p. 68, n. 9.

25. Cleghorn *v.* Johnson, 69 Ga. 369. See Peirce *v.* Bank of Tenn., 1 Swan (Tenn.) 265.

Where the original writ of *scire facias* has been lost, a copy shown to be correct may be filed in its place. Sturtevant *v.* Robinson, 18 Pick. (Mass.) 175.

Such records when properly restored have the same evidentiary force as the original.[26]

B. Nature and Sufficiency of the Evidence. — In the absence of statutory provision any competent secondary evidence is admissible to show the contents of the original which is sought to be established.[27] For this purpose a copy properly certified[28] or verified by the testimony of competent witnesses[29] is sufficient.

But where a statute provides a method for restoring lost records and papers in a pending cause, such method is exclusive and must be followed.[30]

26. Cleghorn *v.* Johnson, 69 Ga. 369.

An established copy of a lost original paper has all the force of the original (Civ. Code § 3611), and consequently a copy of a court paper certified by the proper officer to be "a true, full and complete copy of the original copy as established, now on file in my office," is admissible in evidence to the same extent as would be a certified copy of the original paper. McLanahan *v.* Blackwell, 119 Ga. 64, 45 S. E. 785.

Under § 4743 of the Civil Code after a suit in a justice court has proceeded to judgment and execution, the summons, service thereon and pleas, if any are office papers, and if lost may be established in that court instanter on motion. And under §§ 5213 and 5214 of the Civil Code certified copies of such established copies are admissible in evidence in the superior court. Bell *v.* Bowdoin (Ga.), 34 S. E. 339.

Absence of Seal. — Under § 96 of the school law of 1857 authorizing the auditor of public accounts upon certain proof furnished, to issue, in lieu of a patent for land which has been lost or destroyed, a "duplicate copy thereof, it is not necessary that such copy should have affixed to it the seal of the state to render it admissible in evidence for the same purpose for which the original might have been offered. Jackson *v.* Berner, 48 Ill. 203.

Established Copy of Deed. Where the statute provides that a copy of a lost deed may be established by the superior court of the county where the land lies and when so established shall have all the effect of the original, a certified copy of the proceedings establishing a copy in this manner is competent evidence the same as the original would have been; and where the established copy has been recorded such certified copy is admissible without proof of the execution of the original deed. Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736. See also Allen *v.* Lindsey, 113 Ga. 521, 38 S. E. 975.

27. To authorize the establishment of a copy of an amendment to the declaration alleged to have been filed at a previous term, neither an entry upon the bench docket nor an order upon the minutes is absolutely necessary. There is no necessity for any action of the judge on an amendment except where the rights of the opposite party are to be affected by the negligence of the amending party. Hence, evidence other than that upon the records of the court may be considered by the judge upon the proposition to establish a copy. Strange *v.* Barrow, 65 Ga. 23.

A minute entry of the court reciting the approval of an administrator's bond, its amount and the names of the sureties, is competent and sufficient evidence to authorize the restoration of such a bond. Tanner *v.* Mills, 50 Ala. 356.

28. A copy of an official transcript preserved in the office of the clerk of the superior court, duly certified, is competent and sufficient evidence for the purpose of establishing a copy of the original pleadings, process, verdict and judgment which are lost. Eagle & Phenix Mfg. Co. *v.* Bradford, 57 Ga. 249.

29. Terry *v.* Wood, 7 Baxt. (Tenn.) 292.

30. Strohmeyer *v.* Wing (Tex.

C. Non-Judicial Records Restored Without Express Authority. — Where a non-judicial record has been restored by the custodian thereof although without express authority of law, it may be competent secondary evidence without any certificate by such custodian that it is a true copy.[31]

D. Restoration Not Essential. — a. *Generally.* — Although a lost record may be restored in a proper proceeding therefor, secondary evidence of its contents is nevertheless admissible without resorting to such procedure.[32]

b. *Effect of Statutory Provision For Restoration.* — Although a statute provides a method for restoring lost files and records it is not encumbent on a party desiring to prove such files and records to have them restored, but any competent secondary evidence would be admissible.[33]

Civ. App), 77 S. W. 977, holding that where the statute required certified copies or substantial copies to be filed with the motion, the testimony of the county clerk as to the former existence of the paper was not admissible; and disapproving a contrary intimation in Houston *v.* Blythe, 60 Tex. 506.

31. Hall *v.* Manchester, 40 N. H. 410 (record of laying out of a highway). See also Forsaith *v.* Clark, 21 N. H. 409 (*citing* Winn *v.* Patterson, 9 Pet. (U. S.) 663.

Record Restored From Original Data. — Where the original tract book of a local land office had been destroyed, another tract book made under the direction of the commissioner of the general land office from the records of his office and sent to take the place of the original tract book, and used as such, was held a proper basis for the testimony of a witness as to the public character of certain land. The fact that the book was not certified by the commissioner to be a true copy was no objection to its use by the witness. "The book from which the witness testified, and which was in effect received in evidence, was in our opinion an official book and admissible as such. As before stated, it was made under the direction of the commissioner of the general land office. That officer had before him all of the data necessary for its preparation, and it was his official duty to see that, as prepared, it was a true copy of the records of his office. The presumption is that this duty was properly performed, and it was not necessary for him to attach to the book a certificate of its correctness in order to justify its use by the officers of the local land office and make it admissible in evidence as an official book. Its character as such was sufficiently established by proof that it was in use as a tract book in the local land office, that it was made under the direction of the commissioner of the general land office, and had been transmitted by him to the register and receiver for their official use." Jesse D. Carr Land & Live Stock Co. *v.* United States, 118 Fed. 821, 55 C. C. A. 433; *citing* Belk *v.* Meagher, 104 U. S. 279.

32. United States *v.* Price, 113 Fed. 851; *citing* Hogan *v.* Kurtz, 94 U. S. 773.

Where by statute the sheriff is required to deposit with the clerk of the court the lists and other papers containing evidence of his proceedings in a sale of land for taxes, if such records have been destroyed any secondary evidence of their contents is admissible and it is not necessary that the record should have been made up anew under the direction of the court so that the records so made up could be used as the only competent evidence. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235.

33. *Illinois.* — Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55.

Indian Territory. — Bohart *v.* Hull, 2 Ind. Ter. 45, 47 S. W. 306.

III. COPIES.

1. Unauthenticated Copies. — A. GENERALLY. — Unauthenticated copies of public records or documents are not admissible.[34] Where no objection, however, is made on this ground it will be treated as waived and the copy will be regarded as authentic[35] except against persons not *sui juris*.[36]

Kentucky. — Bullock *v.* Com., 96 Ky. 539, 29 S. W. 341.

Missouri. — Parry *v.* Walser, 57 Mo. 169; Grayson *v.* Weddle, 63 Mo. 523 (lost judicial records may be proved by parol notwithstanding such a statute).

Pennsylvania. — Richards' Appeal, 122 Pa. St. 547, 15 Atl. 903.

Texas. — McMillan *v.* State, 18 Tex. App. 375.

Virginia. — Corbett *v.* Nutt, 18 Gratt. 624.

"The statute for the restoring of lost files, etc., takes away no common law right and orders no common law rule of evidence. It only provides a method by which lost record evidence may again be restored and perpetuated wherever that is practicable." Drake *v.* Kinsell, 38 Mich. 232.

Records Partially Restored. Notwithstanding some portions of the record have been restored under the provisions of such an act, secondary evidence of other portions not so restored, may be given. Beveridge *v.* Chetlain, 1 Ill. App. 231.

34. *Alabama.* — Kilgore *v.* Stoner, 10 So. 60.

District of Columbia. — Ewing *v.* United States, 3 App. Cas. 353.

Indiana. — Doe *v.* Smith, 4 Blackf. 228.

Iowa. — McGlasson *v.* Scott, 112 Iowa 289, 83 N. W. 974; Pfotzer *v.* Mullaney, 30 Iowa 197.

Louisiana. — Briggs *v.* Phillips, 2 La. Ann. 303.

Michigan. — Clark *v.* Dasso, 34 Mich. 86.

Minnesota. — Estes *v.* Farnham, 11 Minn. 423.

Mississippi. — Cockerel *v.* Wynn, 12 Smed. & M. 117.

Montana. — Chambers *v.* Jones, 17 Mont. 156, 42 Pac. 758.

New York. — People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498.

North Dakota. — Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

A document purporting to be a copy of a record in the town clerk's office is not admissible if it is not authenticated. Wooster *v.* Butler, 13 Conn. 309.

Papers purporting to be exemplifications from the treasury department of the United States not authenticated in any manner whatever cannot be admitted in evidence, even though admitted in evidence before the referee, unless by consent. Mott *v.* Ramsay, 92 N. C. 152.

Executive Proclamation. — The mere production of a copy of an executive proclamation, not certified by any person, without any proof that it was ever published, is insufficient proof of the issuance of such proclamation. Carter *v.* Territory, 1 N. M. 317.

35. See article "OBJECTIONS."

36. "When a paper which purports to be an official copy of a public record, which, if properly certified, would be legal evidence, is filed with a pleading as an exhibit, and it does not appear to have been objected to in the court below, we are of the opinion that any objection for want of formality in the authentication is waived, and cannot be made for the first time in this court, and that this rule applies to all persons, whether *sui juris* or not.

But when there is no attempt at authentication, or the attempted authenticaion is by a person not authorized to make it, the supposed copy is not evidence for any purpose, and, although admitted, proves nothing, and must be disregarded whenever called in question by persons not *sui juris* at the trial. As to all others, their silence may be taken to be a tacit

B. Printed Copies. — Although certified copies of a record or document are competent evidence by statute or otherwise, printed copies not authenticated are not admissible even if published under authority of a statute.[37] But statutes frequently provide for the use of printed copies of various records and documents.[38]

2. Authenticated Copies. — A. Common Law Methods and Distinctions. — The old common law rules relating to proof of public documents and records by means of copies have undergone many changes both through statutes and judicial decisions, and it is frequently difficult to distinguish whether the modern law is due to statute or the course of the decisions. At early common law three kinds of copies were used, namely, exemplified, examined or sworn, and office or certified copies.[39]

B. Admissibility. — a. *Generally.* — Public records and documents of a public nature on file in a public office may be proved by properly authenticated copies without further accounting for the non-production of the original.[40] This rule is based upon the

admission that the alleged copy is in fact a copy. But the silence of infants proves nothing, and a paper bearing no evidence whatever of authenticity cannot be made evidence against them under any circumstances." Barret *v.* Godshaw, 12 Bush. (Ky.) 592.

37. Although by statute certified copies of the report of the board of railway commissioners to the state legislature are admissible in evidence, a printed pamphlet purporting to be a copy of the original report, and in nowise certified or authenticated, is not competent evidence. "The fact that the law requires a report from the commissioners to the legislature and that they are authorized to distribute printed copies thereof does not supply the requirements of the statute with respect to their being received as evidence." Bella *v.* New York, L. & W. R. Co., 6 N. Y. Supp. 552, 24 N. Y. St. Rep. 921.

38. Such statutes exist in the case of municipal ordinances (see article "Municipal Corporations," Vol. VIII) statutes and laws generally (see articles "Foreign Laws," Vol. V; "Statutes"), and in other cases which will be found discussed under the articles to which they relate.

39. An Exemplified Copy was obtained by removing the record into the court of chancery by certiorari. The great seal was there attached to a copy which was transmitted by a mittimus to the court in which it was to be used as evidence. This was a proper method of proving any public record except that of the court where the evidence was to be used. The term "exemplified copy" is frequently used now when certified copy is meant. Traction Co. *v.* Board of Public Works, 57 N. J. L. 313, 30 Atl. 581.

An Examined or Sworn Copy. An examined or sworn copy was one made by the witness from or compared by him with the original and which he testified was a true copy. This was competent evidence to the same extent as an exemplified copy. See *infra*, III, C.

Office or Certified Copy. — See *infra*, III, 2, B, a.

40. *Kentucky.* — Dudley *v.* Grayson, 6 Mon. 259.

Maine. — Hammatt *v.* Emerson, 27 Me. 308; McGuire *v.* Sawwood, 22 Me. 230; Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Maryland. — Thornton *v.* Edward, 1 H. & McH. 158.

New Jersey. — Traction Co. *v.* Board of Public Wks., 57 N. J. L. 313, 30 Atl. 581.

North Carolina. — Ward *v.* Saunders, 28 N. C. 382; Drake *v.* Merrill, 47 N. C. 368; Slate *v.* Hunter, 94 N. C. 829.

impossibility or inconvenience of removing such records and documents and the danger of their loss or destruction which would be occasioned thereby.[41]

b. *When Original is in Court.* — An authenticated copy of public records and documents otherwise competent is not inadmissible because the opposite party produces the original and offers it in evidence.[42]

c. *As Secondary Evidence.* — A duly authenticated copy of a public record[43] or document[44] which if available would be the best evidence, is competent secondary evidence of the original.

d. *Records of Private Corporations.* — It has been held that the records of private corporations may be proved by a copy certified by the secretary[45] or by a sworn copy[46] without accounting for the original, though in other jurisdictions such copies are only competent as secondary evidence.[47]

e. *Kind of Copy Preferred.* — **(1.) Relative Competency of Certified or Examined Copies.** — A sworn or examined copy of a public record or document is evidence of as high a grade as a copy certified by the proper officer.[48] Indeed, in some jurisdictions at common law the latter was not competent at all.[49] In some courts, however, it has been held that a certified copy is better evidence than a sworn copy.[50]

(2.) Copy of a Copy.— (A.) GENERALLY. — As a general rule a mere

Tennessee. — State *v.* Cooper, 53 S. W. 391.

Texas. — Wilson *v.* State, 3 Tex. App. 206.

41. Gray *v.* Davis, 27 Conn. 447; Peck *v.* Farrington, 9 Wend. (N. Y.) 44; Simmons *v.* Spratt, 20 Fla. 495.

42. Fouke *v.* Ray, 1 Wis. 104.

43. Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; Forsaith *v.* Clark, 21 N. H. 409; Sanders *v.* Sanders, 24 Ind. 133; Freeman *v.* Thoy, 33 Me. 76.

44. McClellan *v.* Dunlap, 2 Overt. (Tenn.) 183.

A copy of the record in the office of secretary of state is competent secondary evidence of lost letters patent, since this is the proper place for recording them in the absence of a statute. New York Cent. & H. R. R. Co. *v.* Brockway Brick Co., 10 App. Div. 387, 41 N. Y. Supp. 762.

45. See Purser *v.* Eagle Lake Land & Irr. Co., 111 Cal. 139, 43 Pac. 523; Zimmerman *v.* Masonic Aid Assn., 75 Fed. 236; Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124. See also article "CORPORATIONS," Vol. III, p. 651, and Whitehouse *v.* Bickford, 29 N. H. 47; Oakes *v.* Gill, 14 Pick. (Mass.) 442.

46. See Hollowell etc. Bank *v.* Hamlin, 14 Mass. 178; Brown *v.* Ellis, 103 Fed. 834; Henderson *v.* Montgomery Bank, 11 Ala. 855; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Gochenauer *v.* Good, 3 Pen. & W. (Pa.) 274; Palmer *v.* Ruland, 28 Colo. 65, 62 Pac. 841.

47. See article "CORPORATIONS," Vol. III, p. 650.

48. Blackman *v.* Dowling, 57 Ala. 78; Jones *v.* Levi, 72 Ind. 586; Bowman *v.* Bartlett, 3 A. K. Marsh. (Ky.) 86; State *v.* Lynde, 77 Me. 561, 1 Atl. 687; State *v.* Collins, 68 N. H. 299, 44 Atl. 495; Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; and see generally the cases cited in this article under the sections dealing with the competency of these two kinds of copies.

49. See *infra*, "Certified Copies."

50. See Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Davidson *v.* Slocum, 18 Pick. (Mass.) 464.

copy of a copy is not competent evidence;[51] hence a certified copy of a certified copy[52] is not ordinarily admissible.

(B.) As Primary Evidence. — (a.) *When Copy Has Become Public Record.* — Where a copy has itself become a record or archive of a public office, an authenticated copy thereof if otherwise competent is not open to the objection that it is a copy of a copy.[53]

So where a copy on file in a public office is made competent by

51. Orman *v.* Riley, 15 Cal. 48; Lum *v.* Kelso, 3 La. 64; Betts *v.* New Hartford, 25 Conn. 180; Wilson *v.* Conine, 2 Johns. (N. Y.) 280; Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78. See article "Copies," Vol. III.

A record of the county court cannot be proved by the transcript of the record of a chancery suit, in which the record of the county court is an exhibit, as that is but a copy of a copy. Garrett, Admr. *v.* Ricketts, 9 Ala. 533.

52. Goddard *v.* Parker, 10 Or. 102; Huff *v.* Cox, 2 Ala. 310.

A copy certified by the clerk of one court, of another copy certified by the clerk of another court is not admissible in evidence, being a mere copy of a copy. "The law does not go one step further than a copy from the original; because, going beyond that limit would increase the chances of error to an extent deemed unnecessary and perilous." Fenwick's Admr. *v.* Macey, 2 B. Mon. (Ky.) 469.

An instrument certified by the clerk of a court as a true copy of a copy on file in his office, the original of which is lost, is not competent evidence, there being no sufficient showing that the copy is a true copy of the original, or that the original is lost or unavailable. Sternberg *v.* Callanan, 14 Iowa 251.

Where a justice of the peace certifies a transcript of the judgment and proceedings in a case before him to the clerk of the circuit court, but not within the time required by law and the appeal is dismissed for that reason, in an action against the justice for this neglect of his duty the best evidence of the judgment obtained in his court is the record thereof or a certified copy of it, not a copy of the transcript filed in the circuit court, certified by the clerk thereof. The evidence is objectionable because it is a "copy of a copy from the justice's docket. A copy of a public document is admitted in evidence as the original, if properly authenticated, but a copy of a copy proves nothing. It is said to be of no weight whatever. . . . The clerk of the circuit court . . . could only certify to the existence of the copy on file in his office, but he could give no transcript from the original, because he had not the custody of the record, and had no knowledge of its existence." Mills *v.* Barnes, 4 Blackf. (Ind.) 438.

53. Stone Land & Cattle Co. *v.* Boon, 73 Tex. 548, 11 S. W. 544; Vance *v.* Kohlberg, 50 Cal. 346; Vidal's Heirs *v.* Duplanter, 9 La. Ann. 525; Smith *v.* McWaters, 7 La. Ann. 145; West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778, holding that a certified copy of a judgment of the appellate court filed in the records of the lower court pursuant to law becomes a part of the records of the latter, and that a certified copy thereof is not open to the objection that it is a copy of a copy. "The objection that it is a copy of a copy is no more tenable than would be a similar objection to his transcription of any authentic copy of a public act or record which either of the parties might have adduced in evidence upon trial. Any paper thus made a part of the record in the cause, although in reality a copy, becomes an original for the purpose of making out a transcript which shall embody a truthful history of the cause as it appears of record in the court whence it comes." See also Bettis *v.* Logan, 2 Mo. 2.

Under an act making it the duty of the Board of Pharmacy to register names and places of residences of all persons to whom they issue certificates and the dates thereof,

agreement of the parties but is not allowed to be removed, a certified copy thereof is admissible.[54]

(b.) *Established Copy.* — An established copy of a record takes the place of the original and may be proved by a certified copy.[55]

(C.) As Secondary Evidence. — Although a copy on file in a public office[56] or a public record made from a copy[57] may not be admissi-

and a duplicate copy to be filed in the office of the secretary of state, copies of this registration under seal of the secretary of state are competent evidence under the statute making certified copies of papers on file in his office admissible. State *v.* Hendrix, 98 Mo. 374, 11 S W. 728.

Where a properly authenticated copy of a will which has been probated in another state has been proved and admitted to record in a court of this state, a properly certified copy of the copy so proved is admissible in evidence since the first copy became a court record. Owings *v.* Ulery, 4 Bibb (Ky.) 450; Rogers *v.* Barnett, 4 Bibb (Ky.) 480; Corbett *v.* Nutt, 18 Gratt (Va.) 624.

A transcript filed in the court to which cause has been removed by change of venue becomes a record of that court, and a certified transcript thereof is competent as evidence, not liable to objection that it is a copy of a copy. State *v.* Rayburn, 31 Mo. App. 385.

Thus a certified copy of a record may be admissible although such record was itself made from a certified copy. See Logan's Heirs *v.* Logan, 31 Tex. Civ. App. 295, 72 S. W. 416; Moody *v.* Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253; Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Howard *v.* Quattlebaum, 46 S. C. 95, 24 S. E. 93.

Although a copy of a copy is not ordinarily admissible, yet where by law a copy of a patent from Virginia to lands in Kentucky is directed to be recorded in the register's office in Kentucky, and it is further provided that certified copies of the records and other papers of the register's office shall be as good evidence as the originals, a certified copy of the copy of such a patent in the register's office is competent evidence. Hedden *v.* Overton, 4 Bibb (Ky.) 406.

54. Where depositions taken in a case were destroyed by fire, and in a second suit in which the parties and subject-matter were identical with the first an agreement was made to admit the transcript of the record of the first suit filed in the supreme court, as evidence, but on application the transcript was not allowed to be withdrawn; it was held that copies of the depositions certified by the clerk of the supreme court were competent evidence in the second suit. Dowden *v.* Wilson, 108 Ill. 257.

55. McLanahan *v.* Blackwell, 119 Ga. 64, 45 S. E. 785. See *supra*, II, 3.

56. Joslyn *v.* Rockwell, 59 Hun 129, 13 N. Y. Supp. 311, *distinguishing* People *v.* Chapin, 38 Hun (N. Y.) 272. See Jackson *v.* Johnson, 67 Ga. 167.

An exemplification of a copy of the certificate of appraisers made and filed in the treasurer's office pursuant to law, and having upon it an endorsement by the treasurer, that the original copy had been delivered to C., since deceased, after a showing that the original could not be found among the papers of C., was held admissible as competent secondary evidence, although it was a copy of a copy. Jackson *v.* Cole, 4 Cow. (N. Y.) 587.

57. In Hines *v.* Thorn, 57 Tex. 98, after proof of the loss of a deed, a certified copy from the record of the land office was held competent secondary evidence, although the record in that office was made from a certified copy of the original record of the deed.

Although an instrument has been improperly recorded because containing no acknowledgment, a copy of the record may be admissible as sec-

ble as primary evidence, an authenticated copy thereof may be competent secondary evidence after a proper preliminary showing.

C. Sworn or Examined Copy. — a. *Generally.* — A public record,[58] or a document or writing of a public[59] or private[60] nature properly on file in a public office may be proved by a sworn or examined copy without accounting for the non-production of the original. Such a copy is admissible even though a certified copy would also be competent.[61]

ondary evidence of the instrument. The fact that it was but a copy of a copy was held no objection to its use as secondary evidence. Stetson *v.* Gulliver, 2 Cush. (Mass.) 494.

The existence and loss of a deed, executed in another state, having been proved by the admissions of defendant's vendor; and there being testimony that after the loss of the originals she had procured a copy and had it recorded here,—a transcript from the record, properly certified, is admissible in evidence. Arthur *v.* Gayle, 38 Ala. 259.

58. *United States.* — United States *v.* Johns, 4 Dall. 412; Buckley *v.* United States, 4 How. 251 (custom house records).

Alabama. — Jones *v.* Davis, 2 Ala. 730; Selma Street & Sub. R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598 (sworn copy of city ordinance); Watson *v.* State, 63 Ala. 19.

Indiana. — Harris *v.* Doe, 4 Blackf. 369 (records of the general land office).

Maine. — State *v.* Hall, 79 Me. 501, 11 Atl. 181 (record of internal revenue collector).

Maryland. — Hughes *v.* Jones, 2 Md. Ch. 178 (county assessor's books).

Missouri. — Moore *v.* Gaus & Sons Mfg. Co., 113 Mo. 98, 20 S. W. 975 (records of United States Weather Bureau).

New Hampshire. — State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981; State *v.* Collins, 44 Atl 495 (records of internal revenue collector); Willey *v.* Portsmouth, 35 N. H. 305.

New York. — Coolidge *v.* New York Firemen Ins. Co., 14 Johns. 308.

Ohio. — Sheldon *v.* Coates, 10 Ohio 278.

Pennsylvania. — Hackenburg *v.* Carlisle, 1 Watts & S. 282; Welsh *v.* Crawford, 14 Serg. & R. 440.

Texas. — Terry *v.* State, 46 Tex. Crim. 75, 79 S. W. 320 (books of internal revenue collector).

Vermont. — State *v.* White, 70 Vt. 225, 39 Atl. 1085 (internal revenue collector's record of special taxpayers).

59. *United States.* — United States *v.* Johns, 4 Dall. 412.

Florida. — Simmons *v.* Spratt, 20 Fla. 495.

Indiana. — Smith *v.* Mosier, 5 Blackf. 51 (affidavits on file in the office of the register of the land office).

Missouri. — Rector *v.* Welch, 1 Mo. 334.

New Hampshire. — State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981.

New Jersey. — State *v.* Hutchison, 10 N. J. L. 242 (oath of office filed with township clerk).

New York. — Peck *v.* Farrington, 9 Wend. 44.

Ohio. — Buck *v.* McCadden, 16 Ohio 551.

Texas. — York's Admr. *v.* Gregg's Admr., 9 Tex. 85; Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230 (contract entered into between a United States quartermaster and a private individual for the transportation of military stores, and which was on file in the quartermaster's department).

A Bond given in administration proceedings in the probate court being a document which cannot properly be removed is probable by a certified copy. Miller *v.* Gee, 4 Ala. 359.

60. A bill of sale intended as a mortgage, properly filed in the town clerk's office, may be proved by a sworn copy. Pierce *v.* Rehfuss, 35 Mich. 53.

61. Board of Control *v.* Royes, 48 La. Ann. 1061, 20 So. 182.

b. *What Constitutes Sworn or Examined Copy.* — A copy made by the witness who swears to its correctness is a sworn or examined copy;[62] so also is one which the witness has compared with the original and found correct.[63] The witness, however, must state that the instrument produced is a copy,[64] although no particular language need be used.[65]

Where a copy is certified by the proper officer but the required seal is lacking, proof of the handwriting of the certifying officer does not render the copy admissible as a sworn copy.[66]

c. *Necessity of Comparison With Original.* — It is sometimes said that a copy must have been compared with the original by the witness either directly or by following while another read the original.[67] And it has been held that a copy made from memory is not admissible though the witness swears it is a true copy.[68]

A comparison is not, however, absolutely essential since the witness' recollection of the terms of the original may be so perfect as to dispense with a comparison,[69] especially when assisted by written minutes.[70]

The code authorizing the admission in evidence of public documents on the certificate of the head of a bureau or department of the general government is cumulative merely, and does not exclude copies verified by the testimony of a competent witness, admissible under rules of the common law. Blackman *v.* Dowling, 57 Ala. 78.

62. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; State *v.* White, 70 Vt. 225, 39 Atl. 1085. See also State *v.* Clothier, 30 N. J. L. 351.

63. Glos *v.* Boettcher, 193 Ill. 534, 61 N. E. 1017; Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513.

64. A written statement which a witness swears he got from a record but which is not shown to be a copy is not admissible. Thurman *v.* State, 45 Tex. Crim. 569, 78 S. W. 937.

65. Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513, in which the witness testified in his deposition that he had examined the records and found that "the following decree was rendered," attached to which was what purported to be a copy of a decree. This testimony was held sufficient to show that the witness had verified the copy by his own personal examination.

66. A paper purporting to be a copy from the records of the auditor of the treasury of the United States, certified by the auditor to be a true copy but not under his official seal, is not admissible upon proof of his handwriting. It is not an authenticated copy because it contains no seal, nor does swearing to the handwriting of the author make it a sworn copy. Wickliffe *v.* Hill, 3 Litt. (Ky.) 330.

67. Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116; Catlin *v.* Underhill, 4 McLean 199, 5 Fed. Cas. No. 2,523.

Barbour *v.* Watts, 2 A. K. Marsh. (Ky.) 290, holding that a copy of a decree in chancery from another state was not sufficiently proved by the testimony of a witness that he had seen and read the original decree and verily believed the one presented to be a copy, but that it had been upwards of a year since he had seen or read the original, that he could not repeat its contents and had not compared this copy with the original, but that having seen the original and frequently examined the copy since he had no doubt that this was a true copy.

68. McGlinchey *v.* Morrison, 1 Wyo. 105 (copy of execution under which levy was made).

69. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758. And see article "Copies," Vol. III, p. 546.

70. **Blank Form Filled Up From**

d. *By Whom Proved.* — An examined or sworn copy may be authenticated by the testimony of any competent witness with the requisite knowledge.[71]

e. *Authentication by Affidavit.* — The verity of the copy cannot be established by an *ex parte* affidavit.[72]

f. *Authentication by Deposition.* — A copy may be verified by the deposition of a competent witness.[73]

g. *Statutes.* — Statutes sometimes provide for the use of sworn or examined copies of public records.[74]

D. Certified Copies. — a. *Generally.* — It seems that formerly under the common law a certified or office copy was not a recognized method of proving a record or document except in special cases, namely, in the case of a judicial record in the same cause and in the same court, or where special authority had been conferred upon an officer for that purpose. There was no implied authority on the part of the custodian, as such, to certify copies of records or documents in his custody.[75]

And this rule as applied to non-judicial records is still adhered to in some states except as modified by statute.[76] But the later

Minutes. — The testimony of the clerk of a commissioner of insolvency that he drew the assignment of the estate of an insolvent debtor and kept no copy of it, but that the blank form of a copy produced by him was the same used by the commissioner and that he has filled it up from minutes on his docket and believes it to be a correct copy of the assignment, is sufficient to verify the copy. Brigham *v.* Coburn, 10 Gray (Mass.) 329.

71. York's Admr. *v.* Gregg's Admr., 9 Tex. 85; State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981; State *v.* Collins, 68 N. H. 299, 44 Atl. 495; Jones *v.* Davis, 2 Ala. 730.

In Grace *v.* Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158, a city assessor and tax collector was permitted to testify that the general tax rolls of his city for certain years previous to his induction to office were true copies of the assessment rolls or lists for those years, over the objection that he was not the assessor and collector, nor a deputy when the lists were made. The evidence was held properly admitted since the witness testified that he assisted the assessor to make up the tax rolls for the years in question and knew they were correct copies of the original assessment sheets, which latter he was unable to find after diligent search.

72. Grimes *v.* Bastrop, 26 Tex. 310.

73. Hancock *v.* Catholic Ben. Legion, 67 N. J. L. 614, 52 Atl. 301; Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513.

74. See Glos *v.* Boettcher, 193 Ill. 534, 61 N. E. 1017.

Under the Illinois statute the records, papers, entries and ordinances of cities, towns and villages may be proved by copies sworn to be true and correct copies by a witness who has compared them with the original, and such evidence dispenses with the necessity of any certificate. Cleveland, C. C. & St. L. R. Co. *v.* Bender, 69 Ill. App. 262 (in which ordinances of the city of St. Louis, Mo., were held properly proved in this manner). See also City of East St. Louis *v.* Freels, 17 Ill. App. 339.

75. Traction Co. *v.* Board of Public Wks. 57 N. J. L. 313, 30 Atl. 581; Black *v.* Braybrook, 2 Stark. 7, 3 E. C. L. 218; Appleton *v.* Braybrook, 6 M. & S. (Eng.) 34. And see cases in note following.

76. New Jersey R. & T. Co. *v.* Suydam, 17 N. J. L. 25, 60; Francis *v.* Newark, 58 N. J. L. 522, 33 Atl. 853; Traction Co. *v.* Board of Public Wks., 57 N. J. L. 313, 30 Atl.

cases in many jurisdictions make no such distinction, holding a copy of a public record or document, certified to by the lawful custodian to be competent primary evidence of the original,[77] except in certain cases.[78] This is the almost universal rule now either at common law or by virtue of statutes.[79]

581; State *v.* Cake, 24 N. J. L. 516; Dudley *v.* Grayson, 6 Mon. (Ky.) 259 (records of town trustees). See also Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230; Sykes *v.* Beck (S. D.), 96 N. W. 844; Stewart *v.* Swanzy, 23 Miss. 502.

A Copy of the Register of a Vessel certified to be a true copy by the collector of the port under his seal is not competent evidence to prove the ownership and nationality of the vessel because the collector is not authorized by law to give such copies; the proper method of proof is by a sworn or examined copy. Coolidge *v.* New York Firemen Ins. Co., 14 Johns. (N. Y.) 308. See also Dyer *v.* Snow, 47 Me. 254. But see Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2,517.

77. *United States.* — United States *v.* Percheman, 7 Pet. 51, 85 (*dictum*); United States *v.* Wiggins, 14 Pet. 334; Stebbins *v.* Duncan, 108 U. S. 32, 58.

Florida. — Florida Cent. & P. R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424.

Illinois. — Dunham *v.* Chicago, 55 Ill. 357; Columbus, C. & I. C. R. Co. *v.* Skidmore, 69 Ill. 566 (articles of corporate consolidation on file in office of secretary of state).

Massachusetts. — Oakes *v.* Hill, 14 Pick. 442.

New Hampshire. — State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981.

New York. — Peck *v.* Farrington, 9 Wend. 44.

Washington. — Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389 (documents on file in general land office at Washington).

A certified copy of a patent for land issued by the United States is competent evidence, although the statute relating to certified copies of records does not embrace records of patents since no statute is necessary, as such copies are admissible at common law, being copies of public records which cannot be removed without great inconvenience and danger of being lost. Lane *v.* Bommelmann, 17 Ill. 95.

Where the law requires that upon the loss of a vessel the master shall send the original register to the register of the treasury department to be canceled, and no further provision is made in the law for the disposition of the registry after its cancellation, it is properly retained in the files of the office, and a copy thereof certified by the register whose official capacity is certified to by the secretary of the treasury, under the seal of the department, is competent evidence. The document may well be considered one "required by law to be deposited in the register's office, there to remain; and if so, a copy thereof was admissible." Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2,517.

Census Record. — In holding a certified copy of a United States census, certified to by the superintendent of the census at Washington, admissible to show the population of a particular county, the court said: "The records of this census were under the care and in the custody of that officer, and on common-law principles, as the record could not be taken from his custody, a copy of such census, or any part of it, could be proved by a copy certified by him." People *v.* Williams, 64 Cal. 87, 27 Pac. 939.

Sworn Tax List. — A certified copy of a tax list sworn to and filed by a tax payer as provided by law, if made by the officer having legal custody of such records, is admissible in evidence by the rules of the common law. Wilcoxson & Co. *v.* Darr, 139 Mo. 660, 41 S. W. 227.

78. Records of Private Writings, see *infra*, III, 2, F.

79. *United States.* — Meehan *v.* Forsyth, 24 How. 175; United States *v.* Wiggins, 14 Pet. 334; Post *v.* Supervisors, 105 U. S. 667 (records of

b. *Statutes.* — (1.) **Generally.** — In many states there are general statutes making competent certified copies of the records and doc-

legislature in office of secretary of state).

Alabama. — Johnson *v.* McGehee, 1 Ala. 186; Jinkins *v.* Noel, 3 Stew. 60.

California. — People *v.* Williams, 64 Cal. 87, 27 Pac. 939.

Connecticut. — Murray *v.* Supreme Lodge N. E. O. P., 74 Conn. 715, 52 Atl. 722; New Milford *v.* Sherman, 21 Conn. 101 (records of town clerk).

Florida. — Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

Illinois. — Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307 (enrollment and bill of sale of vessel on file in office of collector of customs); National Council K. & L. of S. *v.* O'Brien, 112 Ill. App. 40; Chicago & N. W. R. Co. *v.* Trayes, 17 Ill. App. 136; Gage *v.* Davis, 14 N. E. 36 (record of sales for taxes); Dunham *v.* Chicago, 55 Ill. 357; Lee *v.* Getty, 26 Ill. 76 (land office).

Indiana. — Iles *v.* Watson, 76 Ind. 359.

Iowa. — Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571.

Kentucky. — Trustees of Kentucky Seminary *v.* Payne, 3 Mon. 161.

Louisiana. — Sampson *v.* Noble, 14 La. Ann. 347; State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522 (auditor's accounts); Judice *v.* Chretim, 3 Rob. (U. S. land office); O'Leary *v.* Sloo, 7 La. Ann. 25; State *v.* Succession of Masters, 26 La. Ann. 268.

Maine. — Parker *v.* Currier, 24 Me. 168; Eastport *v.* Mathias, 35 Me. 402 (proceedings of township selectmen committing an insane person to asylum); Jay *v.* Carthage, 48 Me. 353; State *v.* Lynde, 77 Me. 561, 1 Atl. 687 (internal revenue collector); Abbott *v.* Herman, 7 Me. 118.

Maryland. — Shorter *v.* Mozier, 3 H. & McH. 238.

Massachusetts. — Robbins *v.* Townsend, 20 Pick. 345 (copy of city records certified by city clerk); Tapley *v.* Martin, 116 Mass. 275.

Missouri. — Childress *v.* Cutler, 16 Mo. 24; McGill *v.* Somers & McKee, 15 Mo. 80.

New Hampshire. — State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981.

New Mexico. — Gale *v.* Salas, 11 N. M. 211, 66 Pac. 520 (record of brand).

New York. — Catlepp *v.* Pacific Ins. Co., 1 Wend. 578 (copy of register of vessel, certified by register of treasurer under the seal of the treasury department); Herendeen *v.* De Witt, 49 Hun 53, 1 N. Y. Supp. 467; Nolan *v.* Nolan, 35 App. Div. 339, 54 N. Y. Supp. 975.

North Carolina. — Cheatham *v.* Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617 (municipal records).

Pennsylvania. — Lessee of Scott *v.* Leather, 3 Yeates 184 (copy of an assignment of commissioners in bankruptcy to the assignees, certified by their clerk); DeFrance *v.* Stricker, 4 Watts. 327.

Tennessee. — Reeves *v.* State 7, Coldw. 96 (documents on file in comptroller's office).

Texas. — Ward *v.* Hubbard, 62 Tex. 559 (archives of secretary of state's office); Keating *v.* Vaughn, 61 Tex. 518 (bond of assignee for benefit of creditors filed with county clerk).

Vermont. — Hickok *v.* Shelburne, 41 Vt. 409; State *v.* White, 70 Vt. 225, 39 Atl. 1085.

Washington. — Ward *v.* Moorey, Admr., 1 Wash. Ter. 104 (local land office).

West Virginia. — Battin *v.* Woods, 27 W. Va. 58; Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97.

Wisconsin. — Town of Fox Lake *v.* Village of Fox Lake, 62 Wis. 486, 22 N. W. 584; Knowlton *v.* Ray, 4 Wis. 288 (sheriff's certificate of sale of land on file with the register, need not be acknowledged to render certified copy admissible).

The records of town clerks or city registrars relative to marriages are *prima facie* evidence by statute and may be proved by certified copies. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318. See article "MARRIAGE."

A Copy of a Schedule of Freight Rates Fixed by the Board of Commissioners appointed for that pur-

uments of public offices.[80] Such statutes apply to any instrument

pose, and certified by them to be a true copy and to have been published as required by law, is admissible as *prima facie* evidence of the schedule and the fact that it had been duly published. Chicago, B. & Q. R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

A copy of the poll book of an election which has been filed with the county clerk as required by law is admissible in evidence if certified by the county clerk to be a true and correct copy. Piatt *v.* People, 29 Ill. 54.

Records of Confederate Government. — Where in defense of an action of conversion the defendant claimed to have been acting under the orders of the officer of the confederate government, a certified copy of the orders of the military authorities of the confederate states was held properly admitted. Brakebill *v.* Leonard, 40 Ga. 60.

The payment of the internal revenue tax may be shown by a certified copy of the entries in books of the internal revenue office under the proper signature and seal of the department. Goble *v.* State, 42 Tex. Crim. 501, 60 S. W. 968; Gersteman *v.* State, 35 Tex. Crim. 318, 33 S. W. 357.

Filing and Recording Claim of Lien. — Where a lien claimant is required to file a statement of his claim in office of town clerk, a certified copy of said record is competent evidence of the filing and recording of the claim in action to enforce lien. Becker *v.* Joy, 72 Me. 106.

Mechanic's Lien Account. — The account filed in support of a mechanic's lien may be proved by a certified copy in an action for the enforcement of the lien. Van Riper & Rogers *v.* Morton, 61 Mo. App. 440.

A Certified Copy of an Act of Sale which was an archive in the office of the county clerk in accordance with the civil law in force at that time was held properly admitted without accounting for the copy of the original given to the parties. Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31.

An official letter from one public officer to another, kept in the files of the latter, may be proved by a certified copy. Raymond *v.* Longworth, 4 McLean, 481, 20 Fed. Cas. No. 11,595.

A certified copy from the office of secretary of state of a plat and grant is admissible for the purpose of showing that the state had issued such an original plat and grant as a foundation for the introduction of parol evidence to prove that the great seal of the state had once been attached to an unsealed document also offered in evidence as the genuine original plat and grant. Reppard *v.* Warren, 103 Ga. 198, 29 S. E. 817.

80. Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 App. Div. 442, 51 N. Y. Supp. 111; Polykranas *v.* Krausz, 73 App. Div. 583, 77 N. Y. Supp. 46; Board of Comrs. *v.* May, 67 Ind. 562, Naanes *v.* State, 143 Ind. 299, 42 N. E. 609; Stanley *v.* Smith, 15 Or. 505, 16 Pac. 174; Boddie *v.* Pardee, 74 Miss. 13, 20 So. 1 (records of land commissioner's office competent under such statute). See State *v.* Champion, 116 N. C. 987, 21 S. E. 700.

Georgia Statute. — The Georgia Code §§ 3816 and 3817 provides that certified copies of the records kept by a public officer shall be primary evidence of those records or papers required by law to remain in the office where they are kept, but only secondary evidence of such documents as by law properly remain in possession of the party. Brown *v.* Driggers, 60 Ga. 114.

Under this statute copies of the record of homestead papers and schedules of personalty made and recorded to obtain exemption are only secondary evidence which is not admissible until the originals, which should be in the possession of the party claiming the exemption, are accounted for. Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666; Brown *v.* Driggers, 60 Ga. 114; Larey *v.* Baker, 85 Ga. 687, 11 S. E. 800.

properly filed or recorded in the office specified,[81] including official bonds,[82] files and records of courts,[83] and letters on file.[84] But it must appear that the record is from a public office.[85]

Similar statutes relating to particular offices or officers are in force in some jurisdictions.[86]

81. Emmitt *v.* Lee, 50 Ohio St. 662, 35 N. E. 794 (Leases of surplus water of canals and lands connected therewith required to be deposited in office of board of public works for record); Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749; Brummer *v.* Galveston (Tex. Civ. App.), 77 S. W. 239 (relevant portions of the assessment rolls); Allen *v.* Halsted (Tex. Civ. App.), 87 S. W. 754 (muster roll of a military company); Lasher *v.* State, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922 (archives of state department); State *v.* Elam, 21 Mo. App. 290 (duplicate list filed with secretary of state, of persons to whom board of pharmacy has issued certificates).

Receipts of County Convict Contractor, given to the sheriff for convicts taken, may be proved by certified copies of duplicate entries of them in the books of the clerk of the board of supervisors, under such a statute. State *v.* Oliver, 78 Miss. 5, 27 So. 988.

A husband's written consent to his wife's engaging in business as a *feme sole* required to be filed and recorded in the office of the probate judge, is a paper kept by a sworn officer and transcribed on his records under the code providing for the use of certified copies of such papers. Schwartz *v.* Baird, 100 Ala. 154, 13 So. 947.

82. Battle *v.* Gaird, 118 N. C. 854, 24 S. E. 668; Richardson *v.* Whitworth, 103 Ga. 741, 30 S. E. 573 (administrator's bond). See also Ramsey's Estate *v.* People, 197 Ill. 572, 64 N. E. 549.

83. Missouri P. R. Co. *v.* Baier, 37 Neb. 235, 55 N. W. 913 (letters of administration from files of court granting the same). See *infra*, "Judicial Records—Statutes."

Bond to Dissolve Attachment provided for by law becomes a part of the record, so that a copy of it as such part of the record is clearly admissible under statute making certified copies of records evidence. Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

84. Davis *v.* Freeland's Lessee, 32 Miss. 645.

Copies of Letters belonging to and on file in the office of the register of the state land office, duly certified under the hand and seal of the register, are admissible in evidence and entitled to the same credibility as the original letters themselves under §4047 of the Revised Code. The fact that such letters are on file in the proper office is *prima facie* evidence at least that they were sent there by the writer in accordance with the direction. Bellows *v.* Todd, 34 Iowa 18; Holmes *v.* State, 108 Ala. 24, 18 So. 529.

85. State *v.* Pagels, 92 Mo. 300, 4 S. W. 931, holding that under a statute providing for the use of certified copies of non-judicial records of public offices, copies of the records of hospitals for insane are not admissible until their public character appears.

86. *United States.* — Board of Comrs. *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464 (Colorado statute relating to records and files of county judge, clerk and treasurer).

Alabama. — Stanley *v.* State, 88 Ala. 154, 7 So. 273.

Florida. — Tuten *v.* Gazan, 18 Fla. 751 (secretary of state).

Illinois. — Morgan County Bank *v.* People, 21 Ill. 304 (records and files of state auditor—report of a bank).

Indiana. — Vail *v.* McKernan, 21 Ind. 421 (accounts contained in state auditor's books); Wells *v.* State, 22 Ind. 241 (same); Standard Oil Co. *v.* Bretz, 98 Ind. 231.

Massachusetts. — Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26 (executive and other departments of commonwealth—signature of certi-

(2.) When and To What Extent Evidence.— Certified copies made competent by statute are evidence only to the extent provided in the statute.[87]

Unless otherwise specified in the statute such copies of docu-

fying officer must be attested by secretary of commonwealth under its seal).

Missouri. — Wood *v.* Nortman, 85 Mo. 298 (treasurer, auditor and land office); State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728 (secretary of state).

New York. — Devoy *v.* Mayor, etc. of New York, 35 Barb. 264 (all papers filed with county clerk—oath of office).

Pennsylvania. — Northumberland Co. *v.* Zimmerman, 75 Pa. St. 26 (secretary of state—copy of petition to governor for police protection, on file in secretary's office); McCoy *v.* Lighter, 2 Watts 132 (auditor-general's office—contract for constructing section of Pennsylvania canal).

Texas. — See Ingram *v.* Walker, 7 Tex. Civ. App. 74, 26 S. W. 477 (comptroller's office).

Under § 14, ch. 51, Rev. Stat., the papers, entries, records and ordinances, or parts thereof, of any city may be proved by a copy thereof, certified under the hand of the clerk or a keeper thereof and the corporate seal, if there be any; if not, under his hand and private seal; and under § 18, such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses. City of Chicago *v.* English, 80 Ill. App. 163. Under this statute a municipal bond register kept pursuant to the city charter may be proved by certified copies. City of East St. Louis *v.* Freels, 17 Ill. App. 339.

Where the law requires the tax receiver of each county to make out three copies of the tax digest for his county and file one with the comptroller general, and also provides that certified copies of the records, documents and files of the comptroller's office shall be competent evidence, a copy of the tax digest in the comptroller general's office, certified by him, is equally competent with the copy certified by the proper county officer. Clark *v.* Empire Lumb. Co., 87 Ga. 742, 13 S. E. 826.

Certified copies of warrants drawn by the county comptroller on the tax collector in favor of the county treasurer, and of the endorsements on the backs thereof, which warrants were on file in the office of the comptroller and kept by him in performance of his duties, were held admissible as copies of the archives of his office. Harper *v.* Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044.

Civil Service Regulations. — Under § 933 of the code providing for the certification by the secretary or clerk of any public body or board appointed in pursuance of law, under his hand, of the records in his office, a copy of the civil service regulations of a particular city on file in the office of the state civil service commissioner, certified by the secretary under the seal of the commissioner, is competent evidence. People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800.

Certificate of Incorporation. Under a statute providing for the use of certified copies of the records and papers in the office of the secretary of state, a certified copy of his record of a final certificate of incorporation is admissible. Willingham *v.* State, 104 Ala. 59, 16 So. 116.

87. Where the statute provides that certified copies of the records of the clerk or register of the county shall be evidence only of the fact that the instrument was filed, and "of no other fact," such a copy is not competent evidence of the original instrument. George *v.* Toll, 39 How. Pr. (N. Y.) 497.

Where statute only allows an exemplified or authenticated copy of a will to be proven when the original will is in the possession of a "foreign court or tribunal of justice," a notary public is neither a court or tribunal of justice within the meaning of the statute. In the Matter of Diez, 56 Barb. (N. Y.) 591.

ments on file in a public office are only admissible when the original would itself be competent.[88]

(3.) To What Records and Documents Applicable. — A statute providing for the issuance and use of certified copies of instruments on record in a particular office has been held not to apply to documents lawfully filed but not recorded in that office.[89]

But a general statute covering not only the records of, but the papers and documents on file with, a public officer, includes all records and documents properly in that office and applies to private writings.[90]

88. State *v.* Wells' Admr., 11 Ohio 261.

§ 933 of the Code of Civ. Proc., authorizing the receipt in evidence of certified copies of papers filed, kept or recorded pursuant to law in a public office does not make such a copy competent evidence unless the original, if produced, would be competent. Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848.

The Colorado statute that "copies of all documents, writs, proceedings, instruments, papers and writings duly filed or deposited in the office of any county judge, county clerk or county treasurer, and transcripts from books of records or proceedings kept by any of said officers with the seal of his office affixed, shall be *prima facie* evidence in all cases" (Mills' Ann. St., p. 788. § 922) does not make a copy or transcript admissible in any case where the original would not be admissible. Board of Commissioners *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

89. A town clerk is not a certifying officer of a grand list or other document required by law to be *deposited* in the town clerk's office, but not to be *recorded* therein. His certificate, therefore, is not sufficient authentication to make copies of such documents legal evidence. The statute provides that "the town clerk shall furnish certified copies of any instrument *on record* in his office. . . . and his attestation shall be a sufficient authentication of such copies." The court says: "We think considering the numerous papers and documents that are required by law to be deposited in the town clerk's office and not to be recorded that this provision of the statute was not intended to apply to such papers. Had that been the intent of the legislature it would have been so expressed." And this conclusion is strengthened by the succeeding sections relating to penalties distinguishing between the record and the files. Barnet *v.* Woodbury, 40 Vt. 266. See McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

90. § 7504, How. Stat., makes copies of all papers, records, entries, and documents required by law to be filed by any public officer in his office, or to be entered or recorded therein, and duly filed, entered, or recorded according to law, certified by such officer, to be a true transcript, compared by him with the original in his office, shall be evidence in all courts and proceedings in like manner as the original would be, if produced. Under this statute a certified copy of a statement of lien filed with the county clerk is competent evidence. Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601. So also is a copy of a mortgage. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

Where by law it is provided that the secretary of state shall keep a register of all the official acts of the governor and when required shall lay the same and all minutes and other papers in relation thereto before the legislature, an inventory and appraisement made under the direction of the governor upon resuming control of the state penitentiary filed in the office of the secretary of state was held to be an archive of his office, and a certified copy thereof was therefore admissible in evidence. "To enable the secretary to perform these duties he would of course have

(4.) Where Original Record Is Available. — Where a statute makes certified copies of a particular record competent without condition, the fact that the original is available does not serve to exclude the copy.[91]

(5.) No Application to Foreign Records. — A statute providing generally for the competency of public records and documents has no application to records of a foreign or sister state,[92] though the contrary has been held under a statute relating to records of notaries.[93]

(6.) Probative Force. — Statutes making certified copies competent to the same extent as the originals do not have reference to the probative value of the copy which may or may not be as great as that of the original.[94]

(7.) Necessity of Proving Execution of Original. — A statute providing that certified transcripts of the papers and records of a public office "shall be evidence in like manner as the originals would be if produced" does not dispense with the necessity of proving the execution and genuineness of the original, except where the original would prove itself.[95]

(8.) Particular Classes of Records. — In various jurisdictions are statutes relating to particular classes of records.[96]

to be considered the legal custodian of such 'minutes and other papers.'" Ward *v.* Hubbard, 62 Tex. 559.

91. Preston *v.* Evans, 56 Md. 476 (even where the original record belongs to the same court in which the copy is offered). See Jinkins *v.* Noel, 3 Stew. (Ala.) 60.

92. Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712.

93. A statute making the protests made and acknowledgments taken by notaries public and certified copies of their records and official papers competent evidence applies to notaries outside as well as in the state. May *v.* State, 15 Tex. App. 430.

94. § 891 of the Rev. Stat. providing that authenticated copies of the records in the general land office shall be evidence equally with the originals thereof does not mean that in all cases the copy shall have the same prohibitive force as the original instrument, but that it should be regarded as of the same class in the grades of evidence as to written or parol and primary or secondary. "It could not have been intended to say that when the existence of the instrument is conceded but a question arises as to some particular word or figure, the copy would be as convincing as the original." Campbell *v.* Laclede Gas Co., 119 U. S. 445.

95. Shelden *v.* Merrill, 69 Mich. 156, 37 N. W. 66.

Contra. — Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26. See also Kramer *v.* Settle, 1 Idaho 485; McCoy *v.* Lighter, 2 Watts (Pa.) 132.

Papers certified by the clerk of the court to be copies of a guardian's bond filed in his office cannot be read in evidence unless the execution of the original is proved like all other similar papers, as a guardian's bond is not a record. Butter *v.* Durham, 38 N. C. 589.

96. Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48 (records relating to swamp lands); Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384 (instruments in any office or court for safe keeping — applies to navy departments); Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715 (record of execution under which sale is made); McCreight *v.* Gassett, 1 Brev. (S. C.) 515; Ramsey *v.* Wood, 57 Mo. App. 650 (record of county court showing adoption of township organization); Wolf *v.* Goddard, 9 Watts (Pa.) 544; Farmer's Heirs *v.* Eslava, 11 Ala. 1028 (Spanish records).

Vital Statistics. — By statute certified copies of the entries in a pub-

(9.) Statutes Requiring an Officer to Furnish Certified Copies. — A statute requiring a public officer to give certified copies of the records and archives of his office warrants the use of such copies in evidence to prove the originals,[97] though the contrary has been held.[98]

c. *Transferred or Transcribed Records.* — Where the records of one office have by law been transferred to[99] or transcribed into[1] the records of another office they become records of the latter and may be proved by certified copies whenever this is a proper method of proving the records of the latter. The presumption is that a law directing such a transfer has been complied with.[2]

d. *Endorsements on Documents on File in Public Office.* — Where certified copies of documents on file in a public office are competent,

lic record of vital statistics, kept in pursuance of law, showing the deaths and causes thereof, is competent evidence. Keefe *v.* Supreme Council of C. M. B. Ass'n, 37 App. Div. 276, 55 N. Y. Supp. 827.

Where a statute requires the boards of health of all cities in the state except New York, Brooklyn and Buffalo to register the causes of death of persons dying in such cities and makes copies of such records *prima facie* evidence of the facts therein set forth, a subsequent act relating to the city of Albany only and requiring registration of the causes of death in that city, but making no provision for the use of the record or copies thereof as evidence, does not affect or repeal the provision of the prior act making copies of such records *prima facie* evidence. Beglin *v.* Metropolitan L. Ins. Co., 32 Misc. 254, 66 N. Y. Supp. 206.

Under an act providing that copy of any record of French or Spanish government deposited in office of recorder of any county shall be admissible (which is declaratory of common law) conveyances executed in presence of Spanish lieutenant governor and deposited among archives, are records of Spanish government, and copies of archives duly certified by recorder where deposited are admissible in evidence. Charlotte *v.* Chouteau, 21 Mo. 531.

Under the Illinois statute copies of ordinances and council proceedings, certified by the city clerk, are competent evidence. Boyd *v.* Chicago, B. & Q. R. Co., 103 Ill. App. 199. The certificate of a village clerk attached to an ordinance in pamphlet form was held sufficient as against a general objection. Chicago & E. I. R. Co. *v.* Beaver, 96 Ill. App. 558. See more fully article "MUNICIPAL CORPORATIONS."

97. Where the secretary of state is required to furnish a certified copy of official acts of governor, such certified copy as well as the original is the best evidence of a pardon. Redd *v.* State, 65 Ark. 475, 47 S. W. 119.

98. Although a statute directs the adjutant-general to "procure an appropriate official seal and affix same to all certificates of records issuing from his office," neither his certificate under seal nor a certified copy of his record is admissible. Francis *v.* Newark, 58 N. J. L. 522, 33 Atl. 853.

99. Records of deeds, mortgages and other instruments kept by alcaldes, which were transferred to the custody of the county recorded by the Act of 1850, are on the same footing as other records kept by the recorder, and certified copies thereof are admissible on proof of loss or inability to produce the original. Touchard *v.* Keyes, 21 Cal. 202; Garwood *v.* Hastings, 38 Cal. 216.

The original of an act of sale between parties, made before a judge of the first instance October 15, 1835, became, by Act of December 20, 1836, organizing county courts, an archive in such courts, of which certified copies may be had and used. Cowan *v.* Williams, 49 Tex. 380.

1. Mankato *v.* Meagher, 17 Minn. 265.

2. Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

endorsements properly made on the originals by the officer receiving them may be likewise proved by certified copies.[3] But endorsements which are unauthorized or which are not properly archives of the office cannot be so proved,[4] except perhaps in some jurisdictions as secondary evidence.[5]

e. *When Documents Are Not Records of Office Where Filed.* Although documents may have been properly filed in a public office for safe keeping, if they do not thereby become records or archives of that office they cannot be proved by certified copies.[6]

f. *Unauthorized Records and Documents Improperly in Records.* **(1.) Generally.** — A certified copy of an authorized record[7] or of a document which is not properly in the files of a public office[8] is

3. Trustees of Kentucky Seminary *v.* Payne, 3 Mon. (Ky.) 161 (endorsement of fact and date of filing).

4. See *infra* III, 2, D, f.

5. See *infra,* III, 2, D, f, (3).

6. Cargile *v.* Ragan, 65 Ala. 287. The charter of a city having made no provision, either for the custody of the papers relating to the contest of a city election therein provided to be had before the judge of the circuit court, or for making any final record of such contest, while such papers may properly be deposited with the clerk of that court for safe keeping they do not thereby become records thereof of which the clerk can certify and so authenticate a copy to render same admissible in evidence. Davidson *v.* State, 68 Ala. 356.

7. Uhl *v.* Mosquez, 1 Posey Unrep. Cas. (Tex.), 650; Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715; Childress & Mullanphy *v.* Cutler, 16 Mo. 24.

Where the law does not authorize or permit the registration of deeds in the office of the clerk of the district court, a certified copy of such record is not admissible unless it forms part of the judgment. Sullivan *v.* Dimmitt, 34 Tex. 114.

Unauthorized Entry on Justice's Docket. — Hunt *v.* Boylon, 6 N. J. L. 211 (delivery of execution to constable); Armstrong *v.* State, 21 Ohio St. 357.

The fact that plaintiff's agent had released one of the defendants from the note sued on cannot be proved by a certified copy of the justice's docket containing an unauthorized entry of this fact. Brown *v.* Pearson, 8 Mo. 159.

8. Hammatt *v.* Emerson, 27 Me. 308; Frazier *v.* Laughlin, 6 Ill. 347; Wren *v.* Howland, 39 Tex. Civ. App. 87, 75 S. W. 894; Wilson *v.* Ingloes, 6 Gill (Md. Ch.) 121; Herndon *v.* Casiano, 7 Tex. 322; Paschal *v.* Perez, 7 Tex. 348.

Where a certified copy of probate proceedings is not competent as a decree of partition it is not admissible to show an agreed partition, since being a matter "*coram non judice*" it could not be authenticated by the clerk's certificate and the seal of the court. League *v.* Henecke (Tex. Civ. App.), 26 S. W. 729.

An order or letter from the grantee of a land certificate directed to the clerk of the county land board directing him as to the disposition to be made of the certificate when issued is not an archive of the county clerk's office, and a certified copy given by such officer is not competent evidence. Lott *v.* King, 79 Tex. 292, 15 S. W. 231.

The fact that the testimonio or second original of an act of sale has been deposited in the land office for record does not authorize the commissioner to certify a copy, since he can only certify copies of records properly in his office. Hathcett *v.* Conner, 30 Tex. 104.

The original field notes of a deputy surveyor not approved or recorded by the principal surveyor cannot properly be returned to the general land office, nor become a record thereof; hence a certified copy of them is not admissible. Patrick *v.* Nance, 26 Tex. 299.

not admissible, even though it has been the practice to make the record or file the document in question.[9]

(2.) Effect of Statute. — A statute making competent certified copies of the papers and records of a public office applies only to the papers and records legally there.[10]

(3.) As Secondary Evidence. — Where an instrument has been improperly filed in a public office a certified copy thereof is not competent secondary evidence,[11] and the same is true of an unauthorized record.[12]

It has been held, however, that where such an instrument though improperly filed cannot be removed from the office where filed, a certified copy of it is competent,[13] being the next best evidence

Where a power of attorney has been deposited in the land office without authority, a certified copy thereof is not admissible. Rogers *v.* Pettus, 80 Tex. 425, 15 S. W. 1093.

An affidavit of the surveyor explanatory of the field notes of a state survey although filed in the land office was held not to be an archive of that office and hence not admissible as such; nor did the fact that the surveyor was dead when the affidavit was offered alter the case. Barrow *v.* Gridley (Tex. Civ. App.), 59 S. W. 913, 59 S. W. 602.

9. A certified copy of an account of an assessor and collector with an acknowledgment of his indebtedness to the state, the original of which was filed by him with the comptroller, is not admissible where no statute authorizes or requires such an accounting. "Doubtless the practice has grown up in the comptroller's office of obtaining such statements and such acknowledgments from the assessors where it was practicable to do so for the convenience of the office and the greater security of the public interests. But copies of such papers cannot be admitted in evidence upon the certificate of the comptroller in the absence of any statute giving to them the dignity of records of his office." Highsmith *v.* State, 25 Tex. Supp. 137; *citing* Albright *v.* The Governor, 25 Tex. 687.

10. Morrison *v.* Coad, 49 Iowa 571.

Article 2253, Rev. Stat., authorizing certain officers to give certified copies of the papers and records of their office to be used in evidence relates only to such documents as are required or permitted by law to be filed in such offices, and the same is true of the statute making copies of papers and records of the general land office admissible. Rogers *v.* Pettus, 80 Tex. 425, 15 S. W. 1093.

11. State *v.* Cardinas, 47 Tex. 250.

12. A certified copy of the record of a deed improperly admitted to record because defectively acknowledged is not admissible although the deed was made and recorded over forty years before. "A certified copy would not be admissible as of an ancient instrument unless the deed was properly of record." Settegast *v.* Charpiot (Tex. Civ. App.), 28 S. W. 580.

13. Holt *v.* Maverick (Tex. Civ. App.), 24 S. W. 532. In this case a certified copy of an endorsement on a land certificate on file in the land office, which endorsement was made by a county surveyor in whose hands the certificate had been placed for location, and which while not competent merely as a record in the land office because not authorized to be filed there would nevertheless have been admissible as an ancient instrument, was held properly admitted because being inseparably connected with the certificate which could not be removed from the land office secondary evidence was necessary.

A release of land to the state by the grantee thereof, filed with the commissioner of the land office, may be proved by a certified copy. Even if not an archive of the land office the original could not be removed from the office and its non-production is thus sufficiently accounted for

capable of production. But there is authority to the contrary.[14]

g. *Illegible or Obliterated Records.* — Although a record is partially illegible or a portion thereof obliterated, a certified copy thereof is nevertheless admissible.[15]

A certified copy of a signed instrument is not inadmissible because the certifying officers attempted to make a facsimile copy of the signature which is not entirely legible.[16]

h. *Land Office Records.* — **(1.) Generally.** — Certified copies of the records and documents on file in a public land office are competent evidence.[17]

to admit the next best evidence of which the nature of the case is susceptible. Dikes *v.* Miller, 25 Tex. Supp. 281.

Where the holder of a United States register's certificate sells the land therein described and endorses the contract of sale upon the back of the certificate, a copy of such certificate and contract certified by the commissioner of the general land office is admissible in evidence to establish the contract, as, by the act of the parties, that officer became the custodian of their agreement, and it cannot be withdrawn from his custody. Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389 (but see dissenting opinion).

14. Bouchad *v.* Dias, 3 Denio (N. Y.) 238, so holding even where the writing was properly filed.

15. Willey *v.* Portsmouth, 35 N. H. 303 (if portions are illegible blank space should be left and the certificate should state the reason therefor).

A certified copy of a survey given by the surveyor general, under seal of office, is evidence, though it appears in such copy that part of the writing of the original survey had been obliterated. But if the part obliterated was that which recited the authority for making the survey, and there be no other evidence of any authority to make it, nor of the return being accepted by the board of property, it is not evidence. Jones *v.* Hallopeter, 10 Serg. & R. (Pa.) 326.

16. McCamant *v.* Roberts (Tex. Civ. App.), 25 S. W. 731.

Where it appeared that one of the witnesses to a deed often wrote his name so that the middle initial was illegible, a copy of the record of such a deed which varied from the deed in question only in the middle initial of such witness, which appeared to be an attempt of the recorder at a facsimile of an illegible initial or initials of a middle name, was held to be admissible. Melvin *v.* Marshall, 22 N. H. 379.

17. *Alabama.* — Stewart *v.* Trenier, 49 Ala. 492 (copy of any official document in any land office of the state).

Louisiana. — Franklin *v.* Woodland, 14 La. Ann. 188 (state land office); LeBleu *v.* Timber Co., 46 La. Ann. 1465, 16 So. 501 (copy of record of patent certified by register of state land office).

Maryland. — Thornton *v.* Edwards, 1 H. & McH. 158.

Pennsylvania. — Jennings *v.* McDaniell, 25 Pa. St. 357; Anderson *v.* Klein, 10 Watts 251; Oliphant *v.* Ferren, 1 Watts 57.

Washington. — Ward *v.* Moorey, Admr., 1 Wash. Ter. 104 (local U. S. land office). See article "PUBLIC LANDS." But see Doe *ex dem.* Freeland *v.* M'Caleb, 2 How. (Miss.) 756.

Although no law requires the assignment of a land office certificate for the purchase of land to be filed in the office of the commissioner of the general land office, yet when so filed in order to procure the issuance of a patent to the assignee it becomes a part of the records of the office as much as if the commissioner were expressly required by law to retain it in his office, and a certified copy is competent primary evidence. Clark *v.* Hall, 19 Mich. 356.

An exemplification of a patent from the United States certified by the commissioner of the general land

(2.) Texas Statute. — Certified copies of the records and archives of the Texas land office are made competent evidence by a statute of that state.[18] This statute applies to all documents and writings properly on file in that office,[19] including land certificates[20] and maps.[21] Certified copies of the mesne transfers endorsed on land certificates filed in the land office are also admissible[22] though it has been held that they are not competent until after the issuance of the patent.[23] The statute does not, however, apply to documents

office, is receivable in evidence without proof of loss of the original. Avery *v.* Adams, 69 Mo. 603; Barton *v.* Murrain, 27 Mo. 235.

A letter written to the register and receiver of the district land office canceling a homestead entry may be proved by a certified copy. Holmes *v.* State, 108 Ala. 24, 18 So. 529.

18. Where a patent is recorded in the land office, certified copies of such record are competent primary evidence of the original grant. Stevens *v.* Geiser, 71 Tex. 140, 8 S. W. 610; Ney *v.* Mumme, 66 Tex. 268, 17 S. W. 407. See also McClelland *v.* Moore, 48 Tex. 355.

19. Houston *v.* Perry, 3 Tex. 390; Tolleson *v.* Wagner, 35 Tex. Civ. App. 577, 80 S. W. 846 (conveyances of school land have been filed in general land office); Ansaldua *v.* Schwing, 81 Tex. 198, 16 S. W. 989.

A certified copy of an instrument of title properly on file in the land office is admissible although such instrument is not entitled to record in the county records (Airhart *v.* Massieu, 98 U. S. 491), as where it is not properly authenticated for record; Dupree *v.* Frank (Tex. Civ. App.), 39 S. W. 988. See also Hill *v.* Templeton (Tex. Civ. App.), 29 S. W. 535.

An assignment of a lease of school land, made with the consent of the commissioner of the general land office and filed in his office as required by law, is properly an archive of that office, and may be proved by a certified copy under the act making certified copies of his records competent evidence. Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.

Where statute makes all papers relating to sales of land records of the general land office and makes certified copies of such records equally competent with the originals, a certified copy by the commissioner of the general land office of a certified copy of a judgment settling the title and possession of certain land, is competent evidence. Trevey *v.* Lowrie, 33 Tex. Civ. App. 606, 78 S. W. 18.

A Grant of Land which has become an archive of the general land office although not so executed as to constitute it an authentic act may be proved by a certified copy. Allen *v.* Hoxey's Admr., 37 Tex. 320.

A certified copy from the general land office of a grant of land issued in 1835 is evidence of title. The nonproduction of the testimonio need not first be explained. Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31; *citing* Sheppard *v.* Harrison, 54 Tex. 91, Rev. Stat. art. 5222.

20. Holmes *v.* Anderson, 59 Tex. 481.

21. Houston & T. R. Co. *v.* Heirs of Bowie, 2 Tex. Civ. App. 437, 21 S. W. 304 (*distinguishing* Railway Co. *v.* Thompson, 65 Tex. 193); Hollingsworth *v.* Holhousen, 17 Tex. 41.

22. Halbert *v.* Carroll (Tex. Civ. App.), 25 S. W. 1102; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; Parker *v.* Spencer, 61 Tex. 155; Burkett *v.* Scarborough, 59 Tex. 495; Mason's Heirs *v.* McLaughlin, 16 Tex. 24; Graham *v.* Henry, 17 Tex. 164.

23. Assignments of land certificates deposited in the general land office for the purpose of procuring patents to land on the certificates are not records of that office until the issuance of the patent, and copies of them certified by the commissioner are not admissible unless made after the issuance of the patent. Short *v.* Wade, 25 Tex. 510.

which, though deposited in the land office, are not archives thereof.[24]

i. *Maps, Plats, Surveys and Diagrams.* — Certified copies of maps, plats, surveys and diagrams on file in a public office may be competent,[25] but this subject is fully discussed elsewhere.[26]

j. *Articles of Incorporation and Consolidation.* — Where articles of incorporation[27] or consolidation[28] or copies thereof are filed in a public office pursuant to law, certified copies thereof are competent evidence of the incorporation or consolidation shown thereby.

24. See *supra,* III, 2, D, f, for additional cases.

A *hipotica especial* (a security in the nature of a mortgage) and its transfer not being papers pertaining to the records of the general land office do not become archives thereof by being filed or deposited therein; hence copies of them certified by the commissioner are not admissible. Mapes *v.* Leal's Heirs, 27 Tex. 345.

25. *California.* — Goodwin *v.* McCabe, 75 Cal. 584, 17 Pac. 705 (map on file in land department).

Michigan. — Dewey *v.* Campau, 4 Mich. 565.

Mississippi. — Surget *v.* Little, 24 Miss. 118 (map in office of surveyor-general of land office); Fori *v.* Williams, 35 Miss. 533.

Pennsylvania. — Vastbinder *v.* Wager, 6 Pa. St. 339 (diagram).

Texas. — Hollingsworth *v.* Holshousen, 17 Tex. 41.

Virginia. — Pollard's Heirs *v.* Lively, 4 Gratt. 73 (surveys); Taylor *v.* Com., 29 Gratt. 780 (map attached to recorded deed).

26. See articles "DIAGRAMS," Vol. IV; "MAPS," Vol. VIII; "PUBLIC LANDS," *ante.*

27. See fully article "CORPORATIONS," Vol. III, p. 606.

Under statute admitting certified copies of public records of private writings, organization of a corporation may be proved by a copy of the articles of incorporation certified by the secretary of state. Western Iron Wks. *v.* Montana P. & P., 30 Mont. 550, 77 Pac. 413.

Certified Copy Not a "Duplicate." Where a corporation has filed in the office of the secretary of state as the "duplicate" of the original certificate required by law to be filed in that office, a certified copy of the record in the recorder's office of the proper county where the original certificate was recorded, a copy, duly certified by the secretary of state of the copy in his office, is not competent evidence for any purpose. "A duplicate is an original instrument, just as much so as the original article of which it is a duplicate. It must be executed by the same parties, in the same manner, with the same formalities, and must contain the same matter, as an original instrument; else, it is not a duplicate of such original instrument. A certified copy of a record of articles of association is not a duplicate of such articles. When a law requires, as does the first section of the act above cited, that a duplicate of a certificate of incorporation shall be filed in the office of the secretary of state, it is no compliance with the requirements of such law, to file in said office a certified copy of the record of such certificate." Nelson *v.* Blakey, 54 Ind. 29.

28. Vance *v.* Kohlberg, 50 Cal. 346 (certified copy of the copy of articles of consolidation filed with the secretary of state).

Copies of Articles of Consolidation on file in the office of the secretary of state and duly certified by him and authenticated by his seal of office are competent evidence to prove the consolidation the same as the original articles would be, by virtue of the statute making copies of all bonds, papers, writings and documents legally deposited in the office of the governor or secretary of state when certified by the secretary and authenticated by the seal of his office, competent evidence to the same extent as the original. And on general principles properly certified copies would be evidence in the absence of

k. *Official Bond.* — A certified copy of an official bond on file in a public office,[29] or of an authorized record thereof[30] is competent, and statutes sometimes provide for proof of such a bond by a certified copy.[31]

l. *In Criminal Case.* — A certified copy of the record entries otherwise competent are admissible in a criminal case against the defendant and do not violate the rule that he shall be confronted with the witnesses against him.[32]

m. *Effect of Competency of Certified Copy on Use of Original or Sworn Copy.* — **(1.) Generally.** — The general rule is that an original record or document is not rendered inadmissible by the fact that a certified copy thereof is competent,[33] nor is it error to

a statute. Columbus, C. & I. C. R. Co. *v.* Skidmore, 69 Ill. 566.

29. Jones *v.* Hallopeter, 10 Serg. & R. (Pa.) 326 (guardian's bond).

A copy of the bond of a constable, certified by the county clerk, is admissible in evidence to establish the official character of an individual as constable, since the county clerk is custodian of a constable's bonds under the laws. State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.

The copy of a coroner's official bond, authenticated by the secretary of the commonwealth from the originals on file in his office, is not evidence unless it appears thereby that the bond has been previously recorded in the recorder's office for the proper county, as he was not authorized to put the bond on the files of his office until recorded in the proper county, and so indorsed by the recorder. Young *v.* Com., 4 Bin. (Pa.) 113.

A bond taken in an administration proceeding in the probate court may be proved by either an examined or a certified copy without accounting for the original, since it cannot properly be removed from the office in which it is filed. Miller *v.* Gee, 4 Ala. 359.

Sheriff's Bond. — A sheriff's bond on file in a public office may be proved by a copy certified by its custodian. State *v.* Lowrance, 64 N. C. 483; Caskey *v.* Nitcher, 8 Ala. 622; Godbold *v.* Planters' & Merch. Nat. Bank, 4 Ala. 516. But the bond must appear to have been taken in the manner prescribed by law. Dunn *v.* Com., 14 Serg. & R. (Pa.) 431.

30. State *v.* Corne, 53 N. C. 42 (either a copy of such record or the original recorded instrument is admissible without proof of execution). See Jackson *v.* Johnson, 67 Ga. 167.

31. Battle *v.* Baird, 118 N. C. 854, 24 S. E. 668; Richardson *v.* Whitworth, 103 Ga. 741, 30 S. E. 573 (administrator's bond). See also Ramsey's Estate *v.* People, 197 Ill. 572, 64 N. E. 549.

A transcript of an official bond of the constable, when duly certified by the probate judge, is, under statute, required to be received in evidence in all courts of the state. Burton *v.* Dangerfield, 141 Ala. 285, 37 So. 350.

32. "The rule that the prisoner shall be confronted with the witnesses against him does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules of the common law." Rogers *v.* State, 11 Tex. App. 608. See article "Privilege of Witnesses."

33. *United States.* — Bruce *v.* Manchester & K. R. R., 19 Fed. 342 (*citing* Cate *v* Nutter, 24 N. H. 108).

Alabama. — Carwile *v.* House, 6 Ala. 710.

Connecticut. — Gray *v.* Davis, 27 Conn. 447.

Florida. — Ferrell *v.* State, 45 Fla. 26, 34 So. 220.

Georgia. — Thomas & Co. *v.* Parker, 69 Ga. 283.

Indiana. — Anderson *v.* Ackerman, 88 Ind. 481; Iles *v.* Watson, 76 Ind. 359.

North Carolina. — Cheatham *v.*

permit the introduction of both.[34] And generally whenever such copy is admissible the original is equally competent.[35]

(2.) Partial Copy Supplemented by Original. — A certified copy of a portion of a record may be supplemented by the remainder of the original record.[36]

(3.) Effect of Statutes Making Certified Copy Competent. — (A.) ORIGINAL PREVIOUSLY COMPETENT. — A record, already competent evidence, is not rendered inadmissible by a statute providing for the use of certified copies thereof,[37] though it has been held to the con-

Young, 113 N. C. 161, 18 S. E. 92, 13 Am. St. Rep. 617.

Pennsylvania. — See Boggs *v.* Miles, 8 Serg. & R. 407.

Virginia. — Ballard *v.* Thomas, 19 Gratt. 14.

The admission in evidence of the original declaration of homestead instead of certified copy thereof was not error, where it contained the endorsement of the county auditor showing the date of its filing and its entry of record. Smith *v.* Veysey, 30 Wash. 18, 70 Pac. 94 (original declaration of homestead).

A certificate of discharge in an insolvency proceeding is admissible in evidence equally with a certified copy. The fact that the statute provides that a copy of the record shall be *prima facie* evidence does not render the original inadmissible. Greene *v.* Durfee, 6 Cush. (Mass.) 362.

The fact that certified copies of the papers filed in a suit in a state court are admissible in a federal court as primary evidence does not render inadmissible the original papers themselves identified by the proper custodian. Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55.

34. Jinkins *v.* Noel, 3 Stew. (Ala.) 60.

35. Sheehan *v.* Davis, 17 Ohio St. 571; King *v.* Kennedy, 4 Ohio 79; McPhaul *v.* Lapsley, 20 Wall. (U. S.) 264, 284; Lorenz *v.* United States, 24 App. D. C. 337; Cate *v.* Nutter, 24 N. H. 108; Britton *v.* State, 54 Ind. 535; Carolina Iron Co. *v.* Abernathy, 94 N. C. 545. See also Tenant *v.* Rumfield, 11 Ind. 130.

A pardon is properly proved by the production of the charter of pardon itself under the great seal of the state. "The original possessed quite as much authenticity as a copy could, however authenticated." State *v.* Blaisdell, 33 N. H. 388.

A party cannot complain that an original record book from another county is introduced and not proved by a certified copy, where, conceding that the record is inadmissible, he has suffered no prejudice. State *v.* Haskins, 109 Iowa 656, 80 N. W. 1063, 47 L. R. A. 323.

36. The proceedings in another suit may be proved by introducing a certified copy of the decree and producing the original pleadings. Anderson *v.* Ackerman, 88 Ind. 481.

Where plaintiff, who claimed title by virtue of an execution sale, gave in evidence an authenticated copy of the judgment, the original execution issued in pursuance thereto was admissible in evidence as it is a record. Stevelie *v.* Lowry, 2 Brev. (S. C.) 135.

37. Vose *v.* Mandy, 19 Me. 331 (record of court martial); Glenn *v.* Ashcroft, 2 Posey Unrep. Cas. (Tex.) 447.

A statute making certified copies of all the public records of the state competent evidence, "in all cases where the records themselves would be admissible," is cumulative and not restrictive, and does not serve to exclude the original records. Hence the records from a court of another county are admissible. Manning *v.* State, 46 Tex. Crim. 326, 81 S. W. 957, *disapproving* Hardin *v.* Blackshire, 60 Tex. 132, and Wallis *v.* Beauchamp, 15 Tex. 303; *following* Rainey *v.* State, 20 Tex. App. 455, and *citing* Bank *v.* Bryan (Tex. Civ. App.), 34 S. W. 451; Crary *v.* Port Arthur C. & D. Co. (Tex. Civ. App.), 49 S. W. 703; Morris *v.*

trary in at least one state under the statute there in force.[38]

(B.) Original Previously Incompetent. — Where a statute provides that certified copies of a particular public record shall be competent evidence, the original record itself is thereby rendered equally competent.[39]

(C.) Use of Sworn or Examined Copy. — A statute providing for the use of certified copies of records does not abrogate the common law method of proof by means of a sworn or examined copy.[40]

(4.) Private Writings. — The fact that a certified copy of the record of a private writing is competent does not render the orig-

Gaines, 82 Tex. 255, 17 S. W. 538; Evitts *v.* Roth, 61 Tex. 81. See also Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699 (so holding in the case of original minutes of a city council); Ewing *v.* State (Tex. Crim.), 38 S. W. 618 (minutes of county commissioner's court); Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451 (judicial records).

A statute providing that the records and proceedings of the common council of a city may be proved by sworn copies in all cases in which the original would be evidence does not serve to exclude the original record itself. Green *v.* Indianapolis, 25 Ind. 490.

An act making certified copies of assessments in county commissioner's office evidence does not exclude the originals when properly authenticated. Miller *v.* Hale, 26 Pa. St. 432.

A statute authorizing a certified transcript of a justice's docket to be received in evidence does not serve to exclude the original. State *v.* Chambers, 70 Mo. 625.

38. Rule in Georgia. — Where the law provides that certified copies shall be primary evidence of all records required by law to remain in the office of their custodian, the original record is not competent primary evidence. Daniel *v.* State, 114 Ga. 533, 40 S. E. 805 (*holding* that the original records of the county commissioners were not competent primary evidence to show that a chain gang had been established); Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003 (county tax books).

This rule applies to records of superior courts. (Bowden *v.* Taylor, 81 Ga. 199, 6 S. E. 277; Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740. But see Hill *v.* Moulton, 76 Ga. 831), but not of inferior courts not of record (Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838). But where previous to an objection on this ground the objecting counsel has admitted in open court the genuineness of the offered original record, the objection will be disregarded (Cramer *v.* Truitt, 113 Ga. 967, 39 S. E. 459; Rogers *v.* Tillman, 72 Ga. 479.) A *fi. fa.* is not an office paper which must be kept on file in the court where it originates. The original may be taken out of court and used in evidence. It is the best evidence of the right to seize and sell in contests under sheriff's sale and need not be proved by a certified copy. Thomas & Co. *v.* Parker, 69 Ga. 283.

39. Burns *v.* Harris, 66 Ind. 536; Welborn *v.* Spears, 32 Miss. 138.

Keefe *v.* Supreme Council of C. M. B. Assn., 37 App. Div. 276, 55 N. Y. Supp. 827, holding that under a statute making certified copies of a public record of vital statistics competent evidence, the original record was equally competent.

Although the minutes of the court are not competent to prove the conviction of the defendant, where a statute makes a certified copy of them admissible when the formal record has not been extended, the original minutes themselves are thereby made competent. People *v.* Gray, 25 Wend. (N. Y.) 465.

40. Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144; Smithers *v.* Lowrance, 35 Tex. Civ. App. 25, 79 S. W. 1088 (holding that such a statute relating to the records of the land office did not render inadmissible a copy sworn to be a true copy

inal record inadmissible,[41] though it has been held that where neither the record or a copy is competent except by statute that such a statute making a certified copy competent does not render the original book admissible.[42] And of course an original deed or other private writing is not incompetent because a certified copy of the record may be used.[43]

n. *Presumed to Have Been Made From Original.* — Both the record of an instrument[44] and a certified copy of a document on file in a public office[45] are presumed to have been made from an original and not from a copy.

o. *Interlineations and Erasures.* — The fact that interlineations and erasures appear in a certified copy does not render it inadmissible if there is nothing to indicate that they were unlawfully made,[46] especially where it is shown that they do not change the sense of the instrument,[47] or where the changes are signed with

by a witness who had compared it with the original.

41. Pope *v.* Graham & Co., 44 Tex. 196.

As evidence of title the deed books in the office of the clerk of the circuit court verified by him were held properly admitted over the objection that only certified copies of such records were competent evidence. Davis *v.* Clinton, 25 Ky. L. Rep. 2021, 79 S. W. 259.

42. In Hanson *v.* Armstrong, 22 Ill. 442, it is held that the record book itself containing a copy of the deed is not admissible as secondary evidence, but a certified copy thereof must be used; since the right is statutory and the statute must be complied with.

43. The statute relating to the use of certified copies of the records of deeds does not operate to exclude the original deeds when proved as at common law. Greenwood *v.* Fontaine (Tex. Civ. App.), 34 S. W. 826.

An original deed with the official certificate of record endorsed upon it is evidence in the chain of title in cases in which an office copy is evidence. Bellows *v.* Copp, 20 N. H. 492.

44. The record and officer's certificate of the receipt and recordation of an instrument need not show that the record was made from an original. This is presumed. Carbee *v.* Hopkins, 41 Vt. 250.

45. Where a certified copy of a document on file in a public office is offered in evidence, the presumption is that the document from which the copy is certified is an original and not a copy. Houston *v.* Perry, 3 Tex. 90.

46. Matkins *v.* State (Tex. Crim.), 58 S. W. 108.

Erasures and interlineations appearing in a certified copy of a record of an instrument do not warrant its exclusion from evidence, since they may have been made by the copyist to conform to the record. Holbrook *v.* Nichol, 36 Ill. 161.

Where a secretary of state in certifying to the correctness of a copy of a certificate of incorporation made a mistake in stating the date of the filing of the certificate, which he erased and interlined the true date, it was held that this was no ground for excluding the copy. Johnston *v.* Ewing Female Univ., 35 Ill. 518.

It is no objection to a certified copy that the certificate contains interlineations if they are in the same handwriting and ink as the remainder, the presumption being that they were lawfully made. Vickrey *v.* Benson, 26 Ga. 582.

47. It seems that erasures and interlineations appearing in a certified copy in nowise altering the sense of the instrument will not warrant its exclusion from evidence, even if the words erased appear in the original instrument on record. Holbrook *v.* Nichol, 36 Ill. 161.

the initials of the certifying officer in the margin of the copy.[48]

p. *Necessity of Showing Seal on Original Instrument.* — **(1.) Generally.** — A copy of the record of an instrument is not inadmissible because it fails to show the seal on the original instrument.[49] The party offering the copy may show that the original had a seal.[50] And where a seal is not essential to the validity of the original the copy need not show one.[51]

(2.) When Recording of Seal Unnecessary. — When the recording of a seal is not required or provided for by law the copy of the record need contain no reference to a seal.[52]

(3.) Statute. — But where the statute provides that the seal on an original instrument must be indicated on the record, a copy thereof must show in some way the presence of the required seal.[53]

(4.) Presumption as to Seal on Original Instrument. — It has been held that where there is nothing in the copy of an original instrument or record to show that a required seal was affixed to such original there can be no presumption of its presence in support of the offered copy,[54] but that the presumption is that if there had been a seal on the original the recorder would have recorded it.[55]

(5.) Recitals. — But where the original contains a recital of the seal it will be presumed when a certified copy is offered that the seal was properly affixed, though the copy does not show one.[56]

48. Erasures and interlineations appearing upon a certified transcript of the record of a foreign judgment if verified by the initials of the clerk of the court are presumed to have been made by him at the time he authenticated the roll. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

49. Where the statute makes certified copies of patents competent evidence of title, a copy of a patent certified by the register of the land office is not inadmissible because it does not exhibit the seal of the grantor. A facsimile copy of the actual seal is not required to be registered or certified. Sneed *v.* Ward, 5 Dana (Ky.) 187; *citing* Hedden *v.* Overton, 4 Bibb (Ky.) 406; Bell *v.* Fry, 5 Dana (Ky.) 341.

50. Sams *v.* Shield, 11 Rich. L. & Eq. (S. C.) 182.

51. Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782.

52. Where the law provides that when a patent has been signed by the governor "it shall be sealed with the seal of the commonwealth and then entered of record," a certified copy need not show the seal nor any imitation thereof, since by the plain terms of the statute only the patent and not the seal is required to be recorded. Hadden *v.* Overton, 4 Bibb (Ky.) 406.

53. Peters *v.* Reichenbach, 114 Wis. 209, 90 N. W. 184.

54. Where a certified copy of the record of a deed gives no indication that the original was under seal and there is no evidence of possession under the deed, there can be no presumption that the original was properly sealed, and the copy is therefore not admissible; and the mere antiquity of the deed will not supply the defect. Williams *v.* Bass, 22 Vt. 352.

55. Buckmaster *v.* Job, 15 Ill. 328. But the fact that the certified copy of the record of a release showed no seal is not sufficient to overcome the force of direct testimony that the release was under seal when executed, and the fact that the original instrument when produced in evidence contained a seal. Pease *v.* Sanderson, 188 Ill. 597, 59 N. E. 425, *distinguishing* Buckmaster *v.* Job, 15 Ill. 328.

56. Aycock *v.* Railway, 89 N. C. 321 (but see Strain *v.* Fitzgerald, 128

The contrary has, however, been held in at least one jurisdiction.[57]

(6.) Seal of Officer Taking Acknowledgment. — The seal of the notary affixed to his certificate of acknowledgment need not be transcribed by the certifying officer to render the copy of the record admissible,[58] especially where the notarial certificate recites that the notary affixed his seal.[59] Where a scroll appears no recital of a seal is necessary.[60]

(7.) Manner of Indicating Seal on Original. — A certified copy of a sealed instrument or the record thereof need not attempt to reproduce exactly the seal of the original. A scroll with the word seal written in it is sufficient;[61] so also it has been held sufficient

N. C. 396, 38 S. E. 929, practically overruling this case). And see *infra*, "Seal of Officer Taking Acknowledgment."

A Certified Copy of a Deed is admissible although it shows no seal opposite the grantor's signature, where the attestation clause recites that the deed was executed "under the hand and seal" of the grantor. Carrington *v.* Potter, 37 Fed. 767 (*following* McCoy *v.* Cassidy, 96 Mo. 429, 9 S. W. 926, which expressly overrules Hamilton *v.* Boggess, 63 Mo. 233); Colvin *v.* Republican Val. Land Assn., 23 Neb. 75, 36 N. W. 361, 8 Am. St. Rep. 114.

Execution. — The fact that a certified copy of an execution competent under the statute contains no copy of the seal on the original does not render it inadmissible where the execution itself purports to have been under seal. Kuykendall *v.* Markx, 1 White & W. (Tex.) § 669.

It is not necessary that the transcript of a record containing the copy of an execution should set forth that there was a seal to the execution in order to admit the record in evidence. Dowell *v.* Stalcup, 25 N. C. 45.

57. Where a sheriff's deed has been lost and the copy on the registration book is offered in evidence, but has no seal thereto, the law will not presume from the words "Given under my hand and seal" that the original bore a seal, and it was not error to exclude said copy. Strain *v.* Fitzgerald, 128 N. C. 396, 38 S. E. 929 (*distinguishing* Aycock *v.* Railroad, 89 N. C. 391; Heath *v.* Cotton Mills, 115 N. C. 202, 20 S. E. 369). But see dissenting opinion.

58. Jones *v.* Martin, 16 Cal. 166.

59. Alexander *v.* Houghton (Tex. Civ. App.), 26 S. W. 1102; *citing* Hines *v.* Thorn, 57 Tex. 98; Witt *v.* Harlan, 66 Tex. 660, 2 S. W. 41; Coffey *v.* Hendricks, 66 Tex. 677, 2 S. W. 47, and *quoting* from Ballard *v.* Perry, 28 Tex. 366, as follows: "As the certificate of the notary declares that he has affixed his official seal to it, and the clerk should not have recorded the deed unless this were the case, we think it may be presumed that the seal was properly attached, although, in the copy from the record, its place is not indicated by a scroll and the initial letters, 'L. S.,' as is customary in copies of sealed instruments. The clerk who recorded this deed may not have supposed this necessary or proper." To the same effect Minor *v.* Powers (Tex. Civ. App.), 38 S. W. 400; Addis *v.* Graham, 88 Mo. 197; Parkinson *v.* Caplinger, 65 Mo. 290.

60. City of Kansas *v.* Hannibal & St. J. R. Co., 77 Mo. 180.

61. Putney *v.* Cutler, 54 Wis. 66, 11 N. W. 437.

A seal is sufficiently shown in a transcript by a statement in the clerk's attestation that one was affixed, and a scroll with the word "seal" enclosed. State *v.* Bailey, 7 Iowa 390.

After proof of the loss of the original, a certified copy of the record of a deed by a municipal corporation reciting that the grantor had caused the corporate seal to be affixed thereto by the city clerk is admissible in evidence, although objected to on the ground that the seal of the municipal corporation was not attached to the deed, where after the

to write merely the word "seal"[62] or the abbreviation "L. S."[63]

q. *Revenue Stamp.* — The fact that a certified copy bears no revenue stamp will not serve to exclude it.[64] Nor is it admissible because it fails to show that the original instrument was properly stamped.[65]

r. *Surplus, Irrelevant or Incompetent Matter in Transcript.* The fact that the transcript contains unnecessary matter does not render it inadmissible.[66] Irrelevant matter in the copy must be specially objected to.[67] Nor can a transcript be wholly excluded merely because it contains some incompetent matter.[68]

s. *Matter in Copy Not Verified by Certificate.* — The fact that a certified copy embraces matter not covered by the certificate and therefore unauthenticated does not necessarily render the copy inadmissible, but if they can be separated only the unverified portions should be rejected.[69]

signature of the person executing it as mayor was a scroll with the word "seal" written in it. It was held that in view of the character and recitals of the deed there was no reason why the mayor who signed it should attach his own seal, and that it might "be fairly presumed that the seal which was attached to the deed was the seal of the municipal corporation which executed it." Acme Brew. Co. *v.* Central R. & Bkg. Co., 115 Ga. 494, 42 S. E. 8.

62. Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409.

In holding a certified copy of a deed, which contained the words "no seal" in the place where the seal of a notary taking an acknowledgment is usually found, admissible in evidence, the court said: "The certificate asserts that the notary affixed his seal to it, and the words "No Seal" in brackets in the margin do not imply that there was no seal affixed, but are a mere note of the Recorder, of the place of the notarial seal, which he had probably no means of copying." Jones *v.* Martin, 16 Cal. 166.

63. Holbrook *v.* Nichol, 36 Ill. 161.

64. The fact that the transcript of a judgment of a justice in a foreign state bears no revenue stamp is not sufficient to warrant its exclusion. Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135.

65. A copy of the record of a deed is not inadmissible because it fails to show that the original deed contained a revenue stamp as required by law (Mathews *v.* Culbertson, 83 Iowa 434, 50 N. W. 201), since it is presumed that the recorder would have refused to record the deed unless it had contained a revenue stamp. Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904. See also Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503; Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887; Grand *v.* Cox, 24 La. Ann. 462; Bennett *v.* Morris (Cal.), 37 Pac. 929, and article "Stamp Acts."

66. It is no objection to the admission of a copy of the record appointing a guardian, that the certificate to such record embraces a copy of the records of the accounts of such guardian and other proceedings of the court, as well as the record of the appointment itself. Halliburton *v.* Fletcher, 22 Ark. 453.

67. Palmer *v.* Hunter, 8 Mo. 512.

68. Gunn *v.* Howell, 35 Ala. 144.

69. "It does not necessarily follow, however, that because something is incorporated in such a paper which the certificate does not cover, that the paper is to be excluded even as to the matters which are well certified. If those matters which are not certified are immaterial, and cannot affect the case one way or the other, there is no reason for wholly rejecting the evidence. And even if they might have a bearing in the case, the fact that they are not authenticated may be a sufficient reason why the portion of the document relat-

t. *Two Copies Differing.* — Although two properly certified copies of the same record or document differ in material respects, both are admissible[70] since it is a question of fact and not of law which is correct.[71] Where one copy contains matter not in the other the presumption is that such matter was accidentally omitted from the latter.[72] One copy may be used to impeach a copy from which it differs.[73]

u. *Use After Expiration of Certifying Officer's Term of Office.* The mere fact that the term of office of the certifying officer has expired previous to the use of the copy as evidence does not render it incompetent.[74]

v. *When Made.* — A certified copy is admissible although not certified until after the loss of the original record and the commencement of the trial in which it is to be used.[75]

ing to them should not be read, but cannot be ground for rejecting another and entirely distinct and separate portion thereof, which is authenticated in due form." An objection to the whole instrument is properly overruled. Gilman *v.* Riopelle, 18 Mich. 145.

70. Sessions *v.* Reynolds, 7 Smed. & M. (Miss.) 130 (maps); United States *v.* Stone, 106 U. S. 525.

See Dangerfield, Exrx. *v.* Thornton, 8 Mart. N. S. (La.) 232.

Where two papers are produced in evidence by opposing parties purporting to be copies of the record of the same instrument, made and certified by the same officer and verified by the seal of the same court, to one of which was affixed the letters "L.S.," while on the other nothing appears to indicate that a notarial seal was affixed to the certificate of acknowledgment except the statement of the officer who took the acknowledgment, it is a question for the jury which of the two is the true copy, and in such case even if it were shown that the letters "L. S." were placed upon one of the copies by a party to the suit after the copy was made it would not prove the copy incorrect as the clerk may have authorized him to add the letters before he gave the certificate that it was a correct copy. Holbrook *v.* Nichol, 36 Ill. 161.

71. Where two papers are introduced in evidence, both certified to be true copies of the same patent but differing from each other in certain respects, the question of which is a true copy of the original is a question of fact and not of law. McGowan *v.* Crooks, 5 Dana (Ky.) 65.

72. Where the record in Missouri of a patent to lands in that state showed that the original was sealed in due form, but the record of the same patent in the general land office at Washington did not show any seal, it was held that the presumption was that all that was found in either copy was in the original and that any immediate matter not found in one which was in the other was omitted by accident and that the *prima facie* case made by the Missouri record was not overcome by the record from the land office. Campbell *v.* Laclede Gas Co., 119 U. S. 445.

See Dangerfield's Exrx. *v.* Thurston, 8 Mart. N. S. (La.) 232.

73. Where a deed which may properly be recorded in two places or offices is so recorded and the original is lost, one record or a copy of it may be introduced to impeach the others. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

74. Board of Comrs. *v.* May, 67 Ind. 562.

75. A paper certified by a justice of the peace to be a copy of a record of a case before him is admissible in evidence of such proceedings, although made by him after the loss of the original and pending a trial in which he had testified to its contents. Tillotson *v.* Warner, 3 Gray (Mass.) 574.

w. *By Whom Made.* — (1.) **Generally.** — A certified copy to be admissible must be attested by the officer legally entitled to certify copies,[76] who, in the absence of any provision to the contrary is ordinarily the legal custodian of the record or document.[77] It must appear in some manner that the certifying officer had legal authority to certify.[78] But where the courts take judicial notice of who are the keepers of public records, the officer need not certify that he is the custodian.[79] The clerk and not the chairman of a

76. *Alabama.* — Sloss Iron & Steel Co. *v.* Macon County, 111 Ala. 554, 20 So. 400.

Connecticut. — State *v.* Dooris, 40 Conn. 145.

Georgia. — Anderson *v.* Blair, 121 Ga. 120, 48 S. E. 951.

Kansas. — Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938.

Kentucky. — Simpson *v.* Loving, 3 Bush 458, 96 Am. Dec. 252.

Louisiana. — Millandon *v.* McDonough, 18 La. 102.

Missouri. — Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444.

New Hampshire. — Woods *v.* Banks, 14 N. H. 101.

New Jersey. — State *v.* Cake, 24 N. J. L. 516.

A copy of a land patent is not admissible as evidence unless attested by the register of the land office. Woolley *v.* McCormick, 20 Ky. L. Rep. 272, 45 S. W. 885.

77. Keating *v.* Vaugh, 61 Tex. 518; New York Dry Dock *v.* Hicks, 5 McLean 111, 18 Fed. Cas. No. 10,204; Boatner *v.* Scott, 1 Rob. (La.) 546; Childress *v.* Cutter, 16 Mo. 24.

A certified copy of a record or document to be admissible must be certified by the legal custodian of the original, and where the original is deposited with an officer who is not entitled to its custody it cannot be proved by a certified copy. York's Admr. *v.* Gregg's Admx., 9 Tex. 85.

Where the statute requires the assessment roll, and the advertisement of sale of land for taxes, to be filed in the office of the clerk of the circuit court, the assessment of the tax, and the advertisement of the sale, should be proved by copies certified, not by the clerk of the board of justices, but by the clerk of the circuit court. Parker *v.* Smith, 4 Blackf. (Ind.) 70.

The proper mode of proving an extract from the journals of either branch of the legislature is by the certificate of the clerk who keeps the journal. Thomson *v.* Gaillard, 3 Rich. L. (S. C.) 418, 45 Am. Dec. 778.

The county auditor is the proper officer to certify a copy of the registration of the warrant of a school township, since the registration book is in his custody. Mitchelltree School Twp. *v.* Hall (Ind. App.) 68 N. E. 919.

78. Woods *v.* Banks, 14 N. H. 101; Talcott *v.* Delaware Ins. Co., 2 Wash. C. C. 449, 23 Fed. Cas. No. 13,734.

Under the Massachusetts statute providing for attestation of a copy of the records of a court by the clerk, prothonotary, or other officer having charge of the records of such court, if the copy is attested by a deputy clerk it must affirmatively appear that he has charge of the records. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757.

It must not only appear that the certifying officer is the custodian of the record but also that he is authorized by law to certify copies. Bleecker *v.* Bond, 3 Wash. C. C. 529, 3 Fed. Cas. No. 1,534, holding that copies of papers on file in the office of the register of the treasury department, certified by the register with a certificate of the secretary of the treasury under the seal of the department as to the official capacity of the register were not admissible for this reason, and that a sworn copy should be produced.

The justice of the peace who rendered a judgment is presumptively the custodian of the docket and the proper person to certify a transcript. State *v.* Carroll, 9 Mo. App. 275.

79. The courts are bound to ju-

board is ordinarily the proper officer to make and certify records.[80]

(2.) Deputy or Clerk. — (A.) GENERALLY. — A deputy whose appointment is authorized by law may properly certify copies;[81] but it is otherwise where the law makes no provision for such a deputy.[82]

Where certification by a deputy is only proper under certain

dicially know who are the legal custodians of public records in the state, and it is therefore not necessary that the officer should certify that he is the keeper. Though in certifying copies of the records of religious societies a different rule may obtain, for the courts do not know who are the keepers of their records. Barret *v.* Godshaw, 12 Bush. (Ky.) 592.

80. Rich *v.* Lancaster R. Co., 114 Mass. 514; Com. *v.* Chase, 6 Cush. (Mass.) 248.

Where the selectmen of a town are authorized to appoint agents to sell liquors for medicinal purposes, a copy of the selectmen's proceedings attested by the chairman, who is not a recording officer, is not competent to show that defendant ever received a certificate directed by statute to be given to the agent. Inhabitants of Foxcroft *v.* Crooker, 40 Me. 308.

Where there is no provision in the charter of a city or in the general laws of the state as to who shall be the custodian of the records of the city council and board of aldermen, the clerk of such bodies is presumed to be the official custodian of their records and papers, and as such the proper person to give certified copies. But as to all ordinances, resolutions or documents which are the result of the joint action of such boards or require the approval of the mayor, in the absence of any statute or charter provisions to the contrary the mayor being the chief executive is the proper custodian, and such records cannot be certified by the clerk of either the council or board of aldermen. Barret *v.* Godshaw, 12 Bush. (Ky.) 592.

Clerk of Council not being an officer competent by law to authenticate copies, certified copies of papers taken into his possession are inadmissible in evidence. Schwertzell *v.* Young, 3 H. & McH. (Md. Ch.) 502.

81. Dawins *v.* Tarkington, 3 La. Ann. 247 (deputy clerk of court). See Urkett *v.* Coryell-Wasser, 5 Watts & S. (Pa.) 60; Gourdan *v.* Borino, Harp. (S. C.) 221; Godbold *v.* Planters' & Merch. Bank, 4 Ala. 516 (deputy clerk of court).

A copy of a record attested by a deputy clerk with the initials of his official character following his signature, is admissible. "As the office of clerk may be exercised by a deputy, any certificate which the clerk in the course of official duty might make may be made by his deputy." Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41.

A copy may be certified by the register or recorder through his deputy, and it is not material whether the certificate is signed "A. B., register, by C. D., deputy register," or whether "C. D., deputy register, for A. B., register." Cook *v.* Hunter 2 Overt. 113, 6 Fed. Cas. No. 3,161.

Where by law a public officer's certificate as to the contents of his records is made competent evidence and he is also required to appoint assistants whose certificates and attestations shall have the same force and effect as his own, a copy of such officer's records certified by one of his assistants is also competent evidence. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

Under the act of Congress providing for the use of a transcript of the books and proceedings of the treasury department, the fact that the certificate of the secretary of the treasury is by the chief clerk for the secretary is not material, since it is the seal of the treasury department which authenticates the transcript. Smith *v.* United States, 5 Pet. (U. S.) 292.

82. A certificate signed by one as "deputy" in the name of his principal as clerk of a court is not a sufficient authentication of an official document, it seems, where there is no law authorizing the appoint-

circumstances, it will be presumed in favor of his certificate that the necessary facts existed.[83]

(B.) Distinction Between Deputy and Clerk. — A mere clerk of the register or recorder, although required by law to be sworn, cannot certify a copy of the record either in his own name or that of the recorder.[84]

(3.) Certificate by Acting Officer. — The fact that the certificate authenticating a copy purports to be made by one "acting" as the officer entitled to certify does not render the transcript inadmissible.[85]

(4.) Transferred Records. — Where records are lawfully transferred from the custody of one officer to that of another, the latter is the legal custodian thereof and the person authorized to give certified copies.[86]

ment of deputy. Carter *v.* Territory, 1 N. M. 317. See Lesassier *v.* Dashiel, 14 La. 467.

A deputy collector of customs is not such an accredited officer as will authorize the admission in evidence of copies of documents certified by him. White *v.* Kearney, 9 Rob. (La.) 495.

83. Where by statute a deputy register of deeds can certify a copy of the records in the absence or disability of the register, or in case of a vacancy in his office, if a copy of such records certified by the deputy is offered it will be presumed to have been properly certified during a vacancy in the register's office or because of his absence or inability to act. Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753.

Although the statute authorizes a certificate by a deputy clerk of the court only in the absence of the clerk, it will be presumed in favor of the proper performance of official duty that the clerk was absent. National Acc. Soc. *v.* Spiro, 94 Fed. 750.

But see Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757, holding that under the Massachusetts statute it must affirmatively appear that the deputy had charge of the records.

84. "There can be no doubt that the register may act by deputy, and that an attestation of a copy by his deputy would be sufficient; but there is a wide difference between a deputy and a mere clerk." Sampson *v.* Overton, 4 Bibb. (Ky.) 409.

But a certificate of a document from the land office by a clerk for the secretary, under the office seal, is a certificate of the secretary and competent evidence. Grant *v.* Levan, 4 Pa. St. 393. And the same is true of a certificate of the chief clerk of the treasury department for the secretary. Smith *v.* United States, 5 Pet. (U. S.) 292.

85. Laffan *v.* United States, 122 Fed. 333, 58 C. C. A. 495, holding that a copy certified by one as acting secretary of the treasury was admissible since the court would take judicial notice of the persons who from time to time preside over the office of secretary.

A copy of a paper certified by one as "acting commissioner of the General Land Office" does not show a vacancy in office rendering such copy inadmissible by virtue of United States statutes providing that when a vacancy exists in the land office the principal clerk shall authenticate the copies. Murray *v.* Polglase, 17 Mont. 455, 43 Pac. 505.

See also Woodworth *v.* Hall, 1 Woodb. & M. (U. S.) 248; Stephens *v.* Westwood, 25 Ala. 716.

86. New York Dry Dock *v.* Hicks, 5 McLean 111, 18 Fed. Cas. No. 10,204; Touchard *v.* Keyes, 21 Cal. 202; Garwood *v.* Hastings, 38 Cal. 216; Cowan *v.* Williams, 49 Tex. 380. See *supra*, "Certified Copies—Transferred Records."

Where by statute carving a new county out of an old one it is made the duty of the county clerk of the latter to transfer the records pertain-

(5.) When Judge Is Also Clerk. — When the judge is also clerk of his court he may of course give certified copies of his records,[87] but any statute governing the contents of the certificate must be complied with.[88]

(6.) Successor. — The records of an office or court are properly certified by the successor of the former custodian during whose term the record was made.[89]

x. *Method of Certifying.* — **(1.) What Certificate Must Show.** (A.) Generally. — The certificate or attestation of a copy must show that the writing to which it is attached is a correct copy of the original.[90] It is not, however, required to be in any particular form but may consist of any appropriate words sufficiently

ing to the new county to the clerk thereof, the clerk of the new county is the proper officer to certify copies of such records. Hooks *v.* Colley, 22 Tex. Civ. App. 1, 53 S. W. 56.

87. See *infra*, "Records From Other States—Method Provided by Congress—Mode and Sufficiency of Authentication."

88. Where by law the ordinary is by virtue of his office clerk of his own court, but may at his own expense appoint one or more clerks, and it is further provided that when the ordinary and clerk are the same person the certificate attached to a certified copy must so state. A copy of letters of administration certified by the ordinary is not admissible if the certificate does not affirmatively show whether he was also clerk. Lay *v.* Shepard, 112 Ga. 111, 37 S. E. 132, *distinguishing* Witzel *v.* Pierce, 22 Ga. 112, on the ground that the decision in that case was made under a former law.

89. Palmer *v.* Hunter, 8 Mo. 512 (records of justice).

90. Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454; Wilhite *v.* Barr, 67 Mo. 284; Major *v.* Watson, 73 Mo. 661; Redford *v.* Snow, 46 Hun (N. Y.) 370; Naanes *v.* State, 143 Ind. 299, 42 N. E. 609.

A certificate by the state auditor attached to an instrument stating that it is "a true and correct statement of the account of" a certain county treasurer "as the same appears from the records of my office," does not show that the paper to which it is attached is either a copy of an account rendered by such treasurer, or of an account stated by the auditor as required by law under certain circumstances, and is therefore not admissible in evidence. Fry *v.* State, 27 Ind. 348.

Where by statute a copy of an original instrument, certified by the register in whose office it shall have been filed, is admissible in evidence, the fact that the register's certificate accompanying an offered copy states that it is "a true and correct copy of an instrument purporting to be a chattel mortgage" does not render the copy inadmissible because of the use of the word "purporting," where the certificate fully and accurately describes the instrument on record. Vanarsdale *v.* Hax, 107 Fed. 878, 44 C. C. A. 31.

"Abstract." — An instrument purporting to be an abstract of a justice's docket and certified as an "abstract" is not admissible. Jackson *v.* Conrad, 14 W. Va. 526. But see Wilhite *v.* Barr, 67 Mo. 284.

The Word "Official" written at the bottom of a paper preceding the signature of a proper certifying officer is not a sufficient authentication to render the instrument admissible because it does not appear therefrom whether the document is an original or a copy, or whether if a copy it is true. Johnson *v.* Bolton, 43 Vt. 303.

"Correct Representation." — A statement in the officer's certificate that the copy offered is a "correct representation" does not sufficiently show a comparison with the original. Martin *v.* King's Heirs, 3 How. (Miss.) 125.

verifying the copy.[91] If it is a copy of the record of an instrument and not the instrument itself which is being certified the certificate should so state.[92]

An instrument which is merely a statement of what a record shows is not admissible as a certified copy, although it is certified to be a copy.[93]

91. Though the certificate of the register authenticating the transcript of a judicial record is not very formal or technical, if, fairly and reasonably construed, it affirms that transcript contains a full, true and correct copy of all the proceedings had in court and all orders and decrees in the particular case, it satisfies all the requirements and is admissible. Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Cargile *v.* Ragan, 65 Ala. 287; Clements *v.* Pearce, 63 Ala. 284.

"A Copy."—The words "A copy. Attest," followed by the signature of the custodian of the record is a sufficient authentication of a copy where the statute does not require a formal certificate, but a simple attestation. Barrett *v.* Godshaw, 12 Bush (Ky.) 592; Radcliff *v.* Ship, Hard. (Ky.) 292; Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454; Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782; *citing* Fogarty *v.* Connell, 153 Mass. 369, 26 N. E. 880 (in which the words used were "Record. Attest"), and Com. *v.* Ford, 14 Gray (Mass.) 399; Com. *v.* Wait, 131 Mass. 417; Com. *v.* Munn, 156 Mass. 51, 30 N. E. 86 (in all of which cases the words used were "A true copy. Attest"). "The case at bar differs from these last cited in this respect in omitting the word 'true.' But a copy of a record authenticated by one who has the authority to do so must be taken as a true copy for it cannot be a copy if it is false."

"A True Copy." — The words "a true copy" followed by the official signature are enough. Wynn *v.* Harman's Devisees, 5 Gratt. (Va.) 157; American Surety Co. *v.* United States, 77 Ill. App. 106; Wheeler *v.* Lathrop, 16 Me. 18; Pacific Guano Co. *v.* Mullen, 66 Ala. 582. And see preceding paragraph in this note.

"Exemplified." — A copy which is said to be "exemplified" is sufficiently shown to be a correct copy. Schoonmaker *v.* Lloyd, 9 Rich. L. (S. C.) 173; Taylor *v.* Carpenter, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785.

Transcript. — Where a statute provides that a transcript from the docket of a justice of the peace "when certified by the justice having control of such docket, shall be evidence to prove the facts stated in such transcript," a certificate stating or declaring that the paper to which it is attached is a "transcript from the docket" of a specified justice "of the judgment rendered by him in the above entitled cause, and of all the proceedings had by and before him in the cause, so far as they appear upon his docket, which is in my possession, and of which docket and of said judgment I have control" is sufficient without any further statement that the transcript has been compared with the original and is a correct copy. Goodsell *v.* Leonard, 23 Mich. 374.

92. A certificate by the custodian of the record that the "within and foregoing writing is a true copy of a deed" on record in his office is sufficient to render the copy admissible although objected to on the ground that it was certified to be a copy of the deed itself and not of the record, it being sufficiently clear that the certificate meant a copy of the record. Vickery *v.* Benson, 26 Ga. 582. To the same effect Preston *v.* Robinson, 24 Vt. 583, where the court says: "It ought to be intended that the clerk certified from the record, the custody of which he of right had, rather than from the deed, the custody of which he could not properly have."

93. Farrand *v.* Chicago & N. W. R. Co., 21 Wis. 441. See Dunn *v.* Games, 1 McLean 321, 8 Fed. Cas.

The certificate must show that the writing to which it is attached is a copy of some record or document in the office, records or files of the certifying officer,[94] and must be sufficiently definite to show to what it refers.[95]

(B.) Completeness of Copy. — (a.) *Generally.* — A certificate which states that the copy is a complete transcript or copy of a particular record sufficiently shows that the instrument which it authenticates is a transcript of the whole record,[96] as does a certificate which recites that the foregoing is a true copy of a specified record[97] or of the record of certain proceedings,[98] or is an exemplifi-

No. 4,176. *Compare* Com. *v.* Foster, 3 Met. (Ky.) 1.

94. Candy *v.* Twichel, 2 Root (Conn.) 123. See Martin *v.* King's Heirs, 3 How. (Miss.) 125.

Where a statute provides that the commissioner of the state land office may furnish a true copy of any field notes, maps, records, or papers in his office appertaining to land titles or to original surveys of any of the lands of the state, and that such a copy when duly certified under his seal of office may be competent evidence, a certificate that a certain document is a true and correct copy of a certain designated section of land "as shown on a government plat on file in this office" is insufficient to make the instrument admissible because it fails to show that such instrument is a true copy of any map in his office. Wilson *v.* Hoffman, 54 Mich. 246, 20 N. W. 37.

Where the proper clerk certifies that a transcript of a record is a true and perfect copy of the original papers in the case as fully as the same appeared from the files and records then in his office, the certificate though not formal is sufficient because the papers of a cause when filed become, under the statute, a part of the record as fully as if copied into the record book of the court. Harding *v.* Larkin, 41 Ill. 413.

95. A certificate signed by the clerk of the district court officially, with seal of the court affixed, which states "that the foregoing pages, numbered from one to ————, both inclusive, contain a full, true and complete transcript of all the proceedings in the matter of A. B., bankrupt, as the same appears of record and on file in my office," but does not describe or identify the papers included in the transcript, is fatally defective, since, on account of the blank the court cannot tell what entries and papers were intended to be certified. Clements *v.* Taylor, 65 Ala. 363.

96. If a record of a foreign judgment produced in evidence purports to be a record and not a mere transcript of minutes from docket, and the clerk certifies that it is truly taken and copied from the records of the foreign court, and that the same is a full and complete transcript of the proceedings had in the case, and this attestation is certified to be in due form, by presiding judge, it will be presumed that the paper is a full copy of the entire record, and will be deemed sufficient. Shilling *v.* Seigle, 207 Pa. St. 381, 56 Atl. 957.

A transcript of the record of probate proceedings was held sufficiently authenticated by the clerk's certificate "that the foregoing 25 pages of manuscript contains a true and correct copy of all the proceedings had in the probate court" in a particular estate "as they appear of record in volume 2, transcribed probate records of said county," although objected to on the ground that the certificate did not show that the record was a complete transcript of all the proceedings in the estate. O'Connor *v.* Vineyard (Tex. Civ. App.) 43 S. W. 55.

97. Reber *v.* Wright, 68 Pa. St. 471; Edmiston *v.* Schwartz, 13 Serg. & R. (Pa.) 135.

98. Peck & Walton *v.* Jule, 3 La. 320.

A certificate of the proper officer that "the above is a true copy of the proceedings had in the above case as recorded in the minute-book remain-

cation,[99] especially where the copy exhibits an apparently entire record.[1]

Where the certificate recites that the paper to which it is attached contains a true copy of certain enumerated originals which ordinarily constitute a competent record it sufficiently shows that the copy is a copy of the whole record,[2] unless the statute requires a more specific statement.[3]

And where the whole record is not required to be introduced it is sufficient that the certificate verify the correctness and completeness of what it purports to show.[4]

ing in the office of the secretary of the land office," etc., is sufficient evidence of its being a true copy of the whole record unless it otherwise appear from record itself. Harper *v.* Farmers' & Merchants' Bank, 7 Watts & S. (Pa.) 204.

99. The words in an attestation "we have caused to be exemplified" was held a sufficient declaration that the record was complete. Schoonmaker *v.* Lloyd, 9 Rich. L. (S. C.) 173.

1. Where a copy of a judicial record shows an apparently complete record of the proceedings in a case, it is sufficient that the clerk certify that it is a true copy. He need not state that it is a full or complete transcript of the whole proceedings. Mudd *v.* Beauchamp, Litt. Sel. Cas. (Ky.) 142; Radcliff *v.* Ship, Hard. (Ky.) 292 (in which the certificate was as follows: "A copy, test," signed by the clerk with the initials of his official position.) See also Coffee *v.* Neely, 2 Heisk. (Tenn.) 304.

2. A certificate of a clerk that the foregoing contains a "true and perfect transcript" of certain enumerated papers "as the same remain now on file and of record" in his office is sufficient where these papers ordinarily constitute the records of a case. The act of Congress does not "require the clerk to certify that the transcript is a copy of the record." It could not be "a true and perfect transcript unless it embraced every paper properly filed and every entry made of record in the cause." Coffee *v.* Neely, 2 Heisk. (Tenn.) 304, *distinguishing* Burton *v.* Pettibone, 5 Yerg. (Tenn.) 443, where it was held that "to certify that the papers were copied from the record on file is not certifying that the same is a full and perfect transcript of the proceedings in a cause.

A copy of a record from another state, certified to be a copy of the *judgment roll*, is sufficiently certified as an entire copy of the record, for a correct copy of the whole of such roll is an entire copy of record. Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717.

3. A clerk's certificate that the foregoing transcript is a full, true and complete copy and transcript of certain papers and proceedings in a case, enumerating them, "and the record entries of same in the above entitled cause, now on file and of record in said office," is not a sufficient compliance with the statute requiring a certificate that the copy is a full, true and complete transcript of the record; or in cases where a complete record is dispensed with, that the transcript is a complete copy of all the papers and entries in the cause. "The certificate in question is specific in its character, while the statute requires that it should certify that it contained 'all the papers and entries in such cause.' How are we to know that the papers specifically named were all the papers in the cause? or how are we to know that the words, 'the record entries of same in the above entitled cause, now on file and of record in said office,' covered and embraced 'all the entries in such cause?' The certificate does not say that it contains all of the entries, but only the record entries that are on file and of record in his office." Wiseman *v.* Lynn, 39 Ind. 250. But see Gate *v.* Parks, 58 Ind. 117, note following.

4. A certificate attached to a transcript of a part of the record of the

(b.) *Copy Certified To Be an Extract.* — Ordinarily a certificate which states that the writing to which it is attached is an extract is not sufficient,[5] at least where an extract would not be competent,[6] yet a copy of a judicial record is not inadmissible merely because it is certified to be a true extract from the record, where it shows everything necessary to be recorded.[7]

(c.) *Effect of Recitals in Copy.* — Recitals in the copy itself tending to show that it is not a complete copy cannot prevail against the certificate.[8]

(C.) APPEAL. — The certificate authenticating a copy of a judgment need not show the result of proceedings on appeal.[9]

(D.) DATE ON CERTIFICATE. — The fact that the certificate is not dated does not serve to exclude the copy.[10]

(2.) Seal on Certificate. — (A.) GENERALLY. — Where the certifying

proceedings in another case is not insufficient because it does not state that the copy is a full and complete transcript of *all* the proceedings in the other action. It is sufficient if it states that the transcript is a true and complete copy of what it purports to show. "There are many cases wherein a party desires to use only a part of a record, and if such part is properly exemplified we think it may be introduced as evidence without requiring the party to obtain the exemplification of the entire record. Indeed, if the original papers were present and offered as evidence they would have to be introduced separately, as, in that condition, they are not written on a single roll." Gale *v.* Parks, 58 Ind. 117, in which a certificate that a transcript was a true and complete copy of the complaint, the judgment, the execution and the return thereon, was held properly admitted for what it was worth. But see Wiseman *v.* Lynn, 39 Ind. 250, note preceding.

5. **"Extract."** — A certificate reciting that the annexed instrument is an "extract" from the original will not be received over an objection. Bellamy *v.* Hawkins, 17 Fla. 750.

6. A paper certified by the clerk to be a true extract from the docket, is inadmissible, as a true copy of all on the docket relating to the case is essential. Jay *v.* East Livermore, 56 Me. 107.

Competency of Extract. — As to when an extract from a record is competent, see *supra*, "Necessity of Producing Complete Record."

7. Copies of the probate records of a division of an estate among heirs are not defective because the register has certified the same to be true extracts when he has copied all that need be recorded to render the division legal. Robinson *v.* Gilman, 3 Vt. 163.

8. Where a certified copy from the general land office of an original grant containing field notes identifying the land recites that a plat of the land is attached, the fact that the copy does not show such a plat is no objection to its admissibility, since the recitals in the copy cannot prevail against the certificate which states that the copy is a true copy. "In the absence of testimony it must be presumed that the copy discloses the instrument as it exists in the land office." Hooks *v.* Colley, 22 Tex. Civ. App. 1, 53 S. W. 56.

9. It need not appear from the exemplification of a foreign judgment that the judgment has not been reversed on appeal—that is a matter for the defense to show. Schoonmaker *v.* Lloyd, 9 Rich. L. (S. C.) 173.

10. Stewart *v.* Trenier, 49 Ala. 492.

A duly authenticated copy of a plat and survey of lands contained in a confirmation of a Spanish grant from the office of the surveyor general of lands, south of Tennessee, being under statute evidence, the fact that in the certificate of authentication the surveyor general puts no date makes

officer has an official seal, his certificate to be admissible must be under such seal.[11] But it is otherwise where he has no seal,[12] and this is the rule by statute in some jurisdictions.[13] Where the statute provides for a certificate under seal, the seal must be attached.[14]

In some jurisdictions a seal is unnecessary, at least where the certifying officer is one who is judicially noticed by the courts,[15] or the statute providing for use of certified copies does not expressly require a seal.[16]

(B.) Private Seal. — The use of the private seal of an officer is sometimes provided for by statute,[17] but where a certificate by an officer under his official seal of office is required, a copy certified under his private seal is not admissible[18] unless the official seal is lost or mislaid.[19]

(C.) Time When Seal Is Affixed. — The time when the seal of a court or officer is affixed to a certificate or other instrument is not

no difference; he certifies as surveyor general, and the presumption is that the certificate is true. Sessions *v.* Reynolds, 7 Smed. & M. (Miss.) 130.

11. See *infra,* "Judicial Records," and Wickliffe *v.* Hill, 3 Litt. (Ky.) 330.

12. See *infra,* III, 2, E.

13. See Naanes *v.* State, 143 Ind. 299, 42 N. E. 609; State *v.* Champion, 116 N. C. 987, 21 S. E. 700.

Under Act of Congress. — See *infra,* VII, 2, D, e, (2.), (B.).

14. Jenkins *v.* Noel, 3 Stew. (Ala.) 60; Chambers *v.* Jones, 17 Mont. 156, 42 Pac. 758; Ewing *v.* United States, 3 App. D. C. 353; New York *v.* Vanderveer, 91 App. Div. 303, 86 N. Y. Supp. 659; Allen *v.* Thaxter, 1 Blackf. (Ind.) 399. In Hotchkiss *v.* Glasgow, 5 McLean 424, 12 Fed. Cas. No. 6,717, a copy of the record of a deed certified by the recorder but not authenticated by his seal of office was held inadmissible because not authenticated as the statute required.

Municipal Records. — Corporate Seal. — Where by law it is provided that the records of municipal corporations shall be admissible when certified under the seal, an exemplification of a municipal ordinance is not admissible unless duly certified under the corporate seal. Central of Georgia R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299, holding that § 5211 Civ. Code providing that copies of the records, documents and papers in the office of any officer of the state or of any county thereof shall be sufficiently attested by his certificate applies exclusively to public officers of the state and counties. It has no reference to certificates by municipal officers.

15. Weis *v.* Levy, 69 Ala. 209; Biggs *v.* State, 55 Ala. 108.

A certified copy of a state land grant by the register of the land office, although his seal of office is not affixed to the certificate, is admissible as courts take judicial notice of state officials. State *v.* Cooper (Tenn.), 53 S. W. 391.

16. Stewart *v.* Trenier, 49 Ala. 492.

17. Under § 14, ch. 51, Rev. Stat. papers, entries, records and ordinances, or parts thereof, of any city, village, town or county may be proved by a copy thereof, certified under the hand of the clerk or keeper thereof and the corporate seal, if there be any; if not, under his hand and private seal. City of East St. Louis *v.* Freels, 17 Ill. App. 339.

18. Butler *v.* Durham, 38 N. C. 589.

19. Gadbald *v.* Planters' & Merchants' Nat. Bank, 4 Ala. 516 (where a copy certified under the private seal of the clerk of the court was admitted, the certificate reciting that the official seal was lost or mislaid).

material where it is upon the instrument when offered and received in evidence.[20]

(D.) Verification of Seal. — Where the certificate is made by an officer whose seal is judicially noticed, the seal proves itself;[21] and where a statute provides for the admission of certified copies under the seal of the certifying officer no verification or proof of the seal is necessary.[22]

(3.) Official Capacity and Signature. — (A.) Generally. — The official character of a certifying officer need not be proved to render admissible a copy officially certified by him,[23] nor is proof of his signature or handwriting necessary,[24] at least where the court judicially notices the officer and his signature.[25] The certificate, how-

20. Maloney *v.* Woodin, 11 Hun (N. Y.) 202. In this case letters of administration were offered and excluded on the ground that the seal of the surrogate was not affixed to them. But after an adjournment of the hearing they were again offered, this time with the seal affixed and were admitted. This was held no error. "If a seal is required and is upon the instrument when offered in evidence it is enough."

21. See article "Judicial Notice," Vol. VII. and Cockran *v.* State, 46 Ala. 714 (seal of court of record).

22. The seal of the general land office, and the signature of the commissioner thereof, to copies of papers required by law to be deposited in that office, *prima facie* prove themselves under the act of Congress providing that copies of the records, books and papers belonging to that office, certified under the signature of the commissioner and the seal of the office, shall be competent evidence in all cases where the originals would be competent. "To require proof of the genuineness of these seals would be attended with difficulty, little, if any, less than that of procuring sworn copies. We are, therefore, of the opinion that it was the design of Congress to place the seals of these offices on a footing with the seals of courts of record." Harris *v.* Doe, 4. Blackf. (Ind.) 369.

23. Gourdan *v.* Borino, Harp. (S. C.) 221; Lemington *v.* Blodgett, 37 Vt. 210 (town clerk). But see Stamper *v.* Gay, 3 Wyo. 322, 23 Pac. 69.

The certificate of a justice of the peace as to matters which he is authorized by law to certify is sufficient without other evidence of his official capacity, and the same is true of the official certificate of the clerk of a court. Talbot *v.* Bradford, 2 Bibb (Ky.) 316.

A Recital of his official character by the certifying officer in his certificate is sufficient (Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354; Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172); and has been held to be unnecessary. Barret *v.* Godshaw, 12 Bush (Ky.) 592.

Foreign Records. — As to the necessity of proving or showing the official character and the genuineness of the signature of the certifying officer, see *infra*, "Foreign Records," and "Records of Sister States."

24. Com. *v.* Chase, 6 Cush. (Mass.) 248.

A transcript of a justice is admissible in evidence without proof of his handwriting. Miller *v.* Miller, 5 N. J. L. 508; McDermott *v.* Barnum, 19 Mo. 204.

When the register of lands of United States in the state of Missouri certifies copies of papers required to be deposited in his office, his handwriting need not be proved in order to authorize such copies to be given in evidence. Bryan *v.* Hickman, 4 Mo. 106.

25. Where the law expressly makes the signature of the clerk without a seal sufficient exemplification of the records of his office, and he is an officer required to be commissioned by the governor, the

ever, must be signed by the officer by whom it purports to be made.[26]

(B.) Addition of Title. — The officer must certify in his official capacity; hence he must sign by his official title.[27] But any description of the certifying officer is sufficient which identifies him as the official custodian and proper certifying officer,[28] and the addition of the initials of his office is sufficient.[29]

(C.) When Same Officer Holds Two Offices. — Where an officer holds two offices he must certify copies of the records in the official capacity by virtue of which he is their custodian.[30]

(4.) Mechanical Connection of Pieces of Record Certified and the Certificate. — (A.) Generally. — Where a record consists of various separate documents or papers each piece may be certified separately.[31] But where such a record is authenticated by a single

courts take judicial notice of such a public officer of the state, and his signature need not be proved. Ponder *v.* Shumans, 80 Ga. 505, 5 S. E. 502.

"The courts are bound to take judicial notice of the names and official signatures of all the sheriffs, jailers, constables, clerks, and other officers charged with public duties, without any other evidence than is afforded by the signature, accompanied by the usual indicia of official station. They will presume, until the fact is directly called in question, that one who signs his name and follows it by words or letters indicating a particular official character is such officer." Barrett *v.* Godshaw, 12 Bush (Ky.) 592. See article "Judicial Notice," Vol. VII.

26. Citizens' State Bank *v.* Bonnes, 76 Minn. 45, 78 N. W. 875.

27. See Donohoo's Lessee *v.* Brannon, 1 Overt. (Tenn.) 327; Stamper *v.* Gay, 3 Wyo. 322, 23 Pac. 69.

A writing purporting to be a copy of a certificate of survey, offered as a copy of the town records and certified by J. H., "Register," was held inadmissible because it did not appear of what body the certifying officer was the register. Wells *v.* Tryon, 3 Day (Conn.) 489.

28. Anderson *v.* Blair, 121 Ga. 120, 48 S. E. 951, holding that an extract from the minutes of a municipal corporation certified by a person described as "clerk of council" was admissible in evidence over an objection that it was not certified by the person holding the office of clerk to the corporate authorities who were described in the charter as "mayor and council" of the city. "The office of clerk to the mayor and council of Marietta is not one which need be described in any particular way. Any description is sufficient which identifies the person who acts in that capacity, and who as such has custody of the official records of the city."

An objection to a certified copy of a deed is properly overruled where the certificate shows that it was issued from the office of the recorder of the county in which the lands were situated, and was signed by a person designating himself as "recorder." Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354.

29. Wynn *v.* Harmann's Devisees, 5 Gratt. (Va.) 157.

30. The offices of the clerk of the county court and of the county clerk of Cook county are distinct offices although held by the same person; and copies of the records in the custody of the county clerk, certified to by the "clerk of the county court" are not admissible, since they should have been certified to by the "county clerk." Tifft *v.* Greene, 211 Ill. 389, 71 N. E. 1030.

31. Dismukes *v.* Musgrove, 2 La. 335. *Contra.* Susquehanna etc. R. Co. *v.* Quick, 68 Pa. St. 189.

Certified copies of the petition, schedule, affidavit, and other papers necessary in proceedings in insolvency, including a decree of final discharge, although detached and cer-

certificate the papers should be so attached as to show that the certificate applies to all of them.[32] It has been held, however, that although the copy certified is on separate and detached sheets of paper this does not of necessity make it incompetent,[33] and the fact that the clerk's certificate is on a separate sheet of paper attached to the copy of the judgment which it certifies does not render the transcript inadmissible.[34]

(B.) Certificate on Loose Piece of Paper. — But it has been held that an officer's certificate forming part of the authentication of a copy must be attached to the copy and not on a loose piece of paper.[35]

(C.) Certificate Covering Two Distinct Records. — One certificate may cover copies of two or more distinct records of the certifying officer if it is attached to and refers to them.[36] This rule applies

tified to separately, are admissible as the record of the proceedings to support a plea of discharge in insolvency. Goldstone *v.* Dandson, 18 Cal. 41. But see Ordway *v.* Conroe, 4 Wis. 45; Stark *v.* Billings, 15 Fla. 318.

In an action on a judgment rendered in an inferior court of another state where the plaintiff attached to his petition a transcript of the declaration and judgment in the original suit, it was held that he was properly permitted to introduce this transcript and another one subsequently obtained which contained in addition a copy of the original writ and the service thereon. It was not "incumbent on the plaintiff to obtain a transcript of the whole record; or, if it was, that it should all be in one transcript. He might have contented himself with introducing the last record, but he appears to have introduced both, and we see no reason for excluding the second. It was only necessary for the court to be satisfied with the verity of the record." Lattourett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

32. Herndon *v.* Ginnis, 16 Ala. 261.

33. The fact that a certified copy of a judicial record is on three distinct sheets of paper not attached or connected together does not of necessity render it inadmissible. "It is by no means fatal to the evidence, although it is certainly improper to certify records in the way that this is in sheets unconnected by some fastening, but if the court upon inspection is satisfied (as we are in this case) with the verity of the record that is sufficient." United States *v.* Wood, 2 Wheel. Cr. Cas. (N. Y.) 325, 28 Fed. Cas. No. 16,757.

34. Woodworth *v.* McKee, 126 Iowa 714, 102 N. W. 777, where the clerk's certificate was on a separate sheet of paper attached to a copy of the judgment rendered in another state and recited that the "foregoing" was a true and complete copy, etc.

Where the copy consists of several separate sheets of paper and the certificate is also on a separate sheet, if the whole is bound together with a string, sealed with the seal of the court, it is admissible. Schoonmaker *v.* Lloyd, 9 Rich. L. (S. C.) 173.

35. The judge's certificate authenticating a copy of a judgment from another state must be attached to the copy and not on a loose piece of paper. Norwood *v.* Cobb, 20 Tex. 588; *citing,* as holding the same McFarland *v.* Harrington, 2 Bay (S. C.) 555.

36. City of Portland *v.* Besser, 10 Or. 242, *disapproving* Newell *v.* Smith, 38 Wis. 39; Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414, which lay down a contrary rule.

Where several copies of assignments on file in the patent office were attached together and annexed to them was a certificate of the commissioner that "the annexed is a true copy from the records of this office," it was held that the certificate cov-

to copies of records of judgments and of judicial records generally.[37]

(5.) Statutes. — (A.) Generally. — Statutes providing the method by which copies may be certified must be strictly complied with, both as to the officer who certifies,[38] and the manner of certification.[39]

Where a statute prescribes what the certificate must show, its

ered all the copies and not a particular one, although the singular number was used in the certificate. Goodyear *v.* Blake, 10 Fed. Cas. No. 5,560.

37. The transcripts of two judgments of a justice of the peace written on the same sheet of paper may be authenticated by one certificate of the justice including in its terms both transcripts. Remington *v.* Henry, 6 Blackf. (Ind.) 63.

A transcript of two judgments from another state where they are against the same person and from the docket of the same justice may both be properly authenticated by one certificate of the clerk of a court of record; a certificate of authentication to each is not necessary in such case. Railroad Bank *v.* Evans, 32 Iowa 202.

Where the records of two suits from a sister state sewed together were each duly certified by the clerk of the court, the fact that there was but one certificate of the judge, which was attached to the end of the second record, did not render the evidence inadmissible where the judge's certificate referred to both the preceding certificates of the clerk. West Syndic & Co. *v.* McConnell, 5 La. 424, 25 Am. Dec. 191.

38. A copy of the record of the probate court certified by the judge of that court to be a true copy, but not certified by the clerk, is not admissible where the statute provides that the record may be proved by a copy certified under the hand of the clerk and the seal of his office, or, in case of his absence or inability, by an examined or sworn copy. The statute "by strong implication" evinces "the intention of the legislature to confine the power of making a copy proof of the existence and contents of a record by a mere certificate, to an officer specially appointed for that purpose, and whose fidelity is secured by his official oath and the penal sanction provided for its violation. It may be added that it seems eminently fit and proper that the officer who alone is authorized to make and is bound to keep the record, should be the only person authorized by his signature and seal alone, to prove the existence of such record and its contents." Dibble *v.* Morris, 26 Conn. 416.

39. Sykes *v.* Beck (N. D.), 96 N. W. 844; Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Painter *v.* Hall, 75 Ind. 208. See *supra*, III, 2, D, x, (1.).

A copy of an assessment roll sworn and certified to by the clerk of the department of taxes, before a notary, but not under the seal of the clerk's office or of the department, is not competent evidence of the facts therein contained because not authenticated in accordance with § 933 Code Civ. Proc., which requires that copies of public records to be competent must be certified by the clerk or officer having the custody of the original, or his deputy or clerk appointed pursuant to law, under his official seal, or by the presiding officer, secretary or clerk of the public body or board, and except where it is certified by the clerk or secretary of either branch of the legislature, under the official seal of the body or board. "The provisions of the Code are to be strictly complied with, as only in the manner and form therein prescribed can a transcript be received in evidence. Either the books and officers themselves, who have knowledge of the subject, must be produced, or the certificate must be evidenced by a proper officer, with the proper seal of the officer attached." City of New York *v.* Vanderveer, 91 App. Div. 303, 86 N. Y. Supp. 659.

provisions must be substantially followed to render the copy admissible.[40] But it is not essential that the words of the statute be used.[41]

(B.) Form of Certificate Provided by Statute. — Although a statute provides a form of certificate for use by the certifying officer, a copy authenticated by a certificate which is not in exact verbal conformity with the statutory form is not inadmissible if the certificate contains the substance of all that is required by law.[42]

(C.) Comparison. — Where the statute requires the certificate to state that the transcript has been compared with the original, a certificate containing no such statement is insufficient to render the copy admissible.[43]

y. *Certificate as Evidence.* — **(1.) Generally.** — The sole function of the certificate being to authenticate the copy to which it is an-

40. Smith *v.* United States, 5 Pet. (U. S.) 292; United States *v.* Harrill, 1 McAll. 243, 26 Fed. Cas. No. 15,310; Ewing *v.* United States, 3 App. D. C. 353; Phelps *v.* Tilton, 17 Ind. 423 (in which the failure of the presiding judge to state in his certificate that he was "of such court" was held fatal where the statute required such statement).

Indiana Statute. — A statute in Indiana requires the certificate attached to a copy to show that the copy is a "full, true and complete" transcript. Various expressions used in certificates have been held not a sufficient compliance with this statute. Tull *v.* David, 27 Ind. 377 (a statement that "the foregoing is a true transcript" is not sufficient); Weston *v.* Lumley, 33 Ind. 486 (a statement that "the foregoing is truly copies from the records" held insufficient); Painter *v.* Hall, 75 Ind. 208 (a statement that the writing is a "true copy" is not sufficient); Naanes *v.* State, 143 Ind. 299, 42 N. E. 609 (the same). But certain expressions though not exactly the same as those used in the statute have been held sufficient. Bailey *v.* Martin, 119 Ind. 103, 21 N. E. 346 (a "true and correct copy" held the equivalent of a "true and complete copy"); Anderson *v.* Ackerman, 88 Ind. 481 (the same); Fisher *v.* Hamilton, 49 Ind. 341 (the same). And where the statute requires a justice to certify a "true and complete transcript" but does not prescribe the form of the certificate, the expression "a true and correct" copy sufficiently attests the completeness of the copy. Collier *v.* Collier, 150 Ind. 276, 49 N. E. 1063. So under the same statute a statement that the transcript was "a correct statement of the proceedings had before" the justice was held sufficient. Yeager *v.* White, 112 Ind. 230, 13 N. E. 707.

41. See People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800; Piatt *v.* People, 29 Ill. 54.

Under a statute making copies of papers, records, entries, and documents filed or recorded in accordance with law in the office of any public officer competent evidence, when certified by the officer, "to be a true transcript, compared by him with the original in his office," a copy of a statement of lien was held admissible when certified by the county clerk to be a true copy "of statement of lien, and of the whole of said original record, as compared by me," although objected to on the ground that the certificate did not show that the copy was compared with the original statement on file in the clerk's office. Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601.

42. Bills *v.* Keesler, 36 Mich. 69.

43. Nolan *v.* Nolan, 35 App. Div. 339, 54 N. Y. Supp. 975. See also Redford *v.* Snow, 46 Hun (N. Y.) 370; Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601.

Where a statute requires the certifying officer to state that the copy has been compared by him with the original, a certificate which states

nexed, it is not of itself evidence,[44] though it may be competent to show certain facts in relation to the record or document certified which do not appear from the copy.[45]

(2.) What Certificate May Properly State as to Completeness of Record. While the officer may properly certify that the copy contains all of the records or files in a particular case as they appear of record,[46] his certificate that the transcript contains all of his record which is relevant and material to a particular point is not competent evidence of the completeness of the extract.[47] But it has been

merely that the copy has been compared without saying by whom is insufficient. Stevens *v.* Supervisors of Clark County, 43 Wis. 36.

44. Johnson & Clark *v.* Mays & Meeks, 8 Ark. 386.

Statements in the clerk's certificate attached to a copy of a judicial record that no proceedings to review the judgment had been taken, that it was now too late to take any, and that the judgment had become absolutely final, and bore interest at the rate of seven per cent., were held mere hearsay and opinion and inadmissible. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

45. See notes to following section.

The commissioner of the general land office has authority to give copies of maps as well as titles of record in his office, and his certificate may be received to show the connection of the maps with the titles and thus to show *prima facie* that a subsequent survey conflicts with a prior one; "otherwise it might be necessary to take his deposition to show the connection of records appertaining to and constituting parts of the same title, which would be attended with great inconvenience without any corresponding benefit." Hollingsworth *v.* Holshousen, 17 Tex. 41.

46. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758 (statement in certificate that copy embraces all the files in the case is *prima facie* evidence that no proceedings in review had been instituted).

Where a transcript of an imperfect record of another case was offered in evidence in support of a sheriff's sale and deed and showed the judgment and execution, it was held that being introduced collaterally they were properly admissible, although the clerk certified that the transcript contained a true copy of the record and proceedings of the court in the action "so far as they can be found on the records or amongst the files of the court." The court said: "If the official keeper of the records is not competent to certify that, so as to make it evidence, we know not what matters are within his province to certify." Lanning *v.* Dolph, 4 Wash. C. C. 264, 14 Fed. Cas. No. 8,073.

47. Bellamy *v.* Hawkins, 17 Fla. 750. See also Griffith *v.* Tunckhouser, Pet. C. C. 418, 11 Fed. Cas. No. 5,823; Griffith *v.* Evans, Pet. C. C. 166, 11 Fed Cas. No. 5,822. But see Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

The return to the county treasurer made by a town collector of unpaid taxes cannot be proved by an alleged copy authenticated by the certificate of the deputy comptroller that the paper is a correct extract from the original and contains all of the original relating to a certain piece of land, since it is not within the province of such officer to determine what is or what is not material to the issues of the case. He can only certify to the correctness of the copy. Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632.

But in a proceeding to set aside a tax deed as a cloud upon title, the form of the certificates attached to the certified copies of the judgment record and other records offered in evidence was "that the foregoing is a true copy, . . . in so far as said record relates to the premises described in the foregoing copy." An objection to them as insufficient was held without force. Glos *v.* Stern, 213 Ill. 325, 72 N. E. 1057. See also Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

held that the officer's testimony to that effect is competent in support of such a certified copy.[48]

z. *Error in Copy.* — A certified copy is not conclusive evidence of its correctness, but other copies certified by the same officer or supported by the testimony of a witness are admissible to show errors in the former.[49]

E. JUDICIAL RECORDS. — a. *Generally.* — As a general rule judicial records and documents need not themselves be produced when relevant and material, but may be proved by properly authenticated copies.[50]

b. *Plea of Nul Tiel Record.* — At common law on a plea of *nul tiel record* the original record or an exemplification thereof was required to be produced,[51] but the modern rule is that even under

48. A certifying officer may properly testify that the transcript of a portion of certain records certified by him to contain all of the record relating to a particular matter does in fact contain everything in the record which pertains to that matter. Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095. The court basing its holding on the rule permitting a witness to testify to the result of his examination of books.

49. A certified transcript of a judgment is only *prima facie* evidence of the judgment itself and does not preclude defendant from showing the true amount of judgment. This may be done either by introducing another transcript for the true amount, certified by the same officer, or by copies connected with parol proof of their correctness. Pryor *v.* Beck, 21 Ala. 393.

50. *Alabama.* — Childs *v.* State, 55 Ala. 28; Lyon *v.* Bolling, 14 Ala. 753.

Arkansas. — Denton *v.* Roddy, 34 Ark. 642.

Florida. — Walls *v.* Endel, 20 Fla. 86; Ashmead *v.* Wilson, Exr., 22 Fla. 255.

Georgia. — Allen *v.* Lindsey, 113 Ga. 521, 38 S. E. 975.

Illinois. — Thompson *v.* Mason, 4 Ill. App. 452.

Indiana. — Redman *v.* State, 28 Ind. 205.

Louisiana. — State *v.* Roland, 38 La. Ann. 18.

Maine. — Folsom *v.* Cressey, 73 Me. 270.

Maryland. — Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

Massachusetts. — Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782.

Missouri. — Littleton *v.* Christy's Admr., 11 Mo. 390.

Minnesota. — Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

Nebraska. — Burge *v.* Gandy, 41 Neb. 149, 59 N. W. 359.

New York. — Baker *v.* Kingsland, 10 Paige 366; Handy *v.* Greene, 15 Barb. 601 (exemplified or sworn copy); Townshend *v.* Wesson, 4 Duer 342.

North Carolina. — Ward *v.* Sanders, 28 N. C. 382; State *v.* Hunter, 94 N. C. 829; McLeod *v.* Bullard, 84 N. C. 515; Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410.

South Carolina. — Brown's Admr. *v.* Winn, 2 Brev. 297.

Texas. — Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

Document on File Which Is Also Copied Into Record. — Although a document forming part of the files in a case, or the substance of it, is recorded in the record, a copy certified to be a true copy of the original document is nevertheless admissible. Robinson *v.* Gillman, 3 Vt. 163, holding that a certified copy of the warrant for the division of an estate forming part of the files of the probate office are admissible, although the substance of the warrant was written at length in the record.

51. Bettis, Admr. *v.* Taylor, 8 Port. (Ala.) 564.

such a plea the record may be proved by a properly authenticated copy.[52]

c. *Exemplification.* — A judicial record is provable at common law by an exemplification thereof.[53]

d. *Sworn or Examined Copy.* — **(1.) Generally.** — A sworn or examined copy of a judicial record is competent primary evidence of its contents.[54]

(2.) Justice Court. — This rule applies to the records of a justice of the peace court,[55] unless statutes otherwise provide.[56] And where a copy of such a record is not certified in such a manner as

52. Wentworth *v.* Keazer, 30 Me. 336 (a certified copy of a justice's judgment is admissible on a plea of *nul tiel record*); Ware *v* Bennett, 18 Tex. 794.

53. A transcript of a justice's judgment filed in a county clerk's office, and the entry of a judgment thereon by the county clerk as provided by law, may be proved by an exemplification thereof. Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213.

Exemplified copies of judgment records and executions properly authenticated under the seal of the court are admissible in evidence without a certificate of the clerk stating that the exemplification contains the whole of the record, since the statute requiring such certificate does not refer to exemplifications "which are of a higher character and purport to proceed from a different source." Merritt *v.* Lyon, 3 Barb. (N. Y.) 110.

54. Magee *v.* Scott, 32 Pa. St. 539; Gaines *v.* Relf, 12 How. (U. S.) 472, 522; Bettis' Admr. *v.* Taylor, 8 Port. (Ala.) 564 (sworn copy of execution); Miller *v.* Gee, 4 Ala. 359 (administration bond).

A record offered in evidence which is not authenticated with the seal of the court may be proved by parol testimony to be a true copy of the record. An exemplification of a record is of no higher authority than a sworn copy. Porter *v.* Cox, 1 Morris (Iowa) 494.

55. Welsh *v.* Crawford, 14 Serg. & R. (Pa.) 440; Bonis *v.* Campbell, 71 Ala. 271; Watson *v.* State, 63 Ala. 19.

Where a justice's proceedings are evidence in a cause, it is not necessary to produce the original papers, but sworn copies compared by any competent person to whom the justice will entrust the originals for that purpose are admissible. Jones *v.* Davis, 2 Ala. 730.

A sworn copy of an execution issued by a justice of the peace is competent primary evidence. Henkle *v.* German, 6 Blackf. (Ind.) 423.

56. Where a defendant justifies the taking and conversion of property under a judgment rendered by a justice of the peace, the judgment cannot be proved by the production of a sworn copy of the justice's docket proved by the oath of the justice to be a true copy, since the docket itself is the best evidence of its contents; and if the justice is neither dead nor absent it should be produced. But this seems to be by virtue of several statutory provisions regulating proof of the proceedings before justices. "It is true in some states . . . it has been held that sworn copies of the entries in a justice's docket are admissible as primary evidence upon the ground that they are public books which ought not to be removed and of which the law therefore permits copies; but this is in the absence of any statutory regulations on the subject. . . . In this state the whole subject relating to the proof of judgments rendered by a justice of the peace is regulated by statute and proof must be made in conformity with its requirements." Pratt *v.* Peckham, 25 Barb. (N. Y.) 195, *holding* that under the statute the primary evidence of proceedings before justices is either the record itself or a certified transcript.

to be competent it will be admissible as a sworn copy if supported by the testimony of a competent witness.[57]

e. *Certified Copies.* — **(1.) Generally.** — The records of a court and the documents properly on file therein may be proved by a duly certified copy thereof.[58]

Mere Summary Insufficient. — The copy must be a literal copy and not a mere summary or historical statement of the proceedings shown by the record.[59]

(2.) In Same Court. — Where a record of the court in which the cause is pending becomes material the common law rule was that an office (certified) copy was sufficient[60] except upon a plea of *nul tiel record* when the original must be produced.[61]

57. Wilkinson *v.* Vorce, 41 Barb. (N. Y.) 370.

A transcript of a justice's record when not certified as required by statute may be proved by the oath of the justice himself. Wilber *v.* Goodrich, 34 Mich. 84; Goodrich *v.* Burdick, 26 Mich. 39.

58. *United States.* — United States *v.* Makins, 26 Fed. Cas. No. 15,710.

Alabama. — Lyon *v.* Bolling, 14 Ala. 753.

Arkansas. — Chipman *v.* Fambro, 16 Ark. 291.

Colorado. — McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

Georgia. — Roe *v.* Doe, Dud. 168.

Indiana. — Blizzard *v.* Bross, 56 Ind. 74.

Iowa. — Dupont *v.* Downing, 6 Iowa 172.

Kentucky. — Cornelison *v.* Browning, 9 B. Mon. 50; Ratcliff *v.* Trimble, 12 B. Mon. 32.

Louisiana. — State *v.* Roland, 38 La. Ann. 18 (copy of coroner's inquest certified by clerk of criminal district court).

Maine. — Gray *v.* Garnsey, 32 Me. 180; Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

Massachusetts. — Com. *v.* Phillips, 11 Pick. 28.

Mississippi. — Scroggins *v.* Howorth, 1 Cush. 514.

Nebraska. — Morrison *v.* Boggs, 44 Neb. 248, 62 N. W. 473.

New Hampshire. — Willard *v.* Harvey, 24 N. H. 344.

Tennessee. — Hall *v.* Hall, 59 S. W. 203.

Texas. — Winters *v.* Laird, 27 Tex. 616; Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720; Mills *v.* Howeth, 19 Tex. 257, 17 Am. Dec. 331.

Where the original record of an administrator's account is competent, a certified copy is admissible. Logan *v.* Troutman, 3 A. K. Marsh (Ky.) 66.

In an action for malicious prosecution, a copy of the indictment duly certified is admissible in evidence, and the original need not be produced. Fant *v.* McDaniel, 1 Brev. (S. C.) 173. See also Kolterman *v.* Stelzer, 7 Watts (Pa.) 189.

An assignment in insolvency filed in the probate court may be proved in all cases by a certified copy from this court since the original is by statute to remain on file as a basis of future proceedings in the settlement of the insolvent estate. Hart *v.* Stone, 30 Conn. 94, *holding* that the assignee need not produce the original assignment.

A Deposition filed and used in a cause for which it was taken may be proved by a certified copy. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

59. Succession of Bowles, 3 Rob. (La.) 33; Thompson & Lively *v.* Mann, 53 W. Va. 432, 44 S. E. 246.

An historical statement of the proceedings had in a cause, duly certified by the clerk, is not evidence — a copy of the record should be certified. Barry's Lessee *v.* Rhea, 1 Overt. (Tenn.) 345.

60. West Jersey Traction Co. *v.* Board of Public Wks., 57 N. J. L. 313, 30 Atl. 581.

61. Adams *v.* State, 11 Ark. 466. See also Anderson *v.* Dudley, 5 Call.

(3.) Statutes. — (A.) Generally. — In some jurisdictions there are statutes providing for the use of certified copies of the records and proceedings of courts.[62] General statutes providing for the admissibility of certified copies of public records and documents apply to the records and documents of courts.[63]

(B.) Admissible Only When Relevant. — Although a statute provides that copies of judicial records shall be admissible in all cases when authenticated in a prescribed manner, such copies are only admissible when they are relevant to the issues.[64]

(C.) In Same Court. — Under a statute making competent a certified copy of the records of a court the copy is admissible even in the court to which the record belongs.[65]

(D.) Defects in Record. — Under such a statute it has been held that the fact that the record is defective although it may affect the validity of the proceedings does not render the copy inadmissible.[66]

(Va.) 529; Burk *v.* Tregg, 2 Wash. (Va.) 215.

62. Hoodless *v.* Jernigan (Fla.), 35 So. 656; Baxter *v.* Pritchard, 113 Iowa 422, 85 N. W. 633; Hinchman *v.* Ballard, 7 W. Va. 152; Kennard *v.* Carter, 64 Ind. 31 (certified copy of record of justice court competent under statute); Wiseman *v.* Risinger, 14 Ind. 461 (copy of the record of a court of conciliation competent under the statute); McDermott *v.* Barnum, 19 Mo. 204 (records of justice of peace).

Texas Statute. — § 2306, Rev. Civ. Stat. provides that copies of the records of the courts of the state, certified under the hand and seal of the lawful possessor of such records, shall be admissible wherever the originals would be. Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894. Under this statute certified copies of the order of the commissioners' court announcing the result of a local option election are admissible. Johnson *v.* State (Tex. Crim.) 55 S. W. 968; Frickie *v.* State, 40 Tex. Crim. 626, 51 S. W. 394.

Instruments Filed in Other Actions. — Where the statute provides that in an action upon a written instrument which has been filed in another action thereon in any other court of the state, a certified copy thereof under the hand and seal of the court in which the original is filed shall be admissible in evidence the same as the original, such a certified copy is not admissible if the action on the instrument is in the same court in which the copy is offered. Morrison *v.* Bean, 22 Tex. 554.

63. Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275 (bond filed to dissolve attachment).

64. Ordway *v.* Conroe, 4 Wis. 45.

65. Preston *v.* Evans, 56 Md. 476.

66. Under a statute making copies of public records competent the same as the originals, it was held no valid objection to a copy of a judgment that the transcript thereof did not show that the court by which the judgment was rendered convened, and that a judge presided; nor that it did not have the signature of the presiding judge, nor that it failed to show that the minutes of the court of the term at which the judgment was rendered had been signed by the judge. The document appeared on its face to be the record of a court and was duly certified as such. "Defects in the proceedings on which the judgment was based, and which might be manifest on the face of the transcript, whilst they might be availably urged to either impair or wholly destroy the validity of the judgment, would not render the copy of the record inadmissible, but would relate rather to the weight of the evidence, and the effect, force or value of the purported judgment." Mitchusson *v.* Wadsworth, 1 White & W. (Tex.) § 976.

But the record must be in fact a record and not a mere informal recital.[67]

(4.) Signature of Court. — Although a certified transcript of a judgment[68] or the minutes[69] of a court fails to show that the required signature of the judge was subscribed to the original the copy is not thereby rendered inadmissible, the presumption being that the original was properly signed, and this rule applies as well to properly authenticated transcripts of the judicial records of sister states.[70]

(5.) Clerical Errors in Copy. — A clerical error in a certified copy of a judicial record does not render the copy inadmissible where it clearly appears from the context what the true purport of the original is.[71] And errors in copying may be corrected by intro-

67. Burge *v.* Gandy, 41 Neb. 149, 59 N. W. 359, *holding* that a record which was a mere recital that judgment had been rendered was not admissible. But the same formality in the records of a justice of the peace is not required. Com. *v.* Foster, 3 Met. (Ky.) 1.

68. A certified copy of a judgment entered in the minutes of the court is admissible although it does not show the signature of the judge. "The minutes of the court import verity, and a copy of a judgment appearing in them carries with it the presumption of all facts essential to its validity. It is not necessary that the signature of the judge should be attached to every copy issued by the clerk of judgments appearing in the minutes. The fact that the judgment appears in the minutes is sufficient, and that fact is properly shown by the certificate of their custodian." King *v.* Duke (Tex. Civ. App.), 31 S. W. 335.

Where the transcript of a judgment is duly authenticated by the proper clerk it cannot be excluded as incompetent evidence merely because it failed to show that the entry of the judgment was signed by the judge of the court, although the statute requires such signature, for in such case the presumption is that the proceedings were regular and that the judge discharged his duty by signing the record. Anderson *v.* Ackerman, 88 Ind. 481; Adams *v.* Lee, 82 Ind. 587. But see Dangerfield's Exrx. *v.* Thruston, 8 Mart. N. S. (La.) 232.

69. Where the law provides that the minutes of a court shall be signed by the judge, but if not signed they shall be valid unless repudiated by the court, a copy of the minutes of an order certified by the ordinary under seal to be a copy of the records of his office is admissible, although the order does not purport to have been signed by the ordinary. "In the absence of other proof the presumption is that the ordinary signed the minutes from which the certified copy of the order purports to be an extract." Smith *v.* Ross, 108 Ga. 198, 33 S. E. 953.

A transcript of a judicial record of a domestic court of superior jurisdiction, properly authenticated, need not show that the judge signed the proceedings of each day. The authentication is itself evidence of that fact. Adams *v.* Lee, 82 Ind. 587.

70. Dean *v.* Stone, 2 Okla. 13, 35 Pac. 578. But see Morris *v.* Patchin, 24 N. Y. 394, 82 Am. Dec. 311.

Record of Sister State. — Where a transcript of the record of a decree purporting to have been rendered by a court of record of another state has been duly certified under the act of Congress, embodied in § 3830 of the code, this is sufficient evidence of the validity of such decree, although it does not appear to have been signed by the chancellor. Nor, in such case, is it at all essential to show that he signed the minutes of the court by which such decree was rendered. McFarland *v.* Fricks, 99 Ga. 104, 24 S. E. 868.

71. Daniel *v.* State, 114 Ga. 533,

ducing another properly certified copy of the defective portion.[72]

(6.) Preliminary Filing. — Since certified copies of judicial records are competent, independent of any statute, general statutes relating to the use of certified copies and requiring them to be filed among the papers of the case previous to the trial do not apply to a certified copy of a judgment or other judicial record.[73]

(7.) Probate Court. — (A.) GENERALLY. — The records and proceedings of a probate court when relevant may be proved by a certified copy.[74]

A certified copy of the order granting administration on an es-

40 S. E. 805. In this case what purported to be a certified copy of a sentence of the city court of Jefferson was offered in evidence. The caption of the paper was "Georgia, Jackson County. In the city court of said county, State of Georgia *versus* Will Daniel. Accusation for larceny, and plea of guilty." The sentence was signed "W. W. Stark, judge city court, Jefferson." It was certified by the clerk of the city court of Jefferson to be "a true extract from the minutes of the city court of Jefferson." The certificate being signed J. L. W., "C. C. C. J." was objected to on the ground that it appeared to be a sentence from the city court of Jackson county and not from the city court of Jefferson, and that the defect was not cured by the certificate of one purporting to be clerk of the city court of Jefferson. The objection was held properly overruled. "The words 'in the city court of said county' appearing in the caption were plainly the result of a clerical error, either in making out the original sentence or in transcribing it from the minutes of the court."

In an action on a judgment rendered in a sister state the transcript of the record described the plaintiff as "Julia A. Chapman" and as "Julia Ann Chapman." The certificate of the clerk attached to the transcript was to the effect that his books contained "a true and complete record of the plaint, proceedings and judgment, of which the foregoing is a true copy, in the case of Ann Chapman against Benjamin Conley and others," it was held that taking the certificate in connection with the copy of the record the latter was sufficiently identified and the clerical mistake in the certificate did not vitiate it. Conley *v.* Chapman, 74 Ga. 709.

Where a date in a certified copy of a judicial record has by manifest clerical error been improperly described, and the true date is obviously inferable from other parts of the record, the error may be disregarded and the copy received in evidence as if the true date appeared directly instead of indirectly. Head *v.* Woods, 92 Ga. 548, 17 S. E. 928.

72. Objection to the copy of a record of another suit that it does not contain the signature of the judge is overcome by the introduction of another copy of the judgment alone bearing signature, and the record will then be taken as complete and authentic, especially where the date, amount and number of such judgment corresponds with the other parts of the record. Dangerfield *v.* Thrustin's Heirs, 8 Mart. N. S. (La.) 232.

73. McDaniel *v.* Weiss, 53 Tex. 257; Winters *v.* Laird, 27 Tex. 616; Kerr *v.* Oppenheimer, 20 Tex. Civ. App. 140, 49 S. W. 149.

74. Thornton *v.* Campton, 17 N. H. 338; Breedlove *v.* Dennie (Ind. Ter.), 53 S. W. 436; Houze *v.* Houze, 16 Tex. 598; Mitchell *v.* Mitchell, 1 Gill (Md.) 66; Glover *v.* Hill, 85 Ala. 41, 4 So. 613 (appraisement of estate); Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115; Stevenson *v.* Moody, 85 Ala. 33, *reversing* 83 Ala. 418, 3 So. 695 (claim of exemption).

tate[75] and appointing an administrator,[76] of the letters of administration[77] or the record thereof,[78] or of the record of letters of guardianship,[79] is admissible without accounting for the non-production of the letters themselves.

(B.) Certified Copy of Probated Will. — (a.) *Generally.* — A certified copy of a probated will is competent evidence usually by statute.[80]

75. A transcript of the order of the county court granting administration with the will annexed is *prima facie* evidence as well of the jurisdiction of the court as of the facts stated in the order. Such evidence is entitled to as much weight as the formal letters of administration, which when granted by a court of competent jurisdiction are conclusive. Owings *v.* Beall, 1 Litt. (Ky.) 257.

76. Burkhalter *v.* Ector, 25 Ga. 55. The record book of the court of ordinary containing the original order granting letters of administration to the plaintiff is admissible without accounting for the non-production of the letters. McRory *v.* Sellars, 46 Ga. 550.

77. Missouri Pac. R. Co. *v.* Baier, 37 Neb. 235, 55 N. W. 913 (competent under general statute relating to copies, records and documents of public offices); Beach, Exr. *v.* Pears, 1 N. J. L. 288.

An exemplified copy of letters of administration from the surrogate's office is competent evidence without accounting for the non-production of the original. "Where the judgment, decree or proceeding of a court of record is to be proved it may be done by producing the original, or a copy duly authenticated. . . . This is the general rule. I can not find that there is, nor do I know why there should be, an exception to it in relation to the records of surrogates' courts." Jackson *v.* Robinson, 4 Wend. (N. Y.) 436, suggesting that letters of administration are only copies of the record, and citing as so holding Alden *v.* Keddell, 8 East (Eng.) 187.

78. Morse *v.* Bellows, 7 N. H. 549.

79. Letters of guardianship being properly recorded upon the record books of the probate court, such records are, as records, competent evidence without the production of the original letters, and without accounting for their absence; and the fact that they are transcribed some years after being originally made out does not deprive them of their evidentiary value. Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

80. *Georgia.* — Churchill *v.* Corker, 25 Ga. 479.

Maryland. — Raborg *v.* Hammond, 2 H. & G. 42.

Nebraska. — Fremont & M. V. R. Co. *v.* Setright, 34 Neb. 253, 51 N. W. 833.

New Hampshire, — Farnsworth Briggs, 6 N. H. 561.

New Jersey. — Snedekers *v.* Allen, 2 N. J. L. 32.

New York. — Ackley *v.* Dygert, 33 Barb. 176; Fetes *v.* Volmer, 58 Hun. 1, 11 N. Y. Supp. 552.

Pennsylvania. — Loy *v.* Kennedy, 1 Watts & S. 396; Logan *v.* Watt, 5 Serg. & R. 212.

Texas. — Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339.

Washington. — Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

See article "Wills."

A certified copy of the record of a probate court, consisting of a copy of a will, testimony of the subscribing witnesses, petition for probate, notice and order for hearing, and order admitting to probate, is admissible to prove the will. Larco *v.* Casaneuava, 30 Cal. 561.

A transcript of the record of the probate of a will devising lands, made before the surrogate, is competent evidence of title if the record contains proofs taken before the surrogate, as required by statute; and if the proofs contained in the record show that the will was executed with the required formalities the probate will be *prima facie* evidence. Allaire *v.* Allaire, 37 N. J. L. 312.

Probate of a will being a judicial proceeding, in order to use it and

(b.) *Foreign Will and Probate.* — When a properly authenticated copy of a foreign will and its probate has been properly filed or admitted to probate in a domestic court, a certified copy of the record of the latter is competent evidence.[81] In some jurisdictions a copy of a will and its probate in a sister state, authenticated in accordance with the act of Congress, are competent evidence without being filed for probate in a domestic court,[82] in others domestic probate is necessary,[83] at least before the title to land in the domestic state is affected thereby.[84]

(c.) *What Certified Copy Must Show.* — A certified copy of a probated will must show not only a true copy of the will but a copy of the record of its probate.[85] And this rule applies to copies of

the judgment by which it is proved as evidence a statute making certified copies of the will duly proved and recorded by the clerk of the probate court evidence does not require the will to be recorded in the recorder's office. Rodney *v.* McLaughlin, 97 Mo. 426, 9 S. W. 726.

81. Beatty *v.* Mason, 30 Md. 409; Sully *v.* Gunter, 13 Rich. L. & Eq. (S. C.) 72; Applegate *v.* Smith, 31 Mo. 166. See Duff *v.* Good, 24 W. Va. 682; Melvin *v.* Lyons, 10 Smed. & M. (Miss.) 78.

Where a will made in another state is probated there, and testator has property in this state, and a copy of the probated will is admitted to probate in this state according to statute, in a suit for a legacy under the will brought in courts of this state, a certified copy of the probated copy of the will from the probate courts in this state will be admissible evidence of the will. Montgomery *v.* Millikin, 5 Smed. & M. (Miss.) 151, 43 Am. Dec. 507.

82. Newman *v.* Willetts, 52 Ill. 98; Shephard *v.* Carriel, 19 Ill. 313; Lancaster *v.* McBryde, 27 N. C. 421; Hopkin's Appeal, 77 Conn. 644, 60 Atl. 657; Walton *v.* Estate of Hall, 66 Vt. 455, 29 Atl. 803; Bradstreet *v.* Kinsella, 76 Mo. 63.

A copy of a testamentary paper executed, published, probated and recorded as a last will and testament in another state, certified in accordance with the act of Congress, is competent evidence of title to real estate where offered, even though the will is neither probated nor recorded here. Doe *v.* Roe, 31 Ga. 593; Churchill *v.* Corker, 25 Ga. 479; Bowman *v.* Bartlet, 3 A. K. Marsh. (Ky.) 86. But see Hood *v.* Mathers, 2 A. K. Marsh. (Ky.) 553.

A copy of a will proved and admitted to record in a court of competent jurisdiction in Virginia before the separation of Kentucky, authenticated according to the act of Congress, is admissible in evidence although not proved or recorded in Kentucky. McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459; Gray *v.* Patton, 2 B. Mon. (Ky.) 12.

83. Paschal *v.* Acklin, 27 Tex. 173.

84. Kelly *v.* Ross, 44 N. C. 277; Ward *v.* Horne, 44 N. C. 184; Thrasher *v.* Ballard, 33 Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894; Beatty *v.* Mason, 30 Md. 409; Graham *v*, Whitely, 26 N. J. L. 254.

To make a copy of a foreign will and its probate competent evidence of title to real estate the will must have been proved before some probate court in the state, or a duly authenticated copy of the will and its probate elsewhere must have been filed and recorded in some probate office here upon application in writing for that purpose after due notice pursuant to a decree of the judge of probate to that effect. Barstow *v.* Sprague, 40 N. H. 27.

85. Fotheree *v.* Lawrence, 30 Miss. 416; Sutton *v.* Westcott, 48 N. C. 283; Lagow *v.* Glover, 77 Tex. 448, 14 S. W. 141; Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89; Bright *v.* White, 8 Mo. 421; Phebe *v.* Quillin, 21 Ark. 490; Nichols *v.* Romaine, 3 Abb. Pr. (N. Y.) 122.

wills probated in a foreign state.[86] In some jurisdictions, however, it has been held that it is not necessary that there be a formal judgment or decree set out.[87]

And where an informal record is competent, in the state where made, to show the probate of a will a properly authenticated copy thereof is given the same force and effect in a sister state by virtue of the federal constitution and laws governing the effect which

86. Jamison *v.* Smith, 37 Ala. 185; Drake *v.* Merrill, 47 N. C. 368; Succession of Bowles, 3 Rob. (La.) 33.

A certified copy of a will of another state that "it is a true copy from the records of this office" is incompetent evidence, where there is no certified copy of any proceedings of any court showing that the will has been proved or recorded by authority of law. Coffee *v.* Groover, 20 Fla. 64.

Under a statute providing that copies of a will made in Great Britain by which lands in New Jersey are devised, certified under seal of office where will is proved, may be received in evidence, a transcript was held inadmissible because copies of the deposition of witnesses in making the probate are not certified. McCarthy *v.* McCarthy, 57 N. J. Eq. 587, 42 Atl. 332.

A will was executed in a sister state, and from the certificate of probate an exemplified copy produced here, it appeared that but one witness swore that he subscribed the will as witness in presence of testator, and the other witness did not appear to have been sworn at all. *Held,* that such will could not be read in evidence under the laws of this state. Blount *v.* Patton, 9 N. C. 237.

The mere certificate of the clerk is not admissible to prove the action of the court. A copy of the record certified by him is the only competent evidence; and to render a certified copy of a will proved in another state admissible in evidence it must be accompanied by a certified copy of the order of probate. Cornelison *v.* Browning, 9 B. Mon. (Ky.) 50.

A certified copy of a will probated in another state is not admissible in evidence unless accompanied by a copy of the judgment or order admitting it to probate in that state. A certified copy of the evidence upon which it was admitted to probate is not sufficient. Green *v.* Benton, 3 Tex. Civ. App. 92, 22 S. W. 256.

87. Jordan *v.* Thomas, 31 Miss. 557; Hansell *v.* Bryan, 19 Ga. 167; Fotheree *v.* Lawrence, 30 Miss. 416 (holding that the minutes of the court reciting probate, or a memorandum on the will showing its due proof would be competent, no particular form being required).

A certified copy of a will, together with a certificate of its probate, is admissible in evidence, the presumption being that the will was properly executed and proved. See Rowland *v.* M'Gee, 4 Bibb. (Ky.) 439; Logan *v.* Watt, 5 Serg. & R. (Pa.) 212.

In Kentucky Land & Immig. Co. *v.* Crabtree, 24 Ky. L. Rep. 743, 70 S. W. 31, a copy of a will was certified by the clerk of the county of the testator's residence to be a true copy as is "certified of record, which appears from the records of this office." The certificate of record was one by the county clerk "that the foregoing writing, the last will and testament of P. P., deceased, was produced and handwriting proven by A. B. M. and J. B. P. at the October term of the Owsley county court, for probate. After lying over one month for exceptions, it was ordered of record. Whereupon said will and this certificate are admitted to record in my office." The certified copy was held admissible over the objection that there was no judgment admitting the paper to probate; the court construing the writing which was called a "certificate" to be a copy of the judgment of the county court ordering the will to probate.

Where an exemplified copy of the record of the ordinary shows there has been a probate of the will and that the same was admitted to record though there was no formal

the courts of one state must give to the records of another.[88]

(8.) Justice Court. — The records of a justice court are properly proved by a certified copy thereof,[89] although the contrary has been held.[90] In some jurisdictions there are statutes providing for the use of such copies.[91]

(9.) Appellate Court. — (A.) GENERALLY. — The record and proceedings of an appellate court may be proved by a properly certified copy thereof,[92] or in case its proceedings have been duly certified

judgment, the superior court should presume in favor of the court of ordinary, at least until the contrary is shown, that the will was admitted to record by the judgment or direction of the ordinary. Hansell *v.* Bryan, 19 Ga. 167.

An exemplified copy of a will from the ordinary's office is presumptive proof that it was properly probated; otherwise it could not have been recorded (Code §3822). Thursby *v.* Myers, 57 Ga. 154.

88. McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976.

In Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393, a certified copy of a will made and probated in another state accompanied by the certificate of the county clerk of that state that it had been probated and recorded and that executors had been appointed and qualified, was held admissible although unaccompanied by a copy of the probate of the will. The evidence being admissible in the other state was admissible in the state where offered owing to the effect of the act of Congress giving records and judicial proceedings of one state such faith and credit in another state as they have in the courts of the state from which they are taken.

89. *Indiana.* — Fisher *v.* Hamilton, 49 Ind. 341; Dresser *v.* Wood, 19 Ind. 199.

Maine. — Wentworth *v.* Keazer, 30 Me. 336; English *v.* Sprague, 33 Me. 440.

Missouri. — Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470.

New Jersey. — French *v.* Shreeve, 18 N. J. L. 147.

Texas. — Schwartz *v.* Massy, 3 Willson Civ. Cas. §471.

Washington. — Kerstetter *v.* Thomas, 36 Wash. 620, 79 Pac. 290.

A justice's transcript of a docket entry of judgment is evidence of the rendition of judgment by him. State *v.* Carroll, 9 Mo. App. 275.

A transcript of the record of proceedings in a case before a justice of the peace, certified by him to be a full and complete copy of the records in his office, is admissible in evidence although the transcript is in the form of a statement by the justice of what occurred in the case. Com. *v.* Foster, 3 Met. (Ky.) 1.

90. Magee *v.* Scott, 32 Pa. St. 539; Watson *v.* State, 63 Ala. 19.

A justice court not being a court of record, a certified transcript of its judgment is not evidence unless made so by statute; and the statute making a certified statement of a justice's judgment presumptive evidence of the fact, having no reference to a judgment of conviction in a criminal case can only be proved by the production of the original papers and docket, sustained by competent evidence of identity, or by sworn copies compared by a competent witness. Bones *v.* Campbell, 71 Ala. 271.

91. Kennard *v.* Carter, 64 Ind. 31; Palmer *v.* Hunter, 8 Mo. 512; Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078; Remington *v.* Henry, 6 Blackf. (Ind.) 63, holding a certified transcript of the docket entry of bail for a stay of execution on a judgment to be within the terms of the statute, being a matter required to be entered upon the docket.

A statute providing for proof of the proceedings of justices by certified copies held sufficient in itself and not qualified by the general chapter on evidence. Goodsell *v.* Leonard, 23 Mich. 374.

92. Donellan *v.* Hardy, 57 Ind. 393; Draughan *v.* Tombeckbee Bank, 3 Stew. (Ala.) 54.

In an action on an appeal bond given on an appeal to the supreme court, a certified transcript of the judgment of that court is competent

down to the court below, by a certified copy of the transcript on file in the latter.[93]

(B.) Transcript in Appellate Court. — A certified copy of the transcript of the trial court's record on file in the appellate court is not competent primary evidence of the original record and proceedings,[94] nor is a certified copy of a writ of error.[95] But it is competent secondary evidence.[96]

(10.) United States Commissioner. — A United States commissioner being a *quasi*-judicial officer, the contents of his record may be proved by a duly certified copy.[97]

(11.) Execution. — A writ of execution on file in the records of the court may be proved by a certified copy;[98] but it has been held that until such a writ has been returned such a copy is not competent,[99] but its admissibility is not affected by the sufficiency or insufficiency of the return.[1] Statutes sometimes provide for the recording of executions under which property has been purchased and for the use of certified copies of such record as secondary evidence.[2]

(12.) By Whom Made. — (A.) Generally. — Certified copies of judicial records to be admissible must be made by the lawful custodian

evidence. Craig *v.* Encey, 78 Ind. 141.

93. Judgment of Supreme Court. A judgment of the supreme court may be proved by a transcript properly attested by the clerk under the seal of the court, or by the record of such transcript in the order book of a court from which the cause was appealed, where the same has been certified down according to law. Donellan *v.* Hardy, 57 Ind. 393. See West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778. But see United States *v.* Bank of United State, 11 Rob. (La.) 418.

A transcript of a record of the supreme court sent to the circuit court, containing an account of the proceedings of the supreme court, in a cause sent from such circuit to the supreme court, is, when filed in the circuit court, a record of that court; and a copy of such transcript made out and certified by the clerk is evidence of the facts therein contained. Bettis *v.* Logan, 2 Mo. 2.

94. Gibbs *v.* Fulton, 2 Ohio 180; Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651.

95. A trial and conviction in an inferior court cannot be proved by a copy of the writ of error to the superior court, but the record of the inferior court "is the proper evidence, and the recital of that record in the writ of error is no evidence at all except for the proceedings in error." Betts *v.* New Hartford, 25 Conn. 180.

96. Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. 199. See also Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651.

97. Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147 (*citing* Chin Bak Kan *v.* United States, 186 U. S. 193.

98. Pigot *v.* Davis, 10 N. C. 25; Dean *v.* Thatcher, 32 N. J. L. 470; Hobson *v.* Doe, 4 Blackf. (Ind.) 487; Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470; Woodward *v.* Harbin, 1 Ala. 104; Ayers *v.* Roper (Ala.), 20 So. 460.

A certified copy of an execution is evidence of as high an order as the execution docket. Mitchusson *v.* Wadsworth, 1 White & W. (Tex.) § 977.

99. Hobson *v.* Doe, 4 Blackf. (Ind.) 487. See Woodward *v.* Harbin, 1 Ala. 104.

1. Dean *v* Thatcher, 32 N. J. L. 470.

2. Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715.

thereof,[3] who is the proper officer to authenticate them by his certificate.[4] A copy certified by the judge is not competent unless he be also the clerk of his court.[5]

Where the records of one tribunal are required to be kept with and as the records of another, the officers of the latter are the proper persons to certify copies.[6]

(B.) Authority of Clerk Presumed. — The authority of the clerk of a court to certify copies is presumed.[7]

(C.) Certificate by Judge Unnecessary. — A certificate by the judge as to the official capacity of the clerk is unnecessary.[8]

(D.) Deputy. — A copy may properly be certified by a deputy of the clerk.[9]

(E.) Transferred Records. — Where the records of one court have been legally transferred to another court[10] or office[11] the custodian

3. Reynolds *v.* Mahle, 12 La. 424; Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971.

A copy of a will is not admissible as evidence unless certified by the clerk having custody of the record of the probate of the will. Woolley's Admx. *v.* McCormick, 20 Ky. L. Rep. 272, 45 S. W. 885.

4. A copy of the docket of a judgment rendered in the supreme court and docketed in a county clerk's office pursuant to the statute for the purpose of redemption by a judgment creditor of lands sold under the judgment, is properly certified by the clerk of the county in which the judgment was docketed. Woolsey *v.* Launders, 3 Barb. (N. Y.) 301.

Copies of the records of a justice of the peace court are properly certified by the justice having legal custody of the records. Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627.

5. Grant *v.* Levan, 4 Pa. St. 393; Dibble *v.* Morris, 26 Conn. 416.

A Court of Probate having a clerk who is necessarily the keeper of its records, the certificate of appointment of curator must be given and certified from the records by the clerk to be received as evidence of such appointment. The certificate of the probate judge is insufficient. Reynolds' Curator *v.* Mahle, 12 La. 424.

6. The records of one tribunal which are required to be kept with the records of another and are made records of such other, may be authenticated by the seal and the signatures of the chief judge and clerk of the court in which they are deposited. Taylor *v.* Barron, 35 N. H. 484 (decision of commissioners recorded with probate court held properly authenticated by the clerk and the judge of such court).

A Copy of Coroner's Inquest certified by the clerk of the criminal district court, who is the legal custodian of the same, is admissible in evidence. State *v.* Roland, 38 La. Ann. 18.

7. Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378; Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466; Rowland *v.* M'Gee, 4 Bibb (Ky.) 439. See also Jones *v.* Walker, 47 Ala. 175; Choppin *v.* Michel, 11 Rob. (La.) 233.

8. Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519.

9. See *supra* III, 2, D, w, (1.), and National Acc. Soc. *v.* Spiro, 94 Fed. 750; Downes *v.* Tarkington, 3 La. Ann. 247.

10. The original record of the proceedings of the Privy Council in England filed in the office of the registrar of the court of chancery of Canada at Toronto becomes a record of that court and may be proved by a copy certified by such registrar and otherwise authenticated as required by law. Jarvis *v.* Sewall, 40 Barb. (N. Y.) 449.

11. Under a statute requiring a justice's docket within one year after his death to be deposited in the county clerk's office to be kept as a public record, a transcript of the

of the latter may certify copies of the transferred records. Thus where a court is abolished and another substituted in its place the clerk of the new court becomes the custodian of the records of the old and the proper officer to give certified copies thereof.[12]

(13.) Method and Sufficiency of Certification. — (A.) GENERALLY. Generally a copy is sufficiently authenticated by the certificate of the clerk under the seal of the court.[13] The certificate, however, must cover the whole of the transcript.[14]

(B.) SIGNATURE AND OFFICIAL CAPACITY. — The certificate attached to a copy of a judicial record must be signed by the officer making it,[15] in his official capacity,[16] though the failure to add his title may be supplied from other portions of the certificate or from the certificate of the officer authenticating his official capacity.[17] It has been held that a certified copy of a justice's record is not admissible unless his official capacity appears in some manner.[18]

(C.) SEAL. — (a.) *Generally.* — The seal of the court must be affixed to a certified copy of a judicial record or document[19] where the court from which it comes has a seal,[20] otherwise a seal is unnec-

docket of deceased justice certified by said clerk is admissible like other certified copies from said records provided for by statute. Woodruff *v.* Woodruff, 4 N. J. L. 375.

12. Roop *v.* Clark, 4 Greene (Iowa) 294.

Where a court containing certain records is abolished and other courts instituted in place thereof, the former court's jurisdiction being divided between the new courts, and the statute does not clearly designate in which of the new courts certain records of the old one shall be deposited, such records are admissible when produced from the custody of either of the new courts. Williams *v.* Jarrot, 6 Ill. 120.

13. Fitzpatrick *v.* Simonson Mfg. Co., 86 Minn. 140, 90 N. W. 378; Brophy *v.* Brunswick & Balke Co., 2 Wyo. 86; Cockran *v.* State, 46 Ala. 714.

14. Where a transcript from a justice of the peace court filed in the office of the clerk of the court of common pleas shows the issuance and return of an execution, the justice's certificate that "the foregoing is a true and complete transcript of the judgment from my docket," is not sufficient because it covers only the judgment and not the remainder of the proceedings. Brown *v.* McKay, 16 Ind. 484.

15. Citizens' Nat. Bank *v.* Bonnes, 76 Minn. 45, 78 N. W. 875.

16. See Donahoo *v.* Brannon, 1 Overt. (Tenn.) 327.

A copy of the record of a case before a justice of the peace described as such in the record is sufficiently attested if attested by him as "justice" without adding "of the peace" Com. *v.* Downing, 4 Gray (Mass.) 29.

17. The failure of a justice of the peace in certifying transcripts of his records to affix the letters J. P. to his signature as his official designation is no ground of objection, where the body of the certificate recites his official capacity, and especially where the clerk certifies that he was acting justice and that his signature was genuine. Railroad Bank *v.* Evans, 32 Iowa 202.

18. A certified copy of the record of a case before a justice of the peace is not admissible when certificate does not show that person signing it was justice of the peace at time of signing, and there is no proof that he was in any way the legal custodian of the record. Stamper *v.* Gay, 3 Wyo. 322, 23 Pac. 69.

19. Parish *v.* Pearsons, 27 Vt. 621.

20. Jones *v.* Stiefer, 1 Spears (S. C.) 15; Morgan *v.* Betterton, 105 Tenn. 84, 69 S. W. 969; McCarthy *v.* Burtis, 3 Tex. Civ. App. 439, 22 S. W.

essary.[21] The seal affixed must be the seal of the court from which the copy comes.[22] The presumption is that the seal was affixed by proper authority.[23]

Contra. — In some states, however, the clerk's certificate need not be under the seal of the court.[24]

(b.) *Private Seal.* — The private seal of the clerk is not his official seal and will not take the place of the seal of the court,[25] which is ordinarily the official seal of the clerk.[26] But where the court has

422 (*citing* Rev. Stat. art. 1131); Thomasson *v.* Driskell, 13 Ga. 253; State *v.* Brown, 33 La. Ann. 1151; Burge *v.* Gandy, 41 Neb. 149, 59 N. W. 359. But see Roe *v.* Doe, Dud. (Ga.) 168.

Scroll or Flourish Insufficient. A copy of the record of a sentence of condemnation by a foreign court signed and attested by the officer making the copy was held not sufficiently authenticated because not under seal, although there was a peculiar flourish of the pen which also appeared on the margin of each page and which may have been intended as a seal; there being no proof that the officer had no seal. Talcott *v.* Delaware Ins. Co., 2 Wash. C. C. 449, 23 Fed. Cas. No. 13,734.

21. Ponder *v.* Shumans, 80 Ga. 505, 5 S. E. 502.

22. A certified copy of a justice's record need not be under seal. Com. *v.* Downing, 4 Gray (Mass.) 29; O'Connell *v.* Hotchkiss, 44 Conn. 51. But see Geohegan *v.* Eckles, 4 Bibb (Ky.) 5; Wolverton *v.* Com., 7 Serg. & R. (Pa.) 273.

A certified copy of a will and the probate thereon is not inadmissible because not under the seal of the probate court where the judge's certificate recites that his court is no longer a court of record and has no seal. "The law makes a certificate without seal valid where there is no seal." Morgan *v.* Curtenius, 4 McLean 366, 17 Fed. Cas. No. 9,799.

Where the clerk in authenticating a transcript of a record of the court states in his certificate that he has attached the seal of the district in which the court is held, and the seal upon its face shows itself to be of another district, the transcript is inadmissible. Junkin *v.* Davis, 6 U. C. C. P. 408; *s. c.* 22 U. C. Q. B. 369.

Where the certificate was made by the county clerk and the seal was the seal of the county and there was no evidence that this was the proper officer or the proper seal, it was held that the court would not presume that the county clerk was the clerk of the court and that the seal of the county was the seal of the court. Woodruff *v.* Walling, 12 U. C. Q. B. 501.

23. Henry *v.* Campbell, 24 N. J. L. 141.

24. Weis *v.* Levy, 69 Ala. 209; Biggs *v.* State, 55 Ala. 108; Bishop *v.* State, 30 Ala. 34; Fant *v.* McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660; Rowland *v.* M'Gee, 4 Bibb (Ky.) 439 (*citing* Peak's Ev. 31). But see Geohegan *v.* Eckles, 4 Bibb (Ky.) 5.

In Massachusetts a copy of a record of a court of that state is admissible in evidence when attested by the clerk of the court, although it is not under the seal of the court. "This rule of evidence is founded on immemorial usage. It was recognized in the early colonial statutes and . . . has been since generally acted on in practice." Chamberlin *v.* Ball, 15 Gray (Mass.) 352, recognizing the rule to be otherwise in many states. See also Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782; Ladd *v.* Blunt, 4 Mass. 402.

25. Butler *v.* Durham, 38 N. C. 589. But see Thomasson *v.* Driskell, 13 Ga. 253.

Private Seal Insufficient. — Where the statute requires circuit courts to have a seal, a certified transcript of its records under the private seal of the clerk is not admissible, although the court has not provided itself with a seal. To be admissible it must be under the seal of the court. Hinton *v.* Brown, 1 Blackf. (Ind.) 429.

26. The clerk of a court of record is ordinarily the official keeper

no official seal the private seal of the clerk has been held sufficient.[27]

(D.) Justice Court. — (a) *Generally.* — In the absence of statute a copy of a justice's record is sufficiently authenticated by his official attestation without seal.[28] Statutes, however, sometimes require his signature and official capacity to be attested by the certificate of some other officer.[29] Before the transcript of proceedings of a justice court is admissible his jurisdiction must appear, there being no presumption of jurisdiction as in the case of a court of a general jurisdiction.[30]

(b.) *When Certified by Successor of Officer Making Record.* — It has been held that where the records of one justice are certified by his successor the certificate must show the official position of the latter and his right to certify.[31]

of its seal, and the seal of the court is his official seal. Moore *v.* Carson, 12 Tex. 66. See McLain *v.* Winchester, 17 Mo. 49.

27. Torbert *v.* Wilson, 1 Stew. & P. (Ala.) 200.

28. As a justice of the peace is his own clerk and has no seal, a copy of his record needs no further authentication than his official attestation at the end thereof, which is legally equivalent to the attestation placed upon a copy of the record of the superior court by the clerk thereof with its seal affixed and the certificate of the judge to the genuineness of the seal and the clerk's signature. O'Connell *v.* Hotchkiss, 44 Conn. 51.

29. Belton *v.* Fisher, 44 Ill. 32; State *v.* Crow, 11 Ark. 642; Todd *v.* Johnson, 50 Minn. 310, 52 N. W. 864; Huston *v.* Becknell, 4 Mo. 39; Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213; Winn *v.* Peckham, 42 Wis. 493.

A clerk's certificate of the official character of the justice of the peace which certifies that he was such officer at the date of the certificate is not evidence of the official character of the justice at a prior time when he rendered a judgment which he has certified to; nor is such certificate of the clerk aided by the certificate of the presiding judge that it is in due form. Morrison *v.* Hinton, 5 Ill. 457.

The signature of a justice of the peace on a transcript of a record of his court must be authenticated, but the secretary of state is not authorized by the statutes of Maryland to certify to the genuineness of the signature of a justice of the peace. Wagner *v.* County Comrs., 91 Fed. 969, 34 C. C. A. 147.

30. Wagner *v.* County Comrs., 91 Fed. 969, 34 C. C. A. 147.

31. Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627. See Halsted *v.* Brice, 13 Mo. 171.

Where a copy of a justice's docket shows that the original was made by one justice and the certificate is by another, it must appear that the latter was the successor of the former and the legal custodian of the record. And where the latter merely certifies that the copy is a true copy of the docket kept by the justice who made it, and the clerk's certificate merely states that the certifying justice is a justice of that county, the copy is inadmissible. Traylor *v.* Lide (Tex.), 7 S. W. 58.

A justice of the peace with whom the docket of a former justice is legally deposited, may give certified copies from such docket; but the certificate must show that the justice making it has the legal custody of the docket. The court is not bound to judicially know the justices of the county and their successors merely because the clerk of the court is required to register their names, the time of their induction in office, etc., in a book kept by him for that purpose. This register "is no part of the records of the court; and if it were, the court could not act upon it unless it were referred to by a party wishing to avail himself of it." Anderson *v.* Miller, 4 Blackf. (Ind.) 417. (But this case seems to depend upon a statute providing that such a certified copy shall be admis-

F. PRIVATE WRITINGS. — a. *Records Of.* — **(1.) Generally.** — It has been held that a certified copy of the authorized record of a private writing is competent evidence to prove the original instrument.[32]

The general rule, however, is that in the absence of statute a certified copy of the record of such an instrument is not admissible as primary evidence to prove the original.[33]

sible when the certificate shows that the records are legally in the possession of the justice as successor or otherwise).

32. Tebbs *v.* White, 4 Bibb (Ky.) 42 (*citing* 1 Salk. 280); Carroll *v.* Tyler, 2 H. & G. (Md. Ch.) 42; Carroll *v.* Llewellyn, 1 H. & McH. (Md. Ch.) 162. See Thomas *v.* Magruder, 4 Cranch C. C. 446, 23 Fed. Cas. No. 13,904; Peltz *v.* Clarke, 2 Cranch C. C. 703, 19 Fed. Cas. No. 10,914; Beall *v.* Dick, 4 Cranch C. C. 18, 2 Fed. Cas. No. 1,162.

A certified copy of a record is competent evidence only where the instrument is required by law to be recorded. New York Dry Dock *v.* Hicks, 5 McLean 111, 18 Fed. Cas. No. 10,204; Dick *v.* Balch, 8 Pet. (U. S.) 30.

To Show That Original Contained Seal. — In Gillespie *v.* Reed, 4 McLean 77, 10 Fed. Cas. No. 5,436, where a deed offered in evidence purported to be under seal but no seal appeared on its face, a copy of the record of a deed was admitted to show that the original had been under seal.

33. *Alabama.* — Smith *v.* Armistead, 7 Ala. 698; Sommerville *v.* Stephenson, 3 Stew. 271.

California. — Reading *v.* Mullen, 31 Cal. 104; Macy *v.* Goodwin, 6 Cal. 519; Wilson *v.* Corbier, 13 Cal. 166; Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386.

Colorado. — Sullivan *v.* Hense, 2 Colo. 424.

Illinois. — Phoenix Ins. Co. *v.* Mechanics' & Traders' Sav., L. & B. Assn., 51 Ill. App. 479.

Iowa. — Williams *v.* Heath, 22 Iowa 519.

Kansas. — West *v.* Cameron, 39 Kan. 736, 18 Pac. 894.

Louisiana. — Ruddock Cypress Co. *v.* Peyret, 113 La. 867, 37 So. 858; Wells *v.* McMaster, 5 Rob. 154.

Maryland. — Classen *v.* Classen, 57 Md. 510.

Missouri. — Hoskinson *v.* Adkins, 77 Mo. 537; Strother *v.* Christy, 2 Mo. 148; Pierce *v.* Georger, 103 Mo. 540, 15 S. W. 848.

New York. — Sunderlin *v.* Wyman, 10 Hun 493.

North Carolina. — Smith *v.* Wilson, 18 N. C. 40.

Tennessee. — Anderson *v.* Walker, Mart. & Y. 201.

Texas. — Gamage *v.* Trawick, 19 Tex. 58; Peck *v.* Clark, 18 Tex. 239; Firebaugh *v.* Ward's Admr., 51 Tex. 409.

A certified copy of a registered deed cannot be given in evidence if within the power of the party claiming under it to produce the original, unless there be some express provision by statute making an authenticated copy evidence. Brooks *v.* Marbury, 11 Wheat. (U. S.) 78; Saunders *v.* Harris, 5 Humph. (Tenn.) 345.

Where a rule of court provided that in order to introduce a copy of a deed, the party's oath stating his belief in the loss or destruction of the original and that it is not in his possession, power or custody shall be a sufficient authentication for such secondary evidence, a copy of the record of a deed is not admissible without such a showing. Williams *v.* Moore, 68 Ga. 585.

Certified copies of recorded deeds are only admissible where it is shown that the originals are lost, destroyed or inaccessible, or that due diligence has been exercised in endeavoring by proper search and inquiry to ascertain in whose custody they are. Smith *v.* Coker, 110 Ga. 650, 36 S. E. 105. In this case the only showing was the mere statement of counsel who was then and had been for

When, however, the proper foundation has been laid for secondary evidence, a certified copy of the record of a deed or other recorded writing is competent.[34]

(2.) To Prove Existence and Contents of Record. — A certified copy of the record of a private writing is competent to prove the existence and contents of the record, though incompetent to prove the original instrument;[35] such copy is also admissible to prove the date when the original was filed.[36]

(3.) Rule in Some New England States. — (A.) GENERALLY. — In some New England states the rule has been laid down that a person claiming title through a conveyance to which neither he nor his

some time residing in another state; that his client "had made every endeavor to obtain the originals of these deeds from every source where it would avail for him to do so, and had failed to get them." It was held that this statement of counsel, even giving it the force of sworn testimony, was not proper proof of the efforts which his client had made, and "did not show that any one had exercised due diligence in endeavoring to ascertain in whose custody the deeds really were. The court ought to have been distinctly informed, by one having personal knowledge of the facts, as to the extent of the search and of whom inquiries were made, in order to be able to pass intelligently upon the question of diligence."

34. Stanby *v.* Addison, 8 La. 207; Pendexter *v.* Carleton, 16 N. H. 482; Holtzclaw *v.* Edmondson, 114 Ga. 171, 39 S. E. 849; *citing* Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Roberts *v.* Unger, 30 Cal. 676; Trammell *v.* Thurmond, 17 Ark. 203; Duffield *v.* Brindley, 1 Rawle (Pa.) 91.

Where a party is in possession of a deed of conveyance of land and refuses to produce it, a copy from the register's office is admissible. Sally *v.* Gunter, 13 Rich. L. (S. C.) 72.

A copy of the record of a mortgage and of a notice of intention to foreclose the same attested by the city clerk is admissible in evidence after proof of notice to the adverse party to produce the original. Pierce *v.* Gray, 7 Gray (Mass.) 67.

When a certified copy of a deed is tendered in evidence and a showing is made from which it may reasonably be inferred that the original is in the custody of a person beyond the limits of the state, who is not a party to the pending case, the foundation for the introduction of secondary evidence is well laid. Shirley *v.* Hicks, 105 Ga. 504, 31 S. E. 105.

A certified copy of the record of a power of attorney is competent where the original instrument is in the hands of a person out of the jurisdiction of the court and it is not in the power of the plaintiff to produce the document. Halsey *v.* Fanning, 2 Root (Conn.) 101.

Contra. — A lost instrument can not be proved by a certified copy of its record, in the absence of a statute which expressly authorizes the admission of such evidence. Union Pac. R. Co. *v.* Reed, 80 Fed. 234, 25 C. C. A. 389.

35. Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Erwin *v.* Bank of Kentucky, 5 La. Ann. 1.

The record books from the parish judge's office are properly admitted to prove the recording of the acts therein contained. Davis *v.* Police Jury of Concordia, 19 La. 533.

A certified copy of a declaration by a married woman to become sole trader under the Act of 1852, may be admissible to prove that a declaration had been recorded, but not to show the existence or contents of the original declaration. Reading *v.* Mullen, 31 Cal. 104.

36. Sunderlin *v.* Wyman, 10 Hun (N. Y.) 493.

adversary are parties may introduce certified copies of the record of the same without accounting for its non-production.[37]

(B.) In Maine by statute[38] and previous thereto by rule of court[39] certified copies of the record of a deed are admissible in an action involving title to realty[40] without proof of execution or delivery[41] in behalf of one who is not the grantee therein and does not claim as an heir of the grantee.[42] This rule applies to mortgages as well as to absolute deeds.[43]

(C.) In Massachusetts an office copy of the record of a deed or mortgage, where neither of the parties to the action is a grantee therein nor entitled to the custody of the original, is admissible without proof of execution or delivery.[44]

37. Farrar *v.* Fessenden, 39 N. H. 268; Fellows *v.* Fellows, 37 N. H. 75; Lyford *v.* Thurston, 16 N. H. 399; Andrews *v.* Davison, 17 N. H. 413; Southerin *v.* Mendum, 5 N. H. 420; Bolton *v.* Cummings, 25 Conn. 410; Dawson *v.* Orange, 78 Conn. 96, 61 Atl. 101.

A deed in a party's chain of title when the original is not in his possession or control may be proved by a certified copy of the town clerk's records. Williams *v.* Weatherbee, 2 Aik. (Vt.) 329, holding that this has always been the practice in that state, which practice was encouraged by expressions in the statutes making a copy evidence when the original cannot be produced. "These expressions (in the statutes) do not necessarily imply that such copies may be read without proof that the originals are out of the party's power; but the course has been ever since the act passed to admit regular copies of such deeds as do not belong to the party wishing to use them."

In making title to real estate a party may prove the various links in his chain of title by certified copies of deeds from the records of deeds in the town clerk's office, without accounting for the originals, "except the deed to himself, in proof of which he must produce the original, because it is supposed to be in his custody. Such copies are admissible mainly upon the ground of the faith that is due to the acknowledgment certified by the proper officer as *prima facie* proof of the genuineness of the instrument, and partly upon grounds of convenience, the originals not being supposed to be in the possession of the party." Pratt *v.* Battles, 34 Vt. 391.

38. Jewett *v.* Persons Unknown, 61 Me. 408.

39. White *v.* Dwinel, 33 Me. 320; Woodman *v.* Coolbroth, 7 Me. 181.

40. Doe *v.* Scribner, 36 Me. 168; Kent *v.* Weld, 11 Me. 459.

41. Whitmore *v.* Learned, 70 Me. 276.

42. White *v.* Dwinel, 33 Me. 320. Devisees in trust under a will, not coming within the rule prohibiting grantees, heirs, etc., from offering office copies, are therefore entitled to introduce an office copy of the deed to their testator under which they claim. Baring *v.* Harmon, 13 Me. 361.

43. New England W. & C. Co. *v.* Farmington Elec. L. & P. Co., 84 Me. 284, 24 Atl. 848.

44. Gragg *v.* Learned, 109 Mass. 167; Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; Stockwell *v.* Silloway, 105 Mass. 517.

The record copy of a deed is admissible in evidence against one to whom the grantee has conveyed the land without notice to him to produce the original. The rule requiring the production of an original deed applies only to a case where it is necessary to prove a conveyance directly to a party to a suit and which may reasonably be supposed to be in his possession, but does not include prior deeds in a chain of title. Thacher *v.* Phinney, 7 Allen (Mass.) 146.

This rule applies to deeds or mort-

(D.) Limitations of Rule. — This rule does not apply to deeds which are not links in the chain of title of the party offering the copy.[45] Copies of a deed to himself,[46] to his adversary,[47] or to a person through whom he does not claim,[48] are not competent primary evidence, but in such cases the original must be properly accounted for.[49]

(E.) Proof of Execution. — The execution of the instrument through which a party immediately claims must be proved, but the execution and delivery of other deeds in the chain is presumed when a certified copy of the record is produced.[50]

(4.) Statutes. — (A.) Generally. — The use of certified copies of the record of deeds and other private writings is quite generally regulated by statute. In some jurisdictions statutes provide that recorded instruments generally are of certain kinds and may be proved by certified copies of the record without accounting for the original.[51]

gages of personal property. Barnord *v.* Crosby, 6 Allen (Mass.) 327.

45. Office copies of deeds which form no part of the chain of title of the party producing them can not be produced in evidence if the originals are to be had. Smyth *v.* Carlisle, 16 N. H. 464; Loomis *v.* Bedel, 11 N. H. 74; Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542.

46. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Pratt *v.* Battles, 34 Vt. 391.

47. Office copies of deeds which are presumed to be in the possession of the adverse party are not admissible without notice to him to produce the original "The rule which under our practice admits office copies of deeds to be put in evidence does not apply to deeds which are presumed to be in the possession or control of the other party." Draper *v.* Hatfield, 124 Mass. 53.

48. Office copies of conveyances showing title in a third party and not in the chain of either of the parties to the action, are not admissible without proof of search for the original deeds, or proof of execution or delivery. Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542, *following* Wells *v.* Iron Co., 48 N. H. 491, 535.

49. Homer *v.* Cilley, 14 N. H. 85.

50. Pollard *v.* Melvin, 10 N. H. 554; See also Bolton *v.* Cummings, 25 Conn. 410.

After proof of an original deed to himself or of his title by descent or devise a party may use an office copy of a deed to which he is not a party but which constitutes a part of his chain of title, as *prima facie* evidence, without showing the loss of the original and without proof of execution or delivery. But a party can not prove the contents of a deed *to himself* by such a copy, when the original is lost, without proof of the execution of the original. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491, *disapproving* Southerin *v.* Mendum, 5 N. H. 420 and *distinguishing* Cram *v.* Ingalls, 18 N. H. 613.

If one claim land by an assignment of a mortgage he must prove the execution of the mortgage. The production of an office copy is not sufficient. "Such copies do not afford evidence of the execution of the deed recorded except only after proof of the deed under which the party claims title, whether that deed be made to himself or to one to whose title he succeeds." Wallace *v.* Goodall, 18 N. H. 439.

51. *California.* — Canfield *v.* Thompson, 49 Cal. 211; Gethin *v.* Walker, 59 Cal. 502; Jones *v.* Marks, 47 Cal. 242; Weaver *v.* McKay, 108 Cal. 546, 41 Pac. 450.

Florida. — Sanders *v.* Pepoon, 4 Fla. 465; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

Indiana. — Lentz *v.* Martin, 75 Ind. 228.

In other states a copy of the record is only competent when the original instrument is lost or destroyed or is not within the cus-

Kentucky. — Helton *v.* Belcher, 114 Ky. 172, 24 Ky. L. Rep. 927, 70 S. W. 295.

Maryland. — Preston *v.* Evans, 56 Md. 476; Morrill *v.* Gelston, 34 Md. 413; Cole *v.* O'Neill, 3 Md. Ch. 174.

Mississippi. — Cogan *v.* Frisby, 36 Miss. 178.

New Jersey. — Doremus *v.* Smith, 4 N. J. L. 160; Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024.

New York. — Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532; Clark *v.* Clark, 47 N. Y. 664. See Van Cortlandt *v.* Tozer, 17 Wend. 338; Bissell *v.* Pearce, 28 N. Y. 252.

North Carolina. — Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

Ohio. — Burnett *v.* Brush, 6 Ohio 32.

Pennsylvania. — Curry *v.* Raymond, 28 Pa. St. 144; Philips *v.* Bank of Lewiston, 18 Pa. St. 394 (assignment of mortgage).

Washington. — Howard *v.* Gemming, 10 Wash. 30, 38 Pac. 766.

By statute, certified copies of documents acknowledged and properly filed in office of town clerk, such as a chattel mortgage, are competent evidence. Van Dervort *v.* Vye, 85 Minn. 35, 88 N. W. 2.

Statutes sometimes make a certified copy of the record of a deed by an executor, administrator, or sheriff competent primary evidence without proof of its execution or the regularity of the proceedings authorizing it. Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265; Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83 (sheriff's deed).

Although a commissioner's deed is not admissible without proving the judgment on which it is founded, yet under a statute making certified copies of all instruments legally recorded *prima facie* evidence, a certified copy of the record of a commissioner's deed is admissible without proof of the judgment. Helton *v.* Belcher, 24 Ky. L. Rep. 927, 70 S. W. 295.

Under a statute making the original record of a power of attorney in the clerk's office competent, and a statute providing that a transcript from a record kept pursuant to law in a public office of the state whose incumbent has an official seal, when properly certified shall be equally competent with the original, a certified copy of the record of a power of attorney is admissible. Lerche *v.* Brasher, 104 N. Y. 157, 10 N. E. 58.

A properly certified copy of the record of a bill of sale of a vessel kept by the collector of customs is made competent evidence by statute (§ 945, Code Civ. Proc.), but the certificate must be by the collector and must state that the copy has been compared by the person making the certificate with the original and that it is a correct transcript therefrom and of the whole of the original (§ 957, Code Civ. Proc.). A certified copy not complying with the latter requirements is not admissible. Redford *v.* Snow, 46 Hun (N. Y.) 370.

In Montana certified copies of the recorder's records are by statute competent primary evidence except in the case of conveyances, the originals of which must be shown to be lost or not within the power of the party offering the copy. Flick *v.* Gold Hill & L. M. Min. Co., 8 Mont. 298, 20 Pac. 807; Manhattan Malt. Co. *v.* Sweteland, 14 Mont. 269, 36 Pac. 84, *modifying* McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153. See also Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

In North Carolina the code provides that certified copies of recorded instruments are competent primary evidence except where a rule or order of the court to the contrary is made upon affidavit suggesting some material variance between the copy and the original or some other sufficient ground. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887; Taylor *v.* Navigation Co., 105 N. C. 484, 10 S. E. 897 (holding that a contract granting rights in land was properly recorded under the statute and there-

tody or control of the party offering the copy.[52] The latter fact sufficiently appears when the deed is one which does not belong to the party seeking to prove it.[53] And in some states statutes make the copy admissible only after proof of the loss or destruction of the original instrument, or otherwise sufficiently accounting for it under the rules of best and secondary evidence.[54]

fore provable by a copy); Bohanon *v.* Shelton, 46 N. C. 370 (holding that a bond for a deed was within the statute). See also Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. 91.

52. *Alabama.* — Scott *v.* Brassell, 132 Ala. 660, 32 So. 694; Allison *v.* Little, 85 Ala. 512, 5 So. 221; Florence Land, Min. & Mfg. Co. *v.* Warren, 91 Ala. 533, 9 So. 384; Hines *v.* Chancey, 47 Ala. 637.

Florida. — Johnson *v.* Drew, 34 Fla. 130, 15 So. 780.

Iowa. — Knetzer *v.* Bradstreet, 3 Greene 487 (in which the original mortgage was unavailable because forming part of the record in the case then on appeal in the supreme court); Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497 (copies of the record are admissible where the party offering them shows that he did not possess the originals and did not know where they were).

Kansas. — Bergman *v.* State, 39 Kan. 128, 17 Pac. 828; Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938.

Missouri. — Crazier *v.* Hinchey, 143 Mo. 203, 44 S. W. 1052; Baum *v.* Sauer, 117 Mo. 460, 23 S. W. 147; Frank *v.* Reuter, 116 Mo. 517, 22 S. W. 812; Boogher *v.* Neece, 75 Mo. 383 (affidavit that original is not in the power of the party offering the copy is sufficient).

Nebraska. — Buck *v.* Gage, 27 Neb. 306, 43 N. W. 110.

Nevada. — O'Meara *v.* North American Min. Co., 2 Nev. 112.

North Dakota. — American Mtg. Co. *v.* Mouse River Live Stock Co., 10 N. D. 290, 86 N. W. 965.

An assignment of a mortgage is such an instrument as is required by law to be recorded and is therefore within the statute providing for the use of a certified copy of the record. Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933.

Under the Iowa Code, § 4630, proof of the loss of an original deed need not be shown in order to justify the reception of certified copies of the record. Proof by the party on oath or otherwise that the original is not within his control, is sufficient. Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503, in which the testimony showed that the deed could not be found after a careful search, and that the party offering it had heard that it was in the possession of his former attorney, who was then in a distant state.

Where the plaintiffs were non-residents of the state and their attorneys testified that a certain deed was not in the possession of his clients and could not be found, this was held a sufficient showing that the instrument was not within the control of the plaintiffs to warrant the introduction of the record in evidence. Olleman *v.* Kelgore, 52 Iowa 38, 2 N. W. 612.

A subsequent purchaser of land may give in evidence a certified copy of a deed to his vendor, on the ground that he has not the custody of the original. Jones' Heirs *v.* Walker, 47 Ala. 175.

Certified copies of deeds to military bounty lands acknowledged out of the state are not admissible under the Missouri statute, except as secondary evidence after the originals have been properly accounted for. Rigney *v.* DeGraw, 100 Fed. 213, *citing* as construing this statute, Bartin *v.* Murrain, 27 Mo. 235; Crispen *v.* Hannavan, 50 Mo. 415; Crispen *v.* Hannavan, 72 Mo. 548, and Rigney *v.* Plaster, 88 Fed. 686.

53. Proof that the original deed is beyond control of party is not necessary in order to admit a certified copy of the record, where defendant seeks to prove title in stranger as a defense and it sufficiently appears that the original deed does not belong to him. Busk *v.* Gage, 27 Neb. 310. See also Florence Land, Min. & Mfg. Co. *v.* Warren, 91 Ala. 533, 9 So. 384.

54. Conley *v.* State, 85 Ga. 348, 11 S. E. 659; Clayton *v.* Brown, 30

(B.) Special Statute Controls General Statute. — Although a general statute provides that certified copies of the recorder's records shall be competent primary evidence, where a special statute provides that a particular class of such records shall be admissible only after accounting for the non-production of the original, as to such records the special statute governs the general.[55]

(C.) In Texas by statute a certified copy of a recorded instrument to be admissible must be filed at least three days before the trial and be accompanied with an affidavit that the original is lost or cannot be procured.[56] The affidavit need not be filed until the trial,[57] and need not show that the party making it has made a search for the original.[58] This rule applies to all instruments properly recorded in the office designated,[59] but not to judicial records[60] or records of deeds, which latter are specially provided for.[61]

Ga. 490; Stone *v.* Fitts, 38 S. C. 393, 17 S. E. 136; Darby *v.* Huffman, 2 Rich. L. (S. C.) 532; Duvin *v.* Sinclair, 22 S. C. 361; McLeod *v.* Rogers, 2 Rich. L. (S. C.) 19.

Before the record of a deed or a certified copy of the same can be introduced the original must be shown to have been lost or accidentally destroyed, and not disposed of for the purpose of introducing a copy, under the Illinois statute (1 Starr & Curtis' Ann. Stat. 2d. ed. p. 955). Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577. See Dugger *v.* Oglesby, 3 Ill. App. 94. § 18 of the act in regard to evidence and depositions relates only to papers, entries and records mentioned in the previous sections and does not authorize the introduction of copies of contracts between parties. Chicago, W. & V. Coal Co. *v.* Moran, 210 Ill. 9, 71 N. E. 38, *affirming* 110 Ill. App. 664.

55. Flick *v.* Gold Hill & L. M. Min. Co., 8 Mont. 298, 20 Pac. 807; Manhattan Malt. Co. *v.* Sweteland, 14 Mont. 269, 36 Pac. 84, holding that such a general statute was controlled by a special statute making certified copies of the record of conveyances competent only after proof of the loss or destruction of the original or showing that it is not within the power of the party offering the copy.

56. Hancock *v.* Tram Lumb. Co., 65 Tex. 225; Burleson *v.* Collins (Tex. Civ. App.), 29 S. W. 688. See Vandergrift *v.* Piercy, 59 Tex. 371; Ury *v.* Houston, 36 Tex. 260.

The statute must be substantially complied with to render the copy admissible. "A certified copy of a recorded instrument is only evidence by virtue of the statute, and before it can be admitted in evidence the requisites of the statute must be substantially complied with." Henry *v.* Bounds (Tex. Civ. App.), 46 S. W. 120.

57. Hanrick *v.* Barton, 16 Wall. (U. S.) 166.

58. Thompson *v.* Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030.

59. To What Instruments Applicable. — This rule applies to all cases where it is sought to use the certified copy of the record of any written instrument which is permitted or required by law to be recorded in the office of the county clerk. Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385.

Chattel Mortgage. — Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868, *citing* Gen. Laws 1891, p. 38.

60. Where a certified copy of the record of a will and probate is offered in evidence under Rev. Stat. arts. 4875, 4876, the provisions of Rev. Stat., art. 2257 relating to accounting for the original and previous filing of the papers of the case do not apply. Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339.

61. Where a certified copy of the record of a deed is offered under § 5266, Rev. Stat. 1895, it is not necessary to make affidavit of the loss of the original instrument. The notice of filing is sufficient. Greenwood

(D.) Instrument Filed But Not Recorded. — Where by statute an instrument is deemed recorded as soon as it is filed for record, a certified copy of an instrument so filed but not yet actually recorded is competent evidence.[62]

(E.) In Other Counties. — Under a statute making certified copies of recorded instruments competent evidence, a copy of the record of such instrument recorded in the proper county is admissible in another county.[63]

F. When Execution of Original Is In Dispute. — The fact that the genuineness of an original deed or other recorded instrument is questioned does not of necessity serve to exclude a certified copy of the record although on a sufficient showing of fraud or forgery the court might require the production of the original.[64]

But it has been held that where the forgery of the original instrument is in issue, either in a criminal or a civil suit, a statute providing that certified copies shall be admissible equally with the original does not apply.[65]

(5.) Defects in Record or Copy. — Where the record or a copy thereof fails to show a valid instrument it is not admissible,[66] but

v. Fontaine (Tex. Civ. App.), 34 S. W. 826.

Article 4802, Rev. Stat., makes certified copies of the record of deeds competent primary evidence to prove the common source of title. When offered for other purposes certified copies are only admissible after accounting for the original. Ogden *v.* Bosse, 86 Tex. 336, 24 S. W. 798.

62. Instrument Filed But Not Recorded. — The filing of a chattel mortgage in the clerk's office makes it a part of the record, and a certified copy of the same is competent evidence according to the Code. Hall *v.* Aitkin, 25 Neb. 360, 41 N. W. 192.

Under a statute making certified copies of instruments filed for record competent the same as the originals, a certified copy of a chattel mortgage is admissible where the certificate shows that the original was on file with the county clerk. Oxsheer *v.* Watt, 91 Tex. 402, 44 S. W. 67.

63. Under a statute making certified copies of recorded instruments competent evidence, such a copy of a deed of assignment in insolvency recorded in the county where the assignor was doing business was held admissible in another county. Batts *v.* Moore (Tex. Civ. App.), 54 S. W. 1036.

64. Pratt *v.* Battles, 34 Vt. 391.

Although the execution and acknowledgment of an alleged deed is in dispute, a duly certified copy of the record thereof is competent as presumptive evidence both of the record itself and of the fact of the conveyance of title. Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532.

When an Affidavit of Forgery has been filed pursuant to statute the execution of the original must be proved. Thompson *v.* Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030.

65. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779, a prosecution for forging a discharge of a mortgage. The record of the discharge when offered in evidence was objected to as secondary evidence for which no proper foundation had been laid. Its admission was held error on the ground that the statute providing for the use of certified copies of the records and documents of public offices was not applicable. "When the main issue is whether a deed, mortgage or discharge of mortgage has been forged, the original instrument is the best evidence and ought to be produced if it can be."

66. A copy of the record of a deed is not admissible where it shows no signature by the grantor, although it contains a certificate of acknowl-

a variance between the record and the original,[67] or between the record and the copy[68] does not of necessity serve to exclude such defective record or copy.

(6.) Preliminary Requisites. — (A.) Generally. — Statutes and rules of court sometimes require certain preliminary acts by one proposing to offer a certified copy of a private writing, such as the filing of and serving of a notice of intention[69] or the filing of a copy.[70] It has been held that the recording of an instrument pursuant to law is *prima facie* evidence of facts essential to its validity.[71]

(B.) Proof of Execution. — (a.) *Generally.* — Where proof of the execution of an original recorded instrument is unnecessary, a certified copy, if made by statute competent to the same extent as the original, may be introduced without proving the execution of the latter.[72] But where upon the filing of an affidavit of forgery the execution of an original deed must be proved the same rule would apply to a certified copy under the same circumstances.[73] And under such a statute if execution must be proved when the original is offered the same necessity would exist when a copy is introduced.[74]

edgment. Helton *v.* Asher, 106 Ky. 730, 46 S. W. 22.

67. Registration of deeds and other instruments required to be recorded not being made void by reason of the mistake of the officer making them, such errors do not vitiate the probate or deprive a party of the right to read the registry as evidence, subject to right of adversary, if original could be produced, to correct such mistakes by its introduction. Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

68. An immaterial variance between a certified copy and the record of a mortgage does not warrant the exclusion of the copy. Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

69. Such a statute does not apply to the record itself which may be introduced without notice. State *v.* Crocker, 49 S. C. 242, 27 S. E. 49.

70. Valentine *v.* Sweatt, 34 Tex. Civ. App. 135, 78 S. W. 385.

An instrument competent as an ancient document need not be filed among the papers of the cause before trial as required by statute (art. 2257) regulating the introduction in evidence of registered instruments. Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079.

71. Cole *v.* O'Neill, 3 Md. Ch. 174; Crufurd *v.* State, 6 H. & J. (Md.) 231; Warner *v.* Hardy, 6 Md. 525.

72. Hancock *v.* Tram Lumb. Co., 65 Tex. 225; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659.

Holmes *v.* Coryell, 58 Tex. 680, holding that since proof of the execution of an ancient instrument was unnecessary a certified copy of the record thereof made competent secondary evidence by statute, was admissible without proving the execution of the original.

A statute providing that a certified copy of a recorded deed shall be received in evidence in the same manner as the original, does not make the certified copy *per se* evidence of the execution of the original. Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

73. A statute providing that a certified copy of a recorded instrument shall be admitted in like manner as the original where the latter is lost or is not obtainable does not dispense with the proof which is required when the original instrument is offered, where an affidavit of forgery is made. Young *v.* Guilbeau, 3 Wall. (U. S.) 636. See also Hancock *v.* Tram Lumber Co., 65 Tex. 225.

74. Powell's Heirs *v.* Hendricks,

The necessity of proving the execution of the original depends largely upon the statutes regulating that matter, and the effect which is given in this respect to the acknowledgment and recording of an instrument.[75] In most jurisdictions a certified copy if competent is admissible without preliminary proof of execution.[76]

(b.) *Proof of Execution of Original Where Copy Would Be Admissible Without Such Proof.* — Where by statute a certified copy of a recorded instrument is admissible without proof of execution, the

3 Cal. 427; Wilson *v.* Corbier, 13 Cal. 166. *Contra.* — Kramer *v.* Settle, 1 Idaho 485.

75. See articles "ACKNOWLEDGMENT," Vol. I, p. 188, and "WRITTEN INSTRUMENTS"; and Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1; Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620.

A certified copy of the record of a mortgage is admissible without proof of the execution of the mortgage, where the certificate of acknowledgment is regular in form and states that the instrument had been duly executed by the mortgagor. Howard *v.* Gemming, 10 Wash. 30, 38 Pac. 766.

The Recording of a Deed dispenses with the necessity of proving its execution, and a certified copy of the record as secondary evidence would also be admissible without proof of the execution of the original. See Civ. Code, § 3630; Holtzclaw *v.* Edmondson, 114 Ga. 171, 39 S. E. 849; Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003.

76. *United States.* — Peltz *v.* Clarke, 2 Cranch C. C. 703, 19 Fed. Cas. No. 10,914.

California. — Mayo *v.* Mazeaux, 38 Cal. 442.

Georgia. — Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003; Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

Idaho. — Kramer *v.* Settle, 1 Idaho 485.

Indiana. — Burns *v.* Harris, 66 Ind. 536.

Iowa. — Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933.

Minnesota. — Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659.

South Carolina. — Durin *v.* Sinclair, 22 S. C. 361; Darby *v.* Huffman, 2 Rich. L. 532; Stone *v.* Fitts, 38 S. C. 393, 17 S. E. 136.

Washington. — Howard *v.* Gemming, 10 Wash. 30, 38 Pac. 766.

Since a deed can not be recorded until it has been acknowledged the registry is *prima facie* evidence of its authenticity, and an office copy is therefore admissible without proof of execution. Ward *v.* Fuller, 15 Pick. (Mass.) 185.

A duly certified copy of the record of a deed is *prima facie* evidence of the genuineness, due execution, and delivery of the original deed. Anthony *v.* Chapman, 65 Cal. 73, 2 Pac. 889.

A duly certified copy of a mortgage is admissible in evidence over the objection that there is no preliminary proof that the officers of the corporation signing the same had authority to execute same, for the reason that due execution and delivery are presumed until something appears to show the contrary. Lafarier *v.* Grand Trunk of C., 84 Me. 286, 24 Atl. 848; Whitmore *v.* Learned, 70 Me. 276.

Where a deed to land in the state, executed outside of the state in a prescribed manner, is recorded in the county where the land lies, a certified copy of the record is by statute made competent evidence without proof of the execution of the original. Harris *v.* Price, 14 B. Mon. (Ky.) 414.

In Alabama under the statute neither the original deed nor a certified copy thereof is admissible without proof of execution, unless it was recorded within twelve months after its execution. Keller *v.* Moore, 51 Ala. 340; Buncum & Jenkins *v.* George, 65 Ala. 259; Allison *v.* Little, 85 Ala. 512, 5 So. 221. For a similar statute in Missouri see Reorganized Church *v.* Church of Christ, 60 Fed. 937.

Copies of the records of deeds, mortgages and assignments and of a

original instrument itself when offered is equally admissible without such preliminary proof.[77]

(7.) What Copy and Certificate Must Show. — To be admissible the copy must include the acknowledgment,[78] and the authenticating certificate must cover both the instrument itself and the certificate of acknowledgment.[79] These rules do not apply, however, where there is no law requiring the record to show the proof of the deed.[80]

(8.) Patents to Land. — Statutes in some states provide for the recording of patents to land in the county where the land lies, and make certified copies of such record competent evidence of the patent, either primary[81] or secondary.[82] So also a certified copy of the land office record of a patent or grant is competent, either

certificate of entry to foreclose are admissible without further proof of the execution of the instruments. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40.

77. Where the articles of incorporation have been duly recorded and the statute provides that a certified copy of the record shall be admissible without further proof, the original articles themselves so recorded are admissible without proof of their execution. "As a mere copy of the articles, certified to be a copy of the record, would have been competent without proof of their execution, it seems to us that the original, it having been duly recorded, should have been admitted in the same manner. There is no reason for requiring proof of the execution of the articles in the one case that does not prevail in the other. The harmony of the law and public convenience require, as we think, that the rule should be the same in both cases." James *v.* Greensboro & Newcastle Junction Tpk. Co., 47 Ind. 379.

78. Runt *v.* Owings, 4 Mon. (Ky.) 20. See Miller's Lessee *v.* Holt, 1 Overt. (Tenn.) 111.

79. Hunt *v.* Owings, 4 Mon. (Ky.) 20.

The certificate of a recorder, annexed to a paper purporting to be a copy of a deed, and of a certificate of acknowledgment of same, that the foregoing is a true copy of deed on record in his office, will not admit deed in evidence, unless the certificate also certifies to correctness of copy of certificate of acknowledgment. Gentry *v.* Garth, 10 Mo. 226.

80. Freeman *v.* Hatley, 48 N. C. 115. In this case it appeared that the court record showing the proof of the original deed had been destroyed and it was held that the testimony of the register that he had held his office from the date of the deed up to the time of trial, and that during that time no deed had been registered which had not been properly proved, was sufficient to authorize the presumption that the deed in question had been duly proved previous to its registry.

81. Briggs *v.* Holmstrong, 72 Mo. 337.

The validity of a copy of a perfect patent for land, recorded and read in evidence under statute providing for recording of patents granted by the United States, in the county in which situated, and making copies thereof *prima facie* evidence, cannot be impeached by an exemplified copy of an unsealed patent from the records of the land office at Washington. Campbell *v.* Laclede Gas Light Co., 84 Mo. 352.

82. Where the loss of an original patent from the republic of Texas has been shown by affidavit, a certified copy from the records of the county clerk's office is admissible in evidence; such record being governed by the same rules as to its competency as are applied to other duly recorded instruments. Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720; *citing* Rio Grande & E. P. R. Co. *v.* Milmo Nat. Bank, 72 Tex. 467, 10 S. W. 563.

at common law[83] or as in some jurisdictions by virtue of a statute.[84]

(9.) Copies of Notarial Acts. — (A.) GENERALLY. — Under the civil law contracts or conveyances which are executed before a notary are entered in his record which is signed by the parties and constitutes the original agreement. The certified copies, however, which are given to the parties, being the only evidence they possess, are regarded as duplicate originals for evidentiary purposes and are admissible as primary evidence.[85] But other properly authenticated copies are admissible without accounting for these copies delivered to the parties.[86]

Where the civil law does not prevail a notary is ordinarily not authorized to record instruments attested by him, and a certified copy of such an instrument is not competent.[87]

(B.) COPY OF NOTARIAL ACT OF FOREIGN STATE. — It has been held that the copy of a foreign notarial act given by the notary to a party to the act is not competent evidence though an examined copy of such act would be admissible.[88]

(10.) Memoranda by Recording Officer. — A memorandum by the recorder on the book in which an instrument was recorded of the

83. Grants or Patents being enrolled in the office from which they emanate become records there, and like all other records, copies of them by the common law may be used as evidence by all persons except those who would be entitled to the originals. Clarke *v.* Diggs, 28 N. C. 159, 44 Am. Dec. 73. See also Marshall *v.* Corbett, 137 N. C. 555, 50 S. E. 210; McLean *v.* Chisholm, 64 N. C. 343; Strickland *v.* Draughan, 88 N. C. 315; Blount *v.* Benbury, 3 N. C. 542.

84. Beasley *v.* Clarke, 102 Ala. 254, 14 So. 744; Hammond *v.* Blue, 132 Ala. 337, 31 So. 357.

Under the provisions of the code a copy of a patent for lands issued by the United States may be certified by the "acting commissioner" of the general land office; and such certified copy is admissible in evidence without producing or accounting for the patent itself. Ross *v.* Goodwin, 88 Ala. 390, 6 So. 682; Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349 (*overruling* Jones *v.* Walker, 47 Ala. 175 as to last point).

85. Titus *v.* Kimbro, 8 Tex. 210; Herndon *v.* Casiano, 7 Tex. 322; Smith *v.* Townsend, Dall (Tex.) 569.

86. A properly authenticated copy of a notarial act is competent evidence without accounting for the testimonio or second original delivered to the parties to the act. "The testimonio is a copy or first original as it is sometimes called of the protocol and is of itself proof of the original, but we do not understand that it is any higher or better evidence of the protocol than is an exemplified or certified copy." Trinity County Lumb. Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015, disapproving contrary dictum by Lipscomb, J., in Titus *v.* Kimbro, 8 Tex. 210, and *citing* Watrous *v.* McGrew, 16 Tex. 506.

A copy of an entry in the notarial record kept by the county clerk, certified by the successor in office of the clerk who made the record, is competent evidence. Mayfield *v.* Robinson, 22 Tex. Civ. App. 385, 55 S. W. 399; *citing* Rev. Stat. arts. 2306, 2309, 3514.

87. Spurr *v.* Trimble, 1 A. K. Marsh. (Ky.) 278.

88. Under the Louisiana law conveyances are made in a notary's book and copies certified by the notary are given to the parties. Such a certified copy of a conveyance of land in Texas although proved and recorded in the county where the land lies is not admissible as a recorded

date of the record is an official act and a certified copy of such entry is competent evidence.[89]

(11.) **Unauthorized or Improper Record.** — (A.) GENERALLY. — Where the recording of a private writing is improperly done or unauthorized because acknowledgment or proof of the instrument is lacking or fatally defective,[90] or because the instrument is insufficiently

instrument. The law does not provide for the record of such copies, but an examined copy of such a conveyance is competent where the execution of the original in the notary's book has been proved. "The original being a record of another state could not be produced." Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

In Mauri *v.* Heffernan, 13 Johns. (N. Y.) 58, it is said, though not expressly held, that the certified copies furnished by a foreign notary before whom the original is executed and who retains the original in his office although competent evidence in the country where executed are not admissible as primary evidence, but ought not to be entirely disregarded and treated as mere nullities. They ought to be received as forming part of the inferior evidence of the execution of the instrument when the original cannot be produced and proved.

89. Laird *v.* Kilbourne, 70 Iowa 83, 30 N. W. 9.

A memorandum made on the record at the time the deed is left for record that the deed had been recorded at the date mentioned is an official act falling within the statutory duties of the recorder, and a certified copy of it is competent to prove the memorandum and the date of the registration of the deed. Stebbins *v.* Duncan, 108 U. S. 32, 50.

Where at the end of a record of the proceedings of a tax sale of land the town clerk affixed a certificate: "Received for record and recorded and examined April 7, 1840. Attest. John Dodge, Town Clerk," it was held that this certificate referred and applied to the entire record, the proceedings and sale, including the warrant and certificate of the oath, as a complete and perfected record of the sale. Carbee *v.* Hopkins, 41 Vt. 250.

90. *United States.* — McEwen *v.* Den, 24 How. 242; Union Pac. R. Co. *v.* Reed, 80 Fed. 234, 25 C. C. A. 389.

Alabama. — Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413.

Arkansas. — Trammell *v.* Thurmond, 17 Ark. 203.

California. — McMinn *v.* O'Connor, 27 Cal. 239.

Florida. — L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213; Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871; Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344.

Georgia. — Papot *v.* Gibson, 7 Ga. 530.

Illinois. — McCormick *v.* Evans, 33 Ill. 328.

Indiana. — Starnes *v.* Allen, 45 N. E. 330.

Iowa. — Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480.

Kentucky. — Morgan *v.* Bealle, 1 A. K. Marsh. 310; Swafford *v.* Herd's Admr., 23 Ky. L. Rep. 1556, 65 S. W. 803; Middlesboro Waterworks *v.* Neal, 105 Ky. 586, 49 S. W. 428.

Louisiana. — Briggs *v.* Phillips, 2 La. Ann. 303.

Maryland. — Connelly *v.* Bowie, 6 H. & J. 141.

Missouri. — Garnier *v.* Barry, 28 Mo. 438; Musick *v.* Barney, 49 Mo. 458; Patterson *v.* Fagan, 38 Mo. 70; Hunt *v.* Selleck, 118 Mo 588, 24 S. W. 213.

Nebraska. — Maxwell *v.* Higgins, 38 Neb. 671, 57 N. W. 388.

New Hampshire. — Montgomery *v.* Dorion, 6 N. H. 250.

New York. — Striker *v.* Striker, 31 App. Div. 129, 52 N. Y. Supp. 729.

Ohio. — Johnston *v.* Haines, 2 Ohio 55, 15 Am. Dec. 533.

Tennessee. — Bond *v.* Montague, 54 S. W. 65; Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67.

Texas. — Birdseye *v.* Rogers (Tex. Civ. App.), 26 S. W. 841; Wood *v.*

executed,[91] or for any reason,[92] a copy of the record is not competent

Welder, 42 Tex. 396; Cavit *v.* Archer, 52 Tex. 166.

Where an ancient deed does not appear to have been acknowledged, a copy of the same from a lost record is inadmissible. Hoddy *v.* Harryman, 3 H. & McH (Md. Ch.) 581.

A certificate of acknowledgement must substantially conform to statute in order that the record of a deed may be admissible in evidence. Maxwell *v.* Higgins, 38 Neb. 671, 57 N. W. 388.

Where a deed has been improperly recorded because not acknowledged or proved by the subscribing witnesses and has subsequently been lost, a certified copy of the record is not admissible although another certified copy to which was attached an affidavit of probate by the subscribing witnesses has been recorded. Conceding that the subscribing witnesses may make an affidavit of probate without having the original deed before them, such affidavit only authorizes the original and not a certified copy to be recorded. Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003.

91. Van Auken *v.* Monroe, 38 Mich. 725; Budd *v.* Brooke, 3 Gill (Md. Ch.) 198, 43 Am. Dec. 321; Hellman *v.* Hellman, 4 Rawle (Pa.) 440.

92. *United States.* — James *v.* Gordon, 1 Wash. C. C. 333, 13 Fed. Cas. No. 7,181.

Arkansas. — Brown *v.* Hicks, 1 Ark. 232; Trammell *v.* Thurmond, 17 Ark. 203.

Georgia. — Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436. See also Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142.

Iowa. — Curtis *v.* Hunting, 6 Iowa 536.

Maryland. — Cheney *v.* Watkins, 1 H. & J. 527, 2 Am. Dec. 530; Berry *v.* Matthews, 13 Md. 537; Coale *v.* Harrington, 7 H. & J. 147.

Mississippi. — Thomas *v.* Grand Gulf Bank, 9 Smed. & M. 201.

Missouri. — Hoskinson *v.* Adkins, 77 Mo. 537.

North Carolina. — Garland's Exr. *v.* Goodloe, Admrs., 3 N. C. 537; Burnett *v.* Thompson, 35 N. C. 379; Burnett *v.* Thompson, 48 N. C. 113.

Pennsylvania. — Kerns *v.* Swope, 2 Watts 75; Fitler *v.* Shotwell, 7 Watts & S. 14.

Texas. — Fitzpatrick *v.* Pope, 39 Tex. 314.

Vermont. — Bush *v.* Van Ness, 12 Vt. 83.

West Virginia. — Clark *v.* Perdue, 40 W. Va. 300, 21 S. E. 735.

But Under the Burnt Records Act a deed shown to have been recorded is presumed to have been entitled to record; but this presumption is not conclusive. Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657.

Where no law requires the recording of a notice of appropriation of water, a certified copy of the record of such a notice is not admissible. Cruse *v.* McCauley, 96 Fed. 369.

A copy of a patent certified by the recorder of a county is not competent evidence where no law requires that such patent be recorded in the county. Lyell *v.* Maynard, 6 McLean 15, 15 Fed. Cas. No. 8,619.

An assignment of a judgment not being entitled to record under the law relating to the registry of deeds and other written instruments, a certified copy of the record thereof is not admissible. Johnson *v.* Brown, 25 Tex. Supp. 120.

Contract Signed by One Party Only. — Where one party to an agreement signs one copy thereof and the other party signs the other copy, an exemplification of the record of one of these instruments is not admissible since the copy was not legally entitled to record. Barger *v.* Miller, 4 Wash. C. C. 280, 2 Fed. Cas. No. 979.

Against Grantor and Privies. — A certified copy of a deed recorded upon the acknowledgment of the grantor but not required to be recorded is evidence against the grantor and those claiming under him subsequent to the acknowledgment, but not against those deriving from grantor prior to acknowledgment. Ben *v.* Peete, 2 Rand. (Va.) 539.

primary evidence of the original, except by statute,[93] and where the law makes no provision for recording the proof of a deed,[94] though in some jurisdictions a copy of the record of a defectively acknowledged instrument seems to be admissible after other proof of its execution.[95] The general rule applies both to ancient and recent instruments,[96] and even though a statute makes copies of the record of private writings admissible.[97]

(B.) Copy of Record of Copy. — A certified copy of the record of a copy of a private writing is not competent evidence,[98] unless made so by statute.[99]

(C.) Acknowledgment by One of Several. — It has been held that although an instrument has been acknowledged by only one of several persons executing it, a certified copy of the record thereof is admissible.[1]

(D.) Limitations of Rule. — (a.) *To Prove the Existence and Contents of Record Itself.* — Where the existence and contents of the record itself and not of the original instrument is material, a certified copy is properly admitted on this issue although not competent to prove original writing.[2] The contrary, however, has been held on

93. Lamberton *v.* Windom, 18 Minn. 506.

94. Under the code a mortgage may be admitted to record without proof of execution or acknowledgment, and when so recorded has effect as constructive notice; therefore it is no objection to the introduction in evidence of a certified copy of the mortgage, which had been recorded, that the original had neither been acknowledged nor proved by such subscribing witness. Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1.

Under § 2, Act of February 9, 1860, a certified copy of the testimonio or second original of an act of sale of land made and acknowledged before a judge of the first instance in 1835, which copy has been recorded in the county where the land lies, is admissible as secondary evidence to show title to the land notwithstanding that it was admitted to record without other proof. Although such an instrument is not within the letter of the statute, nevertheless it is within the scope of the equity and intention thereof. Beaumont Pasture Co. *v.* Preston, 65 Tex. 448.

95. England *v.* Hatch, 80 Ala. 247. See Ury *v.* Houston, 36 Tex. 260. See *supra*, I, 45, H.

96. Velott *v.* Lewis, 102 Pa. St. 326. See also Morrison *v.* Coad, 49 Iowa 571.

97. Westerman *v.* Foster, 57 Ind. 408.

98. See Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003; Grant *v.* Hill (Tex. Civ. App.), 30 S. W. 952, and *supra*, III, 2, B, e, (2.).

When Recording of Original Is Impossible. — Where a conveyance to be legal must be recorded, a certified copy of the record of a copy of the original is not admissible in evidence, although it is shown that the original has been lost. The original itself must be recorded. Holcott *v.* Bynum, 17 Wall. (U. S.) 44.

99. Crispen *v.* Hannaban, 72 Mo. 548.

1. A certified copy from the recorder's office of a power of attorney to sell real estate purporting to have been executed by four persons but acknowledged by one only is admissible in evidence in support of a title derived through a conveyance by such agent. Spect *v.* Gregg, 51 Cal. 198.

2. Where a certified copy of a record of a deed is not competent evidence of the contents of the original deed because the latter was not acknowledged so as to be entitled to record, but the record is nevertheless notice to purchasers, a certified copy of the record is admissible to show that such deed was of record. "For

the ground that an unauthorized record is not legally a record.[3]

(b.) *Statutes Curing Defective or Unauthorized Record.* — Where statutes validate or cure defective or unauthorized records of private writings, certified copies then become competent to the same extent as though the record had originally been good.[4]

(c.) *As Secondary Evidence.* — Since the record of a private writing though unauthorized because of its defective acknowledgment or proof is competent circumstantial evidence of the existnce and contents of the lost or destroyed original,[5] a certified copy is also competent under such circumstances in place of the record itself, at least where such a record may be proved by a certified copy.[6] It has, however, been held to the contrary.[7]

(E.) Record Not Made Within Prescribed Time. — Where an instrument has not been recorded within the prescribed time, a certified copy of the record subsequently made is not competent evidence[8] unless a statute otherwise provides.[9]

it is a settled rule of evidence that every document of a public nature which there would be an inconvenience in removing and which the party has a right to inspect may be proved by a duly authenticated copy." Stebbins *v.* Duncan, 108 U. S. 32, 50.

3. A certified copy of the record of an improperly acknowledged deed is not admissible, although the statute provides that certified copies of the records of public officers shall be admissible in all cases where the records themselves would be admissible. The fact that the book containing such an unauthorized transcript would be competent circumstantial evidence of the existence of a lost original does not render a certified copy admissible under this statute, because such a transcript is not properly a "record" within the meaning of the statute. "The book is not the 'record,' and the fact that the book, if it were produced in court, might be used to prove that there was such a writing upon its pages does not bring it within the statutory rule which authorizes that proof be made by a certified copy." Heintz *v.* Thayer, 92 Tex. 658, 50 S. W. 929, 51 S. W. 640, *overruling* Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049, in so far as *contrary*, and *distinguishing* it on the ground that the certified copy was shown to be a true copy by the testimony of a witness who had compared it with the original.

4. Where a statute provides that after a certain number of years the record of deeds shall be good and valid for all purposes although they were originally not entitled to record because defectively acknowledged, a copy of the record of such a deed after the prescribed time has the same force as evidence as a copy of any properly recorded instrument Webb *v.* Den, 17 How. (U. S.) 576. See also Robidoux *v.* Cassilegi, 10 Mo. App. 516; White *v.* Hutchings, 40 Ala. 253, 88 Am. Dec. 766.

5. See *supra*, I, 45, H, d.

6. Stetson *v.* Gulliver, 2 Cush. (Mass.) 494. See also Webster *v.* Harris, 16 Ohio 490; Post *v.* Rich, 36 Mich. 16; Robidoux *v.* Cassilegi, 10 Mo. App. 516.

7. Shifflet *v.* Morrelle, 68 Tex. 382, 4 S. W. 843; Wanza *v.* Trapp (Tex. Civ. App.), 87 S. W. 877. But see Guinn *v.* Musick (Tex. Civ. App.), 41 S. W. 723; Cox *v.* Rust (Tex. Civ. App.), 29 S. W. 807.

8. Jones *v.* Crowley, 57 N. J. L. 222, 30 Atl. 871; Ross *v.* Clore, 3 Dana (Ky.) 189; Ormsby *v.* Tingey, 2 Cranch C. C. 128, 18 Fed. Cas. No. 10,580; Keller *v* Moore, 51 Ala. 340. See Carroll *v.* Norwood, 1 H. & J. (Md.) 167.

9. An act providing that a certified copy of the record of a deed not recorded within the time prescribed by law may be used in evidence in the same manner as if it had been recorded within such time is consti-

(F.) Recording at Wrong Place. — (a.) *Generally.* — Where an instrument has been recorded at the wrong place,[10] or in the wrong county[11] a certified copy of such unauthorized record is not competent evidence. It has been held, however, that a certified copy of the record from a county other than that in which the land lies may be admissible to prove actual notice to a subsequent purchaser under some circumstances.[12]

(b.) *Must Appear to Have Been Recorded in Proper County.* — A certified copy of the record of a conveyance must appear to have come from the proper county.[13] Where a new county has been carved from several other counties, a previous conveyance of land within

tutional. And a copy of the record of a deed recorded after the expiration of the statutory time is therefore admissible. Patterson *v.* Hansel, 4 Bush (Ky.) 654.

10. Recorded in Wrong Office. a copy of a treasurer's deed from the registry in the treasurer's office is not evidence, as treasurer's deed is not authorized to be recorded there, but in records. Townsend *v.* Wilson, 9 Pa. St. 270.

11. Pollard *v.* Lively, 2 Gratt. (Va.) 217; Sullivan *v.* Dimmitt, 34 Tex. 114; Broxson *v.* McDougall, 63 Tex. 193; League *v.* Thorp, 3 Tex. Civ. App. 573, 22 S. W. 179, 24 S. W. 685; Jewett *v.* Persons, 61 Me. 408; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Change in County Intermediate Making and Recording of Deed. Since a deed must be recorded in the county in which the land lies at the time the deed is deposited for registration, a copy of the record certified by the clerk of the county in which the land lay at the date of the deed is not admissible as evidence of title where the land lies in a different county at the date of the record. Garrison *v.* Haydon, 1 J. J. Marsh. (Ky.) 222, 19 Am. Dec. 70.

Under a Statute making certified copies of the record of private writings authorized to be recorded admissible when the originals are lost, a certified copy of a power of attorney recorded in the wrong county is not admissible. Villareal *v.* McLaughlin (Tex. Civ App.), 62 S. W. 98.

A copy of the record of a deed from a county other than that in which the land lies, accompanied with an affidavit of the loss of the original deed, is not admissible under the statute authorizing the use of a certified copy of the record "in the office of *the* clerk of the county court." French *v.* Groesbeck, 8 Tex. Civ. App. 19, 27 S. W. 43.

Statute Providing for Record of Copy. — But where a statute provides that a certified copy of the record of a deed recorded in the wrong county may be recorded in the county where the land lies and when so recorded shall be a valid conveyance as against the whole world; and another statute provides that every instrument properly recorded shall be admissible without proof of its execution, a certified copy of the record of a deed recorded in the wrong county, which copy has been subsequently recorded in the proper county, is competent evidence both for the purpose of proving the lost original and to show the record of the copy. Logan *v.* Logan, 31 Tex. Civ. App. 295, 72 S. W. 416; Moody *v.* Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253. See Crispen *v.* Hannavan, 72 Mo. 548.

12. Muldrow *v.* Robison, 58 Mo. 331, as where the purchaser is shown to be in possession of facts which would lead a man of ordinary prudence to examine the record.

13. Gwynn *v.* Frazier, 33 Mo. 89. Under the code a recorded chattel mortgage is not admissible in evidence as self proving, unless it be shown either on the face of the instrument itself or by extrinsic evidence that it was recorded in the proper county or counties. Jones *v.* State, 113 Ala. 95, 21 So. 229.

the boundaries of the new county cannot be proved by a certified copy of the record of a deed in one of the original counties without showing that the land also lay in the county in which the record was made.[14]

(c.) *As an Examined Copy.* — A certified copy of a deed recorded in the wrong place is competent secondary evidence as an examined or sworn copy after independent proof that it is a correct copy of the original instrument.[15]

(12.) Deed Covering Land in Several Counties. — (A.) GENERALLY. Where a deed covering land in several counties has been recorded in some but not all of such counties, a certified copy of the record is not competent primary evidence of title to the portion of the land lying in a county where no record has been made;[16] but that a copy of the record in one county may be competent to correct a clerical error in the record in another county where the portion of the land in controversy lies.[17]

(B.) STATUTE. — But since a record made in one of the counties where the land lies is properly made, it has been held, under a statute making certified copies of authorized records of such private writings competent either as primary[18] or secondary[19] evidence of the original, that a certified copy of the record so made is admissible in any other county even though such record might not operate as notice to subsequent purchasers.[20]

b. *Private Writings on File in Public Office.* — **(1.) Generally.** Where a private writing is properly on file in a public office and is regarded as an archive or record of that office, it may be proved by a certified copy under the same conditions as any other record

14. Tomlinson *v.* League (Tex. Civ. App.), 25 S. W. 313.

15. Harper *v.* Tapley, 35 Miss. 506.

16. Harper *v.* Tapley, 35 Miss. 506; Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683.

17. Where part of the land conveyed by a deed is in one county and part in another, and the deed is recorded in both, in a controversy over the land in one county a certified copy of the record in the other county was held admissible to show a clerical error in the record of the deed in the county containing the land Way *v.* Lowery, 72 Ga. 63.

18. Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186; Leazure *v.* Helligas, 7 Serg. & R. (Pa.) 313; McKeen *v.* Delancy, 5 Cranch (U. S.) 22. But see Garbutt Lumb. Co. *v.* Gress Lumb. Co., 111 Ga. 821, 35 S. E. 686.

Where a deed covers land in different counties it is properly recorded in any one of them; and under a statute making certified copies of the authorized record of conveyances and other instruments competent evidence "in any court within this state without further proof thereof," a certified transcript of the record of a deed properly recorded in one county is admissible as evidence in any other as to any of the lands described in it that lie within the state, even though such record might not be notice of a conveyance of land located in another county. Wilt *v.* Cutler, 38 Mich. 189.

19. Ansaldua *v.* Schwing, 81 Tex. 198, 16 S. W. 989; Hancock *v.* Tram Lumber Co., 65 Tex. 225; Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; Lessee of Scott *v.* Leather, 3 Yeates (Pa.) 184.

20. Hancock *v.* Tram Lumber Co., 65 Tex. 225; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

or archive of that office.[21] It has been held, however, that private writings though filed in a public office as required by law are not public records and cannot be proved by a certified copy.[22]

(2.) For Purpose of Impeachment. — It has been held that a witness cannot be contradicted or impeached by a certified copy of an assignment for the benefit of creditors, with schedules and affidavits annexed, the original of which was filed by him with the county clerk in accordance with the statute, but such original must itself be produced.[23]

G. TRANSLATION. — Records in a foreign language when properly admitted in evidence may be orally translated to the court by a competent witness.[24] But a mere translation of a record or document is not competent primary evidence[25] though statutes sometimes provide for the use of a certified translation of records in a foreign language;[26] and it has been held that a translation is competent secondary evidence where the original or a literal copy cannot be obtained.[27]

IV. PAROL EVIDENCE.

1. Judicial Records. — A. GENERAL RULE. — a. *Statement Of.*

21. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779, and see *supra*, III, 2, D, h, (2.).

22. Bouchad *v.* Dias, 3 Denio (N. Y.) 238, holding that the written consent of a surety in a revenue bond although necessarily deposited with the secretary of the United States treasury department could not be proved by a copy certified by the secretary, since it was a private writing and not a record. "If the paper could not by law be removed from the treasury department so as to produce it on trial it should either have been proved on a commission or by calling the subscribing witness and producing a sworn copy. There is no act of Congress making a certified copy evidence. This paper is not like a record which may be proved by an exemplification, nor is it the act of a public officer." See McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

23. "For almost every purpose except that of impeaching a witness a duly authenticated copy of a paper is competent legal evidence; but where it is sought to show that a party to it has done an act or made a statement inconsistent with the contents of such document it is due to him that the paper actually executed by him should be exhibited to him." Pratt *v.* Norton, 5 Thomp. C. (N. Y.) 8. See article "IMPEACHMENT OF WITNESSES," Vol. VII, p. 131.

24. Davis *v.* Police Jury of Concordia, 19 La. 533. See also article "INTERPRETER," Vol. VII, p. 663.

25. Bixby *v.* Bent, 51 Cal. 590.

26. Spillars *v.* Curry, 10 Tex. 143. Where the law provides that translated copies of all records in the land office certified to under the hand of the translator and the commissioner, attested with the seal of that office, shall be *prima facie* evidence in all cases in which the originals would be evidence, a translated copy certified as a true copy by the official translator of the land office followed by a certificate of the commissioner as to the official capacity of the translator, is admissible. The spirit and intent of the law does not require the commissioner to certify to the correctness of the translation, since this is a fact of which he would probably be ignorant. Swift *v.* Herrera, 9 Tex. 263.

27. The schooner Ulalia, 37 Ct. Cl. (U. S.) 466 (in which a translation of the decree of a foreign prize court was held competent secondary evidence).

Where a court has jurisdiction over the parties and the subject-matter, in a case properly before it, and the record shows upon its face the jurisdiction and contains the essential matters upon which the judgment rests, such record imports verity[28] and is conclusive

28. *United States.* — Fayerweather *v.* Ritch, 195 U. S. 276, *affirming* 118 Fed. 943; Flannigan *v.* Chapman & Dewey Land Co., 144 Fed. 371; Roberts J. & R. Shoe Co. *v.* Westinghouse Elec. & Mfg. Co., 143 Fed. 218; Central Ind. Yr. Co. *v.* Grantham, 143 Fed. 43; Robinson *v.* American Car & Foundry Co., 142 Fed. 170; Groton Bridge Mfg. Co. *v.* Clark Pressed Brick Co., 136 Fed. 27, 68 C. C. A. 577, *affirming* 126 Fed. 552; Bedford Bowling Green Stone Co. *v.* Oman, 134 Fed. 441; Hatcher *v.* Hendrie & Bolthoff Mfg. & Supply Co., 133 Fed. 267; Gordon *v.* Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

Arkansas. — Carraway *v.* Moore, 86 S. W. 993; Washington *v.* Govan, 73 Ark. 612, 84 S. W. 792; Beasley *v.* Equitable Securities Co., 72 Ark. 601, 84 S. W. 224.

California. — Sacramento Bank *v.* Montgomery, 146 Cal. 745, 81 Pac. 138; Koehler *v.* Holt Mfg. Co., 146 Cal. 335, 80 Pac. 73; San Luis Obispo County *v.* Simas, 1 Cal. App. 175, 81 Pac. 972.

District of Columbia. — Consaul *v.* Cummings, 24 App. D. C. 36; Clark *v.* Barber, 21 App. D. C. 274.

Georgia. — Van Dyke *v.* Van Dyke, 54 S. E. 537; Richmond Hosiery Mills *v.* Western Union Tele. Co. 123 Ga. 216, 51 S. E. 290; Helms *v.* Marshall, 121 Ga. 769, 49 S. E. 733; Brown *v.* Webb, 121 Ga. 281, 48 S. E. 917.

Idaho. — Schuler *v.* Ford, 10 Idaho 739, 80 Pac. 219; Clark *v.* Rossier, 10 Idaho 348, 78 Pac. 358.

Illinois. — Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801, *reversing* 117 Ill. App. 644; Thompson *v.* People, 207 Ill. 334, 69 N. E. 842; *In re* Northwestern University, 206 Ill. 64, 69 N. E. 75; Peacock *v.* Iron & Steel Pub. Co., 114 Ill. App. 463; Kanorowski *v.* People, 113 Ill. App. 468. See Goldstein *v.* Village of Milford, 214 Ill. 528, 73 N. E. 758.

Indiana. — Ellison *v.* Branstrator, 34 Ind. App. 410, 73 N. E. 146.

Iowa. — Montgomery *v.* Alden, 108 N. W. 234; Crockett *v.* Crockett, 106 N. W. 944; Tod *v.* Crisman, 123 Iowa 693, 99 N. W. 686.

Kansas. — State *v.* Miller, 80 Pac. 947; Clevenger *v.* Figley, 68 Kan. 699, 75 Pac. 1001.

Kentucky. — Hackney *v.* Hoover, 27 Ky. L. Rep. 1003, 87 S. W. 769; Moran *v.* Vickroy, 25 Ky. L. Rep. 1305, 77 S. W. 668.

Louisiana. — Vicksburg S. & P. R. Co. *v.* Tibbs, 112 La. 51, 36 So. 223.

Maine. — International Wood Co. *v.* National Assur. Co., 99 Me. 415, 59 Atl. 544, 105 Am. St. Rep. 288.

Massachusetts. — Tobin *v.* Larkin, 187 Mass. 279, 72 N. E. 985. See Sylvester *v.* Boyd, 166 Mass. 445, 44 N. E. 343.

Michigan. — Carpenter *v.* Auditor General, 107 N. W. 878; Cole *v.* Potter, 135 Mich. 320, 97 N. W. 774, 106 Am. St. Rep. 398.

Minnesota. — Sodini *v.* Sodini, 94 Minn. 301, 102 N. W. 861.

Mississippi. — Alabama & V. R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770; Sweatman *v.* Dean, 86 Miss. 641, 38 So. 231; Sadler *v.* Trustees of Prairie Lodge, 59 Miss. 572; Murrah *v.* State, 51 Miss. 652.

Missouri. — Vincent *v.* Means, 184 Mo. 327, 82 S. W. 96; Johnson *v.* Stebbins-Thompson Realty Co., 167 Mo. 325, 66 S. W. 933; Reed Bros. *v.* Nicholson, 158 Mo. 624, 59 S. W. 977; State *v.* Mulloy, 111 Mo. App. 679, 86 S. W. 569; Brennan *v.* Maule, 108 Mo. App. 336, 83 S. W. 283.

Nebraska. — Clark *v.* Parks, 106 N. W. 770; Bussing *v.* Taggart, 103 N. W. 430; Sorenson *v.* Sorenson, 68 Neb. 483; (on rehearing), 98 N.W. 837; Cizek *v.* Cizek, 99 N. W. 28, *reversing* 96 N. W. 657; Schlemme *v.* Omaha Gas Mfg. Co., 96 N. W. 644.

New Hampshire. — State *v.* Corron, 62 Atl. 1044.

New Jersey. — McDevitt *v.* Connell, 63 Atl. 504; Podesta *v.* Binns, 60 Atl. 815.

New York. — Rogers *v.* Ingersoll,

103 App. Div. 490, 93 N. Y. Supp. 140; Reich *v.* Cockran, 102 App. Div. 615, 105 App. Div. 542, 94 N. Y. Supp. 404, *reversing* 41 Misc. 621, 85 N. Y. S. 247; Matter of Sanford, 100 App. Div. 479, *s. c.* (under title *In re* Morris, 91 N. Y. Supp. 706); Becker *v.* Studeman, 86 App. Div. 94, 83 N. Y. Supp. 538, *affirmed* 180 N. Y. 548, 73 N. E. 1119; Sutherland *v.* St. Lawrence County, 42 Misc. 38, 85 N. Y. Supp. 696.

North Carolina. — State *v.* Settle, 54 S. E. 445; Earp *v.* Minton, 138 N. C. 202, 50 S. E. 624.

Ohio. — Jones *v.* Willis, 72 Ohio St. 189, 74 N. E. 166.

Oklahoma. — Smith *v.* Finger, 79 Pac. 759.

Oregon. — Duniway *v.* Portland, 81 Pac. 945.

Pennsylvania. — Long *v.* Lebanon Nat. Bank, 211 Pa. St. 165, 60 Atl. 556; Haines *v.* Hall, 209 Pa. St. 104, 58 Atl. 125; Plains Township's Appeal, 206 Pa. St. 556, 56 Atl. 60.

Tennessee. — Wilkins *v.* McCorkle, 112 Tenn. 688, 80 S. W. 834.

Texas. — Nelson *v.* Bridge, 98 Tex. 523, 86 S. W. 7; Dutton & Rutherford *v.* Wright & Vaughn (Tex. Civ. App.), 85 S. W. 1025; State *v.* Cloudt (Tex. Civ. App.), 84 S. W. 415. See Penn *v.* Case, 36 Tex. Civ. App. 4, 81 S. W. 349.

Utah. — Jensen *v.* Montgomery, 29 Utah 89, 80 Pac. 504.

Vermont. — Sowles *v.* Sartwell, 76 Vt. 70, 56 Atl. 282.

Washington. — Compton *v.* Seattle, 38 Wash. 514, 524, 80 Pac. 757. See also citations in following note.

Examine Gering *v.* School District (Neb.), 107 N. W. 250; Mercer Co. *v.* Omaha (Neb.) 107 N. W. 565, *holding* that "The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it was rendered."

"A record is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment; and the design is, not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and precedents for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests; and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction. They are received as the truth itself, and no averment can be made against them nor can they be varied by parol. Co. Lit. 260*a*. Com. Dig. Record, A. F. A departure from this rule, in permitting the introduction of parol testimony, to add to the record, in cases where it professed not to contradict it, would not only lead to uncertainty and confusion, but would end in the subversion of the excellent system of law which rests upon established precedents." Sayles *v.* Briggs, 4 Metc. (Mass.) 421.

"The judgment of a court of record, having jurisdiction, is not void, but stands in force until avoided by reversal; however erroneous it may be, or contrary even to the provisions of a statute. The same is the rule as to decisions not of record. The decisions of courts of chancery, and admiralty, of ecclesiastical courts, orders of session and every judicial act, in matters within their respective jurisdictions, are valid until properly quashed, set aside, or reversed. A stranger may contest the validity of such judgment or decision, by showing a want of jurisdiction in the court, or a fatal omission in the process, such as want of due service of the writ; or on the ground, that the judgment or decision was obtained and kept on foot by fraud, covin and collusion between the parties." Olmsted *v.* Hoyt, 4 Day (Conn.) 436, 442.

Primarily if a court has jurisdiction of the parties and the subject-matter of the controversy in a case properly before it, its judgment imports verity and is valid until impeached in a direct proceeding for that purpose. Harper *v.* Rankin, 141 Fed. 626, *quoting* from Morris *v.* Gentry, 89 N. C. 248, and *affirming* *In re* Harper, 133 Fed. 970. Petition for writ of certiorari denied, 200 U. S. 621.

"No rule of law is better settled

between parties and privies as a bar, or plea, or as a matter of evidence upon all questions within the issues which have been or might have been litigated or determined until the judgment is impeached in a direct proceeding for that purpose. Such a record proves itself and cannot be collaterally attacked, impeached, varied, modified, explained or contradicted by parol or extrinsic evidence.[29] But the jurisdiction of the court must be apparent upon the face

than the rule that the record of a court of competent jurisdiction imports absolute verity as to the proceedings which it sets forth as having taken place, and cannot be contradicted by proof collaterally. The judgment entered by the court is conclusive evidence that such a judgment was actually rendered as therein stated." Parson *v.* State, 97 Ga. 73, 24 S. E. 845.

A judgment as between parties or privies, as a plea or bar, or as a matter of evidence, is conclusive, not only of the questions actually litigated, but of all questions within the issues which could have been litigated and determined. Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8. See also Crowder *v.* Red Mountain M. Co., 127 Ala. 254, 29 So. 847.

"A judgment rendered upon the merits is co-extensive with the issues upon which it is founded and is evidence between the parties thereto not only as to the matters actually proved, argued and submitted for decision, but also as to every other matter directly at issue by the pleadings which the defeated party might have litigated." Lorrillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470, *affirming* 23 Jones & S. 308.

"Whatever appears upon the records of a court or clerk's office and has been duly authenticated by the signature of the judge, or proper officer, must be held to be an absolute verity and cannot be collaterally assailed . . . but it is only that which was actually placed on the record-books by an officer authorized to place it there, that is entitled to be regarded as an absolute verity." Herring *v.* Lee, 22 W. Va. 661, 672.

29. *United States.* — Lyon *v.* Perin & Gaff Mfg. Co., 125 U. S. 698; Humphreys *v.* Third Nat. Bk., 75 Fed. 852, 21 C. C. A. 538; Charles Green's Son *v.* Salas, 31 Fed. 106; Dilworth *v.* Johnson, 6 Fed. 459; Leech *v.* Armitage, 2 Dall. 125.

Alabama. — Louisville & N. R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897, 10 Am. & Eng. R. Cas. (N. S.) 878; Craven *v.* Higginbotham, 83 Ala. 429, 3 So. 777; King *v.* Martin, 67 Ala. 177; Weakley *v.* Gurley's Admr., 60 Ala. 399; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Eslava *v.* Elliott, 5 Ala. 264, 39 Am. Dec. 326; State *v.* Allen, 1 Ala. 442.

Arkansas. — Gates *v.* Bennett, 33 Ark. 475; Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

California. — People *v.* Smalling, 94 Cal. 112, 29 Pac. 421; Haggin *v.* Clark, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478; Wilson *v.* Wilson, 45 Cal. 399.

Connecticut. — Gallup *v.* Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353; Douglass *v.* Wickwire, 19 Conn. 489; Rogers *v.* Moor, 2 Root, 159.

Georgia. — Broxton *v.* Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97; Parsons *v.* State, 97 Ga. 73, 24 S. E. 845.

Illinois. — Rubel *v.* Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033; Sargent *v.* Evanston, 154 Ill. 268, 40 N. E. 440; Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335, *affirming* 24 Ill. App. 178; Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210, 218, 25 N. E. 788, *affirming* 31 Ill. App. 364; Eaton *v.* Harth, 45 Ill. App. 355; Dillman *v.* Nadelhoffer, 23 Ill. App. 168.

Indiana. — Oster *v.* Broc, 161 Ind. 113, 64 N. E. 918; Straub *v.* Terre Haute & L. R. Co., 135 Ind. 458, 35 N. E. 504; Williams *v.* Lewis, 124 Ind. 344, 24 N. E. 733.

Indian Territory. — Barringer *v.* Booker, 1 Ind. Ter. 432, 35 S. W. 246.

Iowa. — State *v.* Miller, 95 Iowa 368, 64 N. W. 288; Maynes *v.*

Brockway, 55 Iowa 457, 8 N. W. 317; Farley Norris & Co. *v.* Budd, 14 Iowa 289.

Kansas. — Guttermann *v.* Schroeder, 40 Kan. 507, 20 Pac. 230; *In re* Macke, 31 Kan. 54, 1 Pac. 785.

Kentucky. — Bennett *v.* Tiernay, 78 Ky. 580; Bagby *v.* Warren Deposit Bank, 20 Ky. L. Rep. 1357, 49 S. W. 177.

Louisiana. — Ackerman *v.* Peters, 113 La. 156, 36 So. 923; Wright-Blodgett Co. *v.* Elms, 106 La. 150, 30 So. 311; Gaudet *v.* Dumonlin, 49 La. Ann. 984, 22 So. 622; Townsend *v.* Fontenot, 42 La. Ann. 890, 8 So. 616; Mann *v.* Mann, 33 La. Ann. 351; Green *v.* Reagan, 32 La. Ann. 974.

Maine. — Pennell *v.* Card, 96 Me. 392, 52 Atl. 801; Eastport *v.* Belfast, 40 Me. 262; Hunt *v.* Elliott, 20 Me. 312.

Maryland. — Burgess *v.* Lloyd, 7 Md. 178.

Massachusetts. — Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46; Tufts *v.* Hancox, 171 Mass. 148, 50 N. E. 459; Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447; Jordan *v.* Palmer, 165 Mass. 317, 43 N. E. 122; Com. *v.* Certain Intoxicating Liquors, 135 Mass. 519; Sparhawk *v.* Twichell, 1 Allen 450.

Michigan. — Hatch *v.* Wayne Circuit Judge, 138 Mich. 184, 101 N. W. 228.

Mississippi. — Murrah *v.* State, 51 Miss. 652; Mandeville *v.* Bracy, 31 Miss. 460.

Missouri. — Board of Ministerial Relief *v.* Drummond, 167 Mo. 54, 66 S. W. 930; Reed Bros. *v.* Nicholson, 158 Mo. 624, 59 S. W. 977; Cook *v.* Penrod, 111 Mo. App. 128, 85 S. W. 676; State to use of Wheless *v.* Stinebaker, 90 Mo. App. 280; Crockett *v.* Althouse, 35 Mo. App. 404, 415; Case *v.* Gorton, 33 Mo. App. 597; Brown *v.* Walker, 11 Mo. App. 226, 233, *affirmed*, 85 Mo. 262.

New Jersey. — Wallace *v.* Coil, 24 N. J. L. 600.

New York. — Lorrillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, *affirming* 23 Jones & S. 308; Hecht *v.* Mothner, 4 Misc. 536, 24 N. Y. Supp. 826, 54 N. Y. St. 121.

North Carolina. — Kerr *v.* Brandon, 84 N. C. 128; Galloway *v.* McKeithen, 21 N. C. 12, 42 Am. Dec. 153; Wade *v.* Odeneal, 14 N. C. 423.

Ohio. — Hanes *v.* Dayton & South Eastern R. Co., 40 Ohio St. 95; Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373; City of Cincinnati *v.* Hosea, 19 Ohio Cir. Ct. 744, Ohio Civ. Dec. 618, *affirmed* 66 Ohio St. 687.

Pennsylvania. — Cochran *v.* Sanderson, 151 Pa. St. 591, 25 Atl. 121; Greenwaldt *v.* Kraus, 148 Pa. St. 517, 24 Atl. 67; M'Dermott *v.* United States Ins. Co., 3 Serg. & R. (Pa.) 604; Springer *v.* Wood, 18 W. N. C. 520, 6 Atl. 330; Media Title & Trust Co. *v.* Kelley, 7 Del. Co. Rep. 196; Finley *v.* Hanbest, 1 Phila. 400.

South Carolina. — Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636.

Tennessee. — Union & Planters' Bk. *v.* Memphis, 107 Tenn. 66, 75, 64 S. W. 13; Radford Trust Co. *v.* East Tennessee Lumb. Co., 92 Tenn. 126, 21 S. W. 329; State *v.* Disney, 5 Sneed 598.

Texas. — Allen *v.* Read, 66 Tex. 13, 17 S. W. 115.

Vermont. — Seymour *v.* Brainard, 66 Vt. 320, 29 Atl. 462; *In re* Bodwell, 66 Vt. 231, 28 Atl. 989; Beech *v.* Rich, 13 Vt. 595.

Virginia. — Chesapeake & O. R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320; Marrow *v.* Brinkley, 85 Va. 55, 6 S. E. 605; Quinn *v.* Com., 20 Gratt. 138; Nichols *v.* Campbell, 10 Gratt. 560.

West Virginia. — Wandling *v.* Straw, 25 W. Va. 692.

Records are conclusive until set aside by a court of competent jurisdiction, and statements therein must be taken as true and cannot be contradicted or explained by evidence *ab extra*. Willard *v.* Whitney, 49 Me. 235.

Public records can neither be explained nor varied by parol testimony. They are conclusive, speak for themselves and import absolute verity. Blue Mountain I. & S. Co. *v.* Portner, 131 Fed. 57.

Oral testimony is not admissible to collaterally impeach and contradict judicial records, in the absence of proof of fraud or mistake. MacVeagh *v.* Locke, 23 Ill. App. 606.

Oral proof is not admissible to contradict or vary written instru-

of the record,[30] and the record must profess to state judicial transactions of the court itself.[31]

b. *Statutory Requirements as to Records.* — It is a general rule that where the statute requires a fact to appear of record, such record cannot be contradicted by parol evidence;[32] but parol evidence

ments made by the authority of the law. Cain *v.* Flynn, 4 Dana (Ky.) 499.

Where Existence of a Record Offered in Evidence Is Not in Dispute all questions as to the time when made and whether its recitals are true or not should, when it is offered as an instrument in evidence, be settled by reference to it alone. Herrington *v.* McCollum, 73 Ill. 476.

A Judgment Is the Final Repository of the final intentions of the parties as to the subject-matter. Straub *v.* Terre Haute & L. R. Co., 135 Ind. 458, 35 N. E. 504.

Nature, Course and Results of judicial proceedings and the contents of records cannot be established by parol evidence. LaClef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461.

Contract or Tort. — Character of judgment cannot be shown by parol testimony where the complaint is unambiguous, as the pleadings must be relied on in such case. Furry *v.* O'Connor, 1 Ind. App. 573, 28 N. E. 103; Pickrell *v.* Jerauld, 1 Ind. App. 10, 27 N. E. 433, 50 Am. St. Rep. 192.

30. Parol testimony will not be heard to contradict a court record in a collateral proceeding, if the court has jurisdiction apparent upon the face of the record. *In re* County Treasurer (Ill. Co. Ct.), 31 Chic. Leg. N. 429.

31. The records of a court professing to state judicial transactions of the court itself cannot be impeached collaterally by parol testimony or otherwise, but must stand until attacked in a proper proceeding for the purpose and reformed by the court which made them. Forbes *v.* Wiggins, 112 N. C. 122, 16 S. E. 905.

32. Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959; Cooper *v.* Freeman Lumb. Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Martin *v.* Allard, 55 Ark. 218, 17 S. W. 878; Bays *v.* Trulson, 25 Or. 109, 35 Pac. 26.

Instances. — Parol evidence is inadmissible to show that stay-bond was not filed at the time that the records state that it was approved. Maynes *v.* Brockway, 55 Iowa 457, 8 N. W. 317. And where a statute required an execution book to be kept and that the clerk make entries therein, an entry by him in such book that execution was delivered to the sheriff cannot be impeached by extrinsic evidence in a motion against the sheriff and his sureties for not returning the execution in proper time. Such entry is conclusive in all collateral proceedings. Green *v.* Goodrum, 4 Metc. (Ky.) 274. So where an order fixing the time of opening court is entered upon the journals of the court, as required by statute, such record is conclusive as to the day and hour when the term commenced and cannot be contradicted by parol evidence. Davis *v.* Messenger, 17 Ohio St. 231.

The Appointment of Commissioners to make an assessment as shown by the record of the court cannot be impeached by affidavit of one alleging that he was one of the commissioners appointed, his name not appearing on the record. Boynton *v.* People, 155 Ill. 66, 39 N. E. 622.

"Judicial records required by law to be kept are said to import unerring verity, and to be conclusive against all the world as to their existence, date, and legal consequences." Jones *v.* Williams, 62 Miss. 183.

Certificate in Poor Debtors Proceeding in conformity with statutory form containing recitals of correct service of notice is conclusive unless destroyed by an agreed statement of facts or by a voluntary admission of illegal testimony. Clement *v.* Wyman, 31 Me. 50; Cunningham *v.* Turner, 20 Me. 435; Brown *v.* Watson, 19 Me. 452; Churchill *v.* Hatch, 17 Me. 411. *Compare* Slasson *v.* Brown, 20 Pick. (Mass.) 436; Parker *v.* Staniels, 38 N. H. 251.

may be received where the law does not require such fact to appear of record as a judicial act.[33] So extrinsic evidence is admissible to prove residence or any other matter essential to jurisdiction of a court or board of special or limited powers in the absence of a statute requiring such facts to appear in the minutes or other record of proceedings.[34]

c. *As to Third Parties.* — The record of a judgment is not conclusive against one not a party or privy thereto as to the jurisdiction of the court or the right to render such judgment.[35] Proof, outside of the record, however, is not admissible to contradict it, where that proof would affect the rights of third persons, acquired under the decree or judgment of the court.[36]

Entries on records of clerks of courts of record, duly made and authenticated by proper officer cannot be collaterally attacked by parol or extrinsic evidence. Herring *v.* Lee, 22 W. Va. 661, 672.

33. "The acts and doings out of court of a ministerial officer, as the clerk in issuing writs, constables and sheriffs in making returns on warrants, writs, etc., although required by law to be returned into a court of record, are only *prima facie* to be taken as true, and are not conclusive evidence of the truth of the things they write; they may be contradicted by any evidence, and shown to be false, antedated, etc." Smith *v.* Low, 27 N. C. (5 Ired. L.) 197, *quoted* in Forbes *v.* Wiggins, 112 N. C. 122, 16 S. E. 905.

Omissions. — Where the Statute Does Not Require that a judgment shall recite that the recovery is for purchase money, that question is subject to litigation, and the fact that it was for purchase money may be shown as between parties and privies in a suit involving the right to levy execution upon property *prima facie* exempt, said fact not appearing on the judgment record. Lillibridge *v.* Walsh, 97 Mich. 459, 56 N. W. 854.

Parol Evidence Is Admissible To Show When a Writ Was Issued, a statute directing the clerk to make the day of issuing process being only directory and not exclusive of other evidence. Jenkins *v.* Cockerham, 23 N. C. 309.

No Record Evidence of the Time When a Summons issued by a justice of the peace was delivered to the sheriff being required by statute, such time may be proved by parol. Town of Woodville *v.* Harrison, 73 Wis. 360, 41 N. W. 526.

34. *In re* Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163.

35. Watson *v.* Holly, 57 Ala. 335; State *v.* Martin, 20 Ark. 629; Den *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417.

36. Rivard *v.* Gardner, 39 Ill. 125; Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636.

In Riggs *v.* Collins, 2 Biss. 268, 20 Fed. Cas. No. 11,824, Drummond J., considering the case of Rivard *v.* Gardner, 39 Ill. 125, said: "It is admitted, in that case, that there is some conflict in the authorities; but the language of the court is, 'We entertain no doubt that the rule forbidding the return to be contradicted, as against third persons who have acquired rights under the judgment of the court, rests upon the sounder reason. The importance of the rule, as a question of public policy, upon which the principles of the law are designed to rest, is most apparent. The public should be permitted to purchase property sold under the judgment or decree of a court, without the apprehension that at some distant day their titles may be divested by parol testimony, that the return of the officer upon which the judgment was rendered was falsely made.' It is true that the question in that case was as to the return of the officer; but if we concede the effect to be given by the recital in the decree, then the principle is precisely the same in this case."

A Presumption Arises That the

B. Application of Rule. — a. *Generally.* — Parol or extrinsic evidence is inadmissible to show, by the party offering the record as *res adjudicata,* that judgment was rendered upon different items than those apparent upon the face of the record;[37] that a different judgment than the one offered in evidence was rendered;[38] that a certain statement was incorporated in the judgment *ex gratia;*[39] that the judgment was for or against a particular person;[40] that the interest of plaintiff in the judgment was different from that shown in the findings;[41] or that the judgment was not rendered in the district where the cause was pending and tried.[42] Nor can such evidence be given to impeach the report of commissioners appointed as to rents, improvements, and profits of land;[43] nor to explain by the referee his statement of account where the matters are sufficiently apparent of record;[44] nor to prove a demand in replevin where judgment was given solely because no demand was proven;[45] nor even upon a direct proceeding for a new trial, to show that the

Facts Necessary To Give Jurisdiction existed in the absence of record evidence to the contrary. Erwin *v.* Lowry, 7 How. (U. S.) 172; Marks *v.* Matthews, 50 Ark. 338, 7 S. W. 303.

Evidence Conflicting With Legal Effect. — Evidence which though it would not contradict any fact certified by the record of a judgment, would conflict with its legal effect, or with judicial deductions from its tenor will not be admitted after a considerable lapse of time where rights acquired thereunder have not been questioned. Bustard *v.* Gates, 4 Dana (Ky.) 429.

Cannot Impeach by Return of Sheriff or Other Papers. — If the court has jurisdiction of the subject-matter and the parties, and persons who were not parties to the suit, have, in reliance upon a decree of a court of equity, dealt with the subject-matter in good faith and have acquired interests therein, the court will not destroy their interests by setting aside the decrees. Teel *v.* Dunnihoo, 221 Ill. 471, 77 N. E. 906. See Sorensen *v.* Sorensen, 68 Neb. 483, 98 N. W. 837.

Recital as to Appointment of Guardian. — As against parties who have acquired title, the recitals in the record of the appointment of a guardian cannot be contradicted by parol. Cochran *v.* Sanderson, 151 Pa. St. 591, 25 Atl. 121.

37. Guttermann *v.* Schroeder, 40 Kan. 507, 20 Pac. 230.

To inquire as to What Formed Original Basis of Judgment. — In an equitable proceeding in a federal court to enforce a state judgment on material and labor claims constituting a lien superior to that of trust deed it is competent for the master, where the judgment was based upon a bill of exchange, to inquire in behalf of other lien claimants, into the consideration of such bill and determine whether or not the consideration therefor was for materials furnished. Gilchrist *v.* Helena Hot Springs & S. Co., 58 Fed. 708, relying upon Hassall *v.* Wilcox, 130 U. S. 493.

38. Gates *v.* Bennett, 33 Ark. 475.

39. Townsend *v.* Fontenot, 42 La. Ann. 890, 8 So. 616.

40. Hecht *v.* Mothner, 4 Misc. 536, 24 N. Y. Supp. 826, 54 N. Y. St. 121.

41. Haggin *v.* Clark, 71 Cal. 444, 9 Pac. 736, 12 Pac. 478.

42. National Tube-Works Co. *v.* Chamberlain, 5 Dak. 54. 37 N. W. 761.

43. Patrick *v.* Woods, 3 Bibb. (Ky.) 29. A case under occupying claimant's law.

44. Gulley *v.* Copeland, 102 N. C. 326, 9 S. E. 137.

45. Williams *v.* Lewis, 124 Ind. 344, 24 N. E. 733.

court did not direct judgment unless the entry thereof be charged to have been procured by fraud;[46] nor to contradict records in partition proceedings,[47] or of an insolvency court,[48] or a judgment of a county commissioner's court assessing damages for land,[49] or a recital in an admiralty sentence,[50] or a judgment or award of a court of claims commission;[51] or a record of judicial acts of municipal officers.[52]

b. *Specifically.* — **(1.) Particular Judgments.** — (A.) JUDGMENT BY CONFESSION. — A presumption of jurisdiction of the court rendering judgment cannot be rebutted by parol evidence in ejectment for lands sold upon execution.[53]

The record of a court showing judgment by confession in open court imports verity and cannot be contradicted by parol evidence. It is conclusive evidence of the fact of rendition of the judgment and of all the legal consequences resulting therefrom.[54]

46. Bennett *v.* Tiernay, 78 Ky. 580.

47. Crockett *v.* Althouse, 35 Mo. App. 404, 415, holding that where the judgment in partition proceedings states what the interest of plaintiff was in the land, oral evidence is inadmissible to show, contrary thereto, that it was only a dower interest.

In an Action for Damages in Which the Title to Land came in question, parol testimony, offered to disprove the correctness of a petition for partition and report of a commissioner who sold the land is properly excluded. Forbes *v.* Wiggins, 112 N. C. 122, 16 S. E. 905.

48. Sheets *v.* Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486, holding that record of discharge of insolvent debtor is conclusive as to the fact of compliance with all legal requirements entitling him to discharge and cannot be contradicted by parol in a collateral action.

Where the Record of an Insolvency Court Shows no Irregularity in the proceedings it is, as made up and amended by direction of the judge of insolvency conclusive and cannot be contradicted by parol. Jordan *v.* Palmer, 165 Mass. 317, 43 N. E. 122.

49. The personal statement of one of the county commissioners that the board supposed they were assessing full damages, is inadmissible to control or modify the record of their judgment. Pennell *v.* Card, 96 Me. 392, 52 Atl. 801.

50. Maryland & Phoenix Ins. Co. *v.* Bathurst, 5 Gill & J. (Md.) 159.

51. Burthe *v.* Denis, 133 U. S. 514.

52. Municipal Officers in Laying Out Drains and Sewers act judicially under authority from the state, and not as agent of the city, and parol evidence is not admissible to supply, extend or modify the record of their proceedings. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

53. Marks *v.* Matthews, 50 Ark. 338, 7 S. W. 303.

54. Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335, *affirming* 24 Ill. App. 178; Koren *v.* Roemheld, 7 Ill. App. 646.

Judgment by Confession Cannot be contradicted. Its recitals can only be corrected by application to court. Roche *v.* Beldam, 119 Ill. 320, 10 N. E. 191.

That Judgment by Confession Was Rendered in Chambers prior to opening of court cannot be shown. Hansen *v.* Schlesinger, 125 Ill. 230, 17 N. E. 718.

A judgment creditor may, on a proceeding in garnishment in aid of execution against the judgment debtor and the garnishee, show by parol evidence that a former judgment, rendered in another action in favor of such garnishee and against such judgment debtor by confession of the latter, was without consideration and in fraud of creditors, and hence that the money paid thereon still belongs to said judgment debtor

(B.) Judgment By Consent. — A judgment entered by agreement or consent expresses the final intentions of the parties as to the subject-matter of the agreement, so that parol or extrinsic evidence of any prior contemporaneous stipulation is inadmissible to contradict the record.[55]

(C.) Judgment of Dismissal. — While *prima facie* a judgment or order of dismissal is *res adjudicata,* yet where it does not appear upon the record itself that there was a hearing upon and adjudication of the merits of the controversy, parol evidence is admissible not to determine what the adjudication was, as that is settled by the record alone, but to determine what was adjudicated upon; so it may be shown that no evidence was heard upon the merits but that the cause was dismissed because the petition was supposed to be insufficient.[56]

(D.) Judgments Nunc Pro Tunc. — A judgment entered *nunc pro tunc* is equally immune from attack by parol.[57]

(E.) Equity Decree. — Parol evidence is inadmissible to impeach[58] or contradict a decree in equity.[59]

and was subject to the garnishment. Bloodgood *v.* Meissner, 84 Wis. 452, 54 N. W. 772.

Parol Evidence Is Admissible in an action by the holder against the indorser of a promissory note, to show that a judgment confessed by the maker to the indorser was intended as a security against his liability on the indorsement, where it does not alter or vary the written record or the original contract between the parties. Bank of S. C. *v.* Myers, 1 Bailey L. (S. C.) 412.

55. Straub *v.* Terre Haute & L. R. Co., 135 Ind. 458, 35 N. E. 504.

Not to Enlarge Consent Decree. In an action to recover an amount alleged to be due upon settlement of a law suit under a consent decree evidence is inadmissible to enlarge the decree by showing that certain matters were not included, there being no fraud, accident or mistake. Williams *v.* Huson, 54 Ga. 28.

Compromise Judgment in an action on an official bond cannot be contradicted by parol evidence to show an intent to enlarge the stipulations of the judgment. Hamilton *v.* Glasscock (Tex.), 9 S. W. 207.

56. Langmuir *v.* Landes, 113 Ill. App. 134.

But Where It Appears From the Record that "This cause coming on for hearing, and, being submitted to the court upon bill, answer and replication, and having been duly considered, the court finds, adjudges, and decrees *that the equities are with the defendant*" it is a final judgment and parol evidence is not admissible to contradict such record. Lyon *v.* Perin & Gaff Mfg. Co., 125 U. S. 698.

57. In Case of a Nunc Pro Tunc Judgment the solemn declaration of the record cannot be overcome by oral testimony tending to show that the trial judge in chambers, and not in open court, had set aside and vacated the original judgment and had neglected to have the order entered of record, there appearing no record or memorandum of such order. Barringer *v.* Booker, 1 Ind. Ter. 432, 35 S. W. 246.

58. Guerry *v.* Perryman, 6 Ga. 119, holding a decree that a specific sum was due to the maker of a non-negotiable note from the payee can not be impeached by extrinsic evidence so as to impair or defeat the maker's equitable right to set off the full amount of the decree against such note in the hands of an assignee for value, but who had not given the maker notice of said assignment.

59. Master's Report in Equity. Suit is not admissible to explain, affect or vary the final judgment

(2.) Prior Conviction or Jeopardy. — The record of a former conviction is conclusive evidence thereof and cannot be varied or contradicted by parol testimony.[60]

Parol evidence is not admissible to vary or contradict a record of conviction for the purpose of showing on what offense the conviction was had;[61] but where the identity of the crime charged in two different cases is not fully established by the record alone, parol evidence is admissible to aid in the identification.[62] So parol evidence to show former jeopardy or conviction may be admissible in connection with the record for the purpose of identifying the defendant as the person who was tried and convicted in the former case.[63] And the date of filing the information may be proved by oath of the magistrate where his docket, introduced to show a prior conviction, is silent as to such fact.[64] But the record of a conviction in a foreign state is not conclusive of the commission of the crime charged and may be rebutted by parol evidence showing the innocence of the party.[65]

It has been held that a foreign record of conviction of a witness for a felony, introduced in a civil action for the purpose of impeachment of such witness may be rebutted by parol evidence, showing that he was in fact innocent.[66]

(3.) Legal Effect, Construction and Meaning of Judgment. — The legal effect of a judgment can never be explained by parol nor by the declaration of parties in opposition thereto,[67] although under

therein. Sparhawk *v.* Twichell, 1 Allen (Mass.) 450.

60. People *v.* Powers, 6 N. Y. 50; Sims *v.* Sims, 12 Hun (N. Y.) 231.

61. State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089; People *v.* Smalling, 94 Cal. 112, 29 Pac. 421.

62. State *v.* Waterman, 87 Iowa 255, 54 N. W. 359; Goudy *v.* State, 4 Blackf. (Ind.) 548.

63. Walter *v.* State, 105 Ind. 589, 5 N. E. 735. See also Dunn *v.* State, 70 Ind. 47; State *v.* Maxwell, 51 Iowa 314, 1 N. W. 666; Com. *v.* Dillane, 11 Gray (Mass.) 67.

Record of a Former Conviction Is Not Evidence in Itself of the identity of the offense but if such conviction is sought to be availed of as a defense it must be both pleaded and proven that the offense is the same. Emerson *v.* State, 43 Ark. 372. *Compare* People *v.* M'Gowan, 17 Wend. (N. Y.) 386.

To Defeat Statute of Limitations and Show Identity of Offense charged in two indictments is proper ground for admission of parol evidence. Swalley *v.* People, 116 Ill. 247, 4 N. E. 379.

64. State *v.* Hockaday, 98 Mo. 590, 12 S. W. 246.

65. Sims *v.* Sims, 75 N. Y. 466; People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1.

66. Sims *v.* Sims, 75 N. Y. 466, *reversing s. c.* 12 Hun 231; People *v.* Rodawald, 177 N. Y. 408, 425, 70 N. E. 1.

67. Cragin *v.* Carleton, 21 Me. 492. See also Clendening *v.* Red River Val. Nat. Bank, 12 N. D. 51, 94 N. W. 901.

Oral testimony is inadmissible in a collateral suit to vary the record or to give broader effect to the judgment than its terms reach or to contradict the jeudgment. Long *v.* Long, 141 Mo. 352, 44 S. W. 341.

Nor can the meaning effect and legal construction of a judgment and pleadings in a former action be shown by extrinsic evidence. McGrady *v.* Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

certain circumstances such evidence has been considered for the purpose of aiding the judgment.[68]

(4.) Verdict. — (A.) RULE. — The verdict of a jury cannot be impeached by the testimony, evidence, or affidavits of jurors, showing error or mistake in respect to the merits, or any irregularity or misconduct of the jury or of any of them.[69]

68. In Aid of Judgment the Construction of a former but ambiguous judgment set up as a prior adjudication may be aided by parol evidence. Lillis *v.* People's Ditch Co. (Cal.) 29 Pac. 780.

69. *United States.* — Holmead *v.* Corcoran, 2 Cranch C. C. 119.

Arkansas. — Pleasants *v.* Heard, 15 Ark. 403.

California. — Castro *v.* Gill, 5 Cal. 40; Amsby *v.* Dickhouse, 4 Cal. 102.

Connecticut. — Haight *v.* Turner, 21 Conn. 593.

Georgia. — Hill *v.* State, 64 Ga. 453; Hoye *v.* State, 39 Ga. 718; Mercer *v.* State, 17 Ga. 146.

Idaho. — Jacobs & Co. *v.* Dooley & Co., 1 Idaho 41.

Indiana. — Stanley *v.* Sutherland, 54 Ind. 339; Hughes *v.* Listner, 23 Ind. 396; McCray *v.* Stewart, 16 Ind. 377.

Iowa. — Cowles, Admx. *v.* Chicago, R. I. & P. R. Co., 32 Iowa. 515.

Kentucky. — Heath *v.* Conway, 1 Bibb 398.

Louisiana. — State *v.* Millican, 15 La. Ann. 557.

Maine. — Greeley *v.* Mansur, 64 Me. 211.

Massachusetts. — Murdock *v.* Sumner, 22 Pick. 156.

Minnesota. — Bradt *v.* Rommel, 26 Minn. 505.

Missouri. — State *v.* Alexander, 66 Mo. 148; State *v.* Coupenhaver, 39 Mo. 430.

New Hampshire. — Walker *v.* Kennison, 34 N. H. 257; Folsom *v.* Brawn, 25 N. H. 114.

New Jersey. — Den *v.* McAllister, 7 N. J. L. 46.

New York. — Dana *v.* Tucker, 4 Johns. 487.

Oregon. — Cline *v.* Broy, 1 Or. 89.

North Carolina. — State *v.* Smallwood, 78 N. C. 560.

Pennsylvania. — White *v.* White, 5 Rawle 61.

Texas. — Davis *v.* State, 43 Texas 189; Mason *v.* Russell's Heirs, 1 Tex. 721.

Virginia. — Steptoe *v.* Flood's Admr., 31 Gratt. 323; Read *v.* Com. 22 Gratt. 924.

Wisconsin. — Edmister *v.* Garrison, 18 Wis. 594.

When Admissible see Johnson *v.* Husband, 22 Kan. 277.

Declarations or Admissions of Jurors Made Subsequent to the Rendition of their verdict are not admissible in support of a motion to set it aside. Clum *v.* Smith, 5 Hill (N. Y.) 560.

Affidavit of a Juror Cannot Be Admitted to Impeach the Verdict for Mistake or Error in respect to the merits or to prove irregularity or misconduct either on his own part or of that of his fellows. Clum *v.* Smith, 5 Hill (N. Y.) 560.

Affidavits of Jurors Not Admissible To Show Personal Misconduct of any of the jury. Sargent *v.* 5 Cow. (N. Y.) 106.

Affidavits of Jurors Cannot Be Received To Show Mistake in making up verdict unless mistake is produced by circumstances passing at the trial which are equivalent to a misdirection of the judge. *Ex parte* Caykendoll, 6 Cow. (N. Y.) 53.

Juror Cannot Be Permitted To Give Evidence in Another Suit of the Grounds on which a verdict was rendered, on which a judgment produced of record was founded, nor can affidavits of the jurors themselves be received to impeach a verdict for mistake or error in respect to the merits or for any irregularity or misconduct of the jury. Wallace *v.* Coil, 24 N. J. L. 600, 606, *per* Elmer, J.

Parol Evidence as to Inquest — Coroner's Jury. — See Maxwell *v.* Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945; Moffatt *v.* State, 35 Tex. Crim. 257, 33 S. W. 344.

(B.) Exceptions and Qualifications. — The rule as to the inadmissibility of juror's evidence or affidavits does not apply where the inconsistency of the juror's findings appear on the face of the veridct.[70] So affidavits of jurors may be received to show that they adopted a principle, in estimating damages, not allowed by law,[71] and it is held that affidavits of jurors are admissible to show simply that the written questions submitted to them for their verdict were misunderstood by them, where such affidavits do not impeach their verdict nor show misconduct in the jury room nor mistakes in their estimates.[72] Such affidavits of jurors have also been received upon direct application to correct the verdict, the foreman having by mistake reported wrongly to the court.[73]

(5.) Drawing of Jurors. — It is held that on a challenge to the panel to show that a jury in a criminal case was not regularly drawn, the officer whose irregularity is complained of, may testify to facts showing that the drawing was regular and the certificate on the list erroneous even though such evidence contradicts his official certificate.[74]

(6.) Grand Jurors. — (A.) Drawing Grand Jurors. — Oral evidence is not admissible to impugn the certificate of those officers in whom trust is confided by statute to select grand jurors although the stat-

"If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact." Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580, 592, *per* Nelson, J.

70. Kennedy *v.* Ball & Wood Co., 91 Hun 197, 36 N. Y. Supp. 325.

A Witness May Be Permitted To Testify that in the trial of a former suit in which he was a juror, the jury allowed certain items embraced within the declaration where the record is silent in regard thereto. Wallace *v.* Coil, 24 N. J. L. 600.

71. Sargent *v.* , 5 Cow. (N. Y.) 106.

72. Webber *v.* Reynolds, 32 App. Div. 248, 52 N. Y. Supp. 1007. *Compare* State *v.* Millican, 15 La. Ann. 557; Saunders *v.* Fuller, 4 Humph. (Tenn.) 516.

73. Dalrymple *v.* Williams, 63 N. Y. 361, 20 Am. Rep. 544. See also *Ex parte* Caykendoll, 6 Cow. (N. Y.) 53.

74. State *v.* Gut, 13 Minn. 315. Genl. Stat. 1866, ch. 96, p. 659, § 9 provides that "Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of challenge." Same provision in Rev. Laws Minn. 1905 § 5385.

Clerk's Testimony as to Jury. — Commissioner's Neglect to take names of absent, disqualified and dead jurors from venire box may be such evidence as does not vary previous venire. State *v.* Nockum, 41 La. Ann. 689, 6 So. 729.

Where Record Shows That Sheriff himself selected jury return cannot be contradicted. Media T. & T. Co. *v.* Kelley (Pa.) 7 Del. Co. Rep. 196.

Testimony of the Clerk of the Court Is Not Admissible to show that he was absent from the drawing of the venire, when the *process verbal* of the drawing, signed by himself recites his presence. State *v.* Revells, 31 La. Ann. 387.

ute provides no mode in which performance of such trust shall be made known to the court.[75]

(B.) INDICTMENT. — Minutes of evidence before the grand jury cannot be contradicted by affidavits of grand jurors or witnesses.[76] Nor is it competent in another court to correct by parol evidence a mistake or error in entering a juror's name on the minutes of the court in which the indictment is found.[77]

(7.) Jurisdiction. — (A.) CONCLUSIVENESS OF RECITALS. — The American courts have widely differed upon the question whether or not a recital of jurisdictional facts can be contradicted in a collateral proceeding, although the general current of American authority is in favor of the conclusiveness of such recital as against the sheriff and the parties.[78]

Generally if a superior court of general jurisdiction expressly finds the existence of the necessary jurisdictional facts, or if those facts otherwise appear of record, the contrary may not be proven in a collateral proceeding,[79] and as a general rule want of jurisdic-

75. State *v.* Allen, 1 Ala. 442, where the court says: "Oral evidence cannot be allowed to show an irregularity in the selection of the grand jurors, when the record of the court or the certificate of the officers to whom that trust was confided shows the same was regular."

Where the certificate of the officers selecting grand jurors is by statute a matter of record it cannot be impeached by showing that the clerk whose signature is appended was not present and did not sign it, such certificate having been made, returned and acted upon by the proper court and being for all purposes a portion of its records. State *v.* Clarkson, 3 Ala. 378.

76. State *v.* Little, 42 Iowa 51.

That Certain Testimony Was Material to Finding Indictment cannot be shown by affidavits of grand jurors as the minute of the evidence returned with the indictment and filed is a conclusive record. State *v.* Miller, 95 Iowa 368, 64 N. W. 288.

77. Kneeland *v.* State, 63 Ga. 641, 644.

78. Rivard *v.* Gardner, 39 Ill. 125.

Recital of Jurisdictional Facts Is Conclusive thereof. Sweatman *v.* Dean, 86 Miss. 641, 38 So. 231.

A Judgment Cannot Be Collaterally Attacked even for want of jurisdiction by matter *in pais*. Reed *v.* Nicholson, 158 Mo. 624, 59 S. W. 977.

Jurisdictional Defect in Record Cannot be supplied by parol proof. Cunningham *v.* Pacific R. Co., 61 Mo. 33.

79. Cohen *v.* Portland Lodge No. 142, B. P. O. E., 140 Fed. 774, 144 Fed. 266.

Parol Evidence Is Inadmissible To Validate even where want of jurisdiction of a court of special and limited jurisdiction makes proceedings void. People *ex rel.* Ottman *v.* Commissioners of Highways, 27 Barb. (N. Y.) 94.

In Collateral Proceedings Extrinsic Evidence Is Not Admissible to show that party was not present at trial, that none was had, no evidence offered, and that attorney consented to entries without authority, to test jurisdiction of court and legality of proceedings. *In re* Macke, 31 Kan. 54, 1 Pac. 785.

An Award of Alimony Must Not Be Merely Erroneous But in Excess of the court's jurisdiction under the statute to subject the judgment to collateral attack. If however, this decree is void it is subject to such attack, and presumptions indulged in to sustain a record against collateral attack can only be made to supply the record in matters regarding which it is silent, and cannot be per-

tion is only available where apparent from recitals upon the record.[80]

There are, however, authorities holding that a domestic judgment is conclusive against collateral attack only when the jurisdictional facts appear of record or when the court has expressly adjudged that they exist,[81] and it is also declared that a void judgment is open to attack by anybody;[82] and that a want of jurisdiction may always be shown by extrinsic evidence, and it has been held

mitted to contradict the record in matters in which it speaks for itself. Cizek *v.* Cizek (Neb.), 99 N. W. 28, *reversing* 96 N. W. 657.

80. *United States.* — Grignon's Lessee *v.* Astor, 2 How. 319, 340.

Colorado. — Hughes *v.* Cummings, 7 Colo. 138, 2 Pac. 289.

Connecticut. — Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244.

Maine. — Granger *v.* Clark, 22 Me. 128.

Maryland. — Clark *v.* Bryan, 16 Md. 171.

Massachusetts.—Finneran *v.* Leonard, 7 Allen 54, 83 Am. Dec. 665.

Minnesota. — Gulickson *v.* Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352.

South Carolina. — Reese *v.* Meetze, 51 S. C. 333, 29 S. E. 73; Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636.

Tennessee. — Reinhardt *v.* Nealis, 101 Tenn. 169, 46 S. W. 446.

Texas. — See State *v.* Cloudt (Tex. Civ. App.) 84 S. W. 415; Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325. *Examine* Ames *v.* Williams,, 72 Miss. 760, 17 So. 762.

Upon Collateral Attack Such Facts Can Only Be Shown to impeach judgment upon ground that court had no jurisdiction as affirmatively appear upon the record. Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742, See Wilcox *v.* Kassick, 2 Mich. 165.

Where Want of Jurisdiction Does Not Appear Upon the Record it cannot be shown by extrinsic evidence. Goldstein *v.* Milford, 214 Ill.. 528, 73 N. E. 758.

In Order To Hold Decree Void in a Collateral Proceeding it is necessary to show beyond controversy that upon the record the court could not have had jurisdiction and an apparent want of jurisdiction on the face of the record is not available in a collateral proceeding after final decree. Delay and acquiescence may also be fatal. Evers *v.* Watson, 156 U. S. 527.

Lack of Jurisdiction Must Appear on Face of Record otherwise it cannot be taken advantage of in collateral proceeding. Thompson *v.* People, *ex rel.*, 207 Ill. 334, 69 N. E. 842.

Upon Collateral Attack of a Judgment, Consent of the Parties to participation of a special judge acting without commission in its rendition is conclusively proved by the recital of such consent and cannot be contradicted by evidence of extraneous facts. Radford Trust Co. *v.* East Tennessee Lumb. Co., 92 Tenn. 126, 21 S. W. 329.

If an Inferior Court, Board or Body Is Required To Keep a Record the jurisdictional facts must appear, and if they do so appear its jurisdiction will not be open to attack, otherwise the record will be open to collateral attack. City of Benwood *v.* Wheeling R. Co., 53 W. Va. 465, 475, 44 S. E. 271, *quoting* from Shank *v.* Ravenswood, 43 W. Va. 242, 27 S. E. 223.

If a Warrant of Attachment Is Issued Upon Affidavits sufficient to give a justice of a city court jurisdiction to issue it his action can only be reviewed by a direct attack upon it, and the validity of the warrant cannot be questioned collaterally. Rogers *v.* Ingersoll, 103 App. Div. 490, 93 N. Y. Supp. 140.

81. Cohen *v.* Portland Lodge No. 142, 140 Fed. 774, 144 Fed 266.

82. Weekes *v.* Edwards, 101 Ga. 314, 28 S. E. 853.

If the Court in Confirming a Special Assessment for public improvements had no jurisdiction the judgment may be resisted everywhere. West Chicago Pk. Comrs. *v.* Farber, 171 Ill. 146, 161, 49 N. E. 427.

that a recital of jurisdictional facts in the record does not preclude showing a want of jurisdiction by extrinsic evidence when the judgment is sought to be enforced or any benefit claimed thereunder[83]

The showing of the record of a judgment of service on and appearance of parties cannot be contradicted by evidence of non-service and non-appearance.[84]

(B.) Service of Process and Appearance. — Where an officer's return appearing in the record of a former adjudication shows an actual personal service of process, it cannot be contradicted in a collateral proceeding by evidence *dehors* the record,[85] for if the jurisdiction of the court appear upon the record, non-service of the original process or of a required notice and non-appearance cannot be shown by extrinsic evidence,[86] where the record contains nothing showing that recital of service could not be true,[87] unless

83. Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589, *reversing* 7 Hun 25, See also Woodward *v.* Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519.

In an Insolvent's Discharge by a Commissioner, jurisdictional facts recited therein may be disproved by parol. Barber *v.* Winslow, 12 Wend. (N. Y.) 102.

Decree Can Be Collaterally Attacked for Want of Jurisdiction Only by showing that under no circumstances could the court have exercised jurisdiction. Ames *v.* Williams, 72 Miss. 760, 17 So. 762.

By Statute in Minnesota extrinsic evidence is admissible to show want of jurisdiction to render a tax judgment. Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481.

See *infra*, IV, 1, E.

84. Robinson *v.* Ferguson, 7 Ill. 538, 544.

85. Harrison *v.* Hart, 21 Ill. App. 348.

86. Pritchell *v.* Clark, 5 Har. (Del.) 63. See also the following cases:

Illinois.—Russell *v.* Baptist Theological Union, 73 Ill. 337.

Indiana. — Bentley *v.* Brown, 123 Ind. 552, 24 N. E. 507. Horner *v.* Doe dem State Bank, 1 Ind. 130, 48 Am. Dec. 355.

Iowa. — Day *v.* Goodwin, 104 Iowa 374, 73 N. W. 864, 65 Am. St. Rep. 465.

Maine. — Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Nebraska. — German Nat. Bk. *v.* Kautter, 55 Neb. 103, 111, 75 N. W. 566, 70 Am. St. Rep. 371.

Ohio. — Railroad Co. *v.* Belle Centre, 48 Ohio St. 273, 27 N. E. 464.

Tennessee. — Harris *v.* McClanahan, 11 Lea 181.

Utah. — Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

As to Officers Returns Generally see IV, 1, B, b, (10), (H).

As to Notice see further IV, 1, B, b, (7), (C.).

Cannot Be Shown Contrary to Record That Defendant Was an Infant at time of service of writ. Kennedy *v.* Baker, 159 Pa. St. 146, 28 Atl. 252.

Infancy and Service of Summons Only Upon Guardian May Be Shown by parol in partition proceedings where the construction of certain stipulations therein permit such evidence. Ruff *v.* Elkin, 40 S. C. 69, 18 S. E. 220.

87. Riggs *v.* Collins, 2 Biss. 268, 20 Fed. Cas. No. 11,824, holding that where decree of foreclosure recites that process was duly served and there is nothing in the record which shows that such averment could not be true such recital is conclusive after a lapse of time. Drummond, J. at p. 278 said: "This seems to be a sound principle, that in a collateral issue, if any proof whatever,

the record is contradicted by other recitals in the record itself,[88] although an attorney's want of authority to appear[89] for an unserved defendant,[90] and also his authority to appear generally, may be shown by evidence *dehors* the record.[91]

There are, however, a few authorities holding that failure to obtain service as a party may be shown by parol in a collateral proceeding.[92]

It is held that in domestic courts of general jurisdiction false recitals of service must be reached by a direct proceeding and not by collateral attack.[93]

It is also decided that the sheriff's return as to service and appearance in a record of a foreign court are conclusive and cannot be contradicted by parol.[94]

either in the case or out of it is to be admitted, to contradict the decree, alleging due service of process, that proof must show that the averment could not be true."

88. Harris *v.* McClanahan, 11 Lea (Tenn.) 181. *Examine* Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262; Anthony *v.* Kasey, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277.

89. Merritt *v.* Merritt, 48 N. J. Eq. 1, 21 Atl. 128; Korman *v.* Grand Lodge, 44 Misc. 564, 90 N. Y. Supp. 120; Blyth & F. Co. *v.* Swenson, 15 Utah 345, 49 Pac. 1027; Raub *v.* Otterback, 89 Va. 645, 16 S. E. 933.

90. Handley *v.* Jackson, 31 Or. 552, 50 Pac. 915, 51 Pac. 1008, 65 Am. St. Rep. 839.

91. Visart *v.* Bush, 46 Ark. 153, *holding* that evidence is admissible to show plaintiff's appearance by attorney and the letter's authority to appear before a justice of the peace, where it does not contradict the record but only explains and makes certain what is not apparent from the justices' docket.

Attorney in Fact. — It Not Appearing by the Record whether the sureties appeared by an attorney at law or an attorney in fact, evidence *aliunde* is admissible to show appearance by attorney in fact and to show authority under which he acted and that the power of attorney did authorize confession of judgment. Calwells *v.* Sheilds & Sommerville, 2 Rob. (Va.) 305.

92. Proof That Summons Was Not Actually Served admissible. Stouffer *v.* Beetern, 18 Pa. Co. Ct. 605; Eayrs *v.* Nason, 54 Neb. 143, 74 N. W. 408 (holding that the heirs of a party who had no proper legal notice of the pendency of an action against him, may, in an action to quiet a title derived under the judgment in such action against their ancestor, show that he was in fact not served and had no notice); Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589, holding that the recital in a judgment roll in a foreclosure action that defendant was served with process and appeared therein does not preclude such defendant from showing by parol, in another action, that he was not in fact served in such former action).

Recitals in Tax Judgment to Effect That Summons Was Served can be contradicted by the files if accessible, and when the files in the case are lost their contents can be proved by parol evidence. Eminence L. & M. Co. *v.* Current River L. & C. Co., 187 Mo. 420, 86 S. W. 145.

93. Sadler *v.* Trustees of Prairie Lodge, 59 Miss. 572.

94. May *v.* Jameson, 11 Ark. 368.

Recital in Judgment Roll in Action of Foreclosure of Service of process and appearance of defendant does not preclude him from showing, in an action by him to foreclose a junior mortgage, non-service and non-appearance, and this applies to domestic and foreign judgments and to records of courts, of general as well as of limited jurisdiction. Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589, *reversing* 7 Hun

(C.) Notice. — Extrinsic evidence is inadmissible to contradict a recital in the record that a notice required by law has been given, such record being that of a court of competent jurisdiction.[95] So where the record of a domestic judgment of a court of general jurisdiction is silent as to notice, and the record itself contains nothing contradictory, the presumption exists that the court had jurisdiction and this cannot be contradicted by evidence *aliunde*.[96] Nor is parol evidence admissible to contradict a recital of service by publication of notice.[97] But in some cases it is held that it is competent to show a want of personal service of notice required by law, even though there is recital of such service attached to the record.[98]

(D.) Not to Supply Jurisdiction and Validate. — The necessary facts wanting in a judgment cannot be supplied by parol evidence.[99] And if proceedings show upon their face the want of jurisdiction they cannot in a collateral suit be validated by evidence *dehors* the record.[1] Nor is such evidence admissible to supply a want of jurisdiction where the statutory notices of sale are indispensable and strict proof thereof must appear of record.[2]

25, *distinguishing* Brown *v.* Nichols, 42 N. Y. 26; Denton *v.* Noyes, 86 N. Y. 609. See Woodward *v.* Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519; Hoes *v.* New York, N. H. & H. R. Co., 173 N. Y. 435, 66 N. E. 119.

95. Marrow *v.* Brinkley, 85 Va. 55, 6 S. E. 605.

Where, in Order To Subject Lands to Payment of Debts, upon petition of administrator, there is a finding of the court of the notice required by law, such finding cannot be contradicted by parol evidence. Richards *v.* Skiff, 8 Ohio St. 586.

Where Statute Requires Notice To Quit as a prerequisite to finding defendant guilty in an action of forcible entry and detainer and that the judgment must be on the merits, parol evidence can be given to show the want of service of notice and that judgment was not based upon the merits. Burkholder *v.* Hollicheck (Neb.), 95 N. W. 860.

The Finding of the Court Confirming a Special Assessment for street improvements, that notice was duly given, is like any other judicial decision and cannot be contradicted by parol or other evidence outside the record, unless by an inspection of the whole record a want of jurisdiction is shown. Illinois Cent. R. Co. *v.* People, 189 Ill. 119, 59 N. E. 609.

96. Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803.

97. In Lawler's Heirs *v.* White, 27 Tex. 250, the court said: "The weight of authority seems to establish the proposition, that even when the record is silent on the subject of notice, the judgment of a court of general jurisdiction will support itself, and cannot be collaterally impeached or called in question because of any alleged want of jurisdiction over the parties to the decree."

Record Recital of Publication of Notice That Action Was Commenced cannot be contradicted by extrinsic evidence. Freeman *v.* Thompson, 53 Mo. 183, 192.

98. Weekes *v.* Edwards, 101 Ga. 314, 28 S. E. 853.

99. Anderson *v.* Binford & Murrell, 2 Baxt. (Tenn.) 310.

1. Judgment Void for Want of Service of Process cannot be made valid by parol evidence. Haywood *v.* Collins, 60 Ill. 328.

2. New York Baptist Union *v.* Atwell, 95 Mich. 239, 54 N. W. 760.

Extrinsic Evidence of Facts Necessary To Give Jurisdiction to proceedings of a court of limited juris-

(8.) To Show No Record. — Although parol evidence is inadmissible to contradict a record, such a rule does not exclude the introduction of evidence to show that a writing which purports to be a record is in fact not a record.[3]

(9.) Prior or Contemporaneous Agreements. — Parol evidence of any prior or contemporaneous agreement or understanding of the parties is inadmissible to contradict or vary the judgment or record,[4] or to defeat its obvious effect.[5]

(10.) Particular Matters and Proceedings. — (A.) PLEADINGS. — A pleader's intention is to be ascertained from the pleas on file, and the attorney's testimony to show a different intention is inadmissible;[6] nor can the plaintiff, in an action on a contract contradict by parol the allegations unequivocably appearing on the face of his pleadings in a former action, for the purpose of showing that the contract sued on was not the subject-matter of both suits.[7] But parol evidence of a fact admitted by the pleadings is not prejudicial.[8]

(B.) NON-INTRODUCTION OF PROOF. — A party to a record, where there was a judgment on the merits, cannot show in a collateral proceeding that he introduced no witnesses and was not present in court when the case was tried.[9]

diction may be given. Van Deusen *v.* Sweet, 51 N. Y. 378.

3. Louisville & N. R. Co. *v* Malone, 116 Ala. 600, 22 So. 897, 10 Am. & Eng.. R. Cas. N. S. 878 *citing* Dyer *v.* Brogan, 70 Cal. 136, 11 Pac. 589; 3 Cowen & Hills notes on Phil. on Ev. Chap. 1 n. 550 pp. 317, 797; Starkie on Ev. (9th ed.) § 320, p. 290.

4. Straub *v.* Terre Haute & L. R. Co., 135 Ind. 458, 35 N. E. 504; Rubel *v.* Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033.

Where There Is No Ambiguity in the terms of an assignment of dower, parol evidence is inadmissible to show the understanding of the parties that other and different land was assigned, such evidence having the tendency to contradict and qualify the record. Young *v.* Gregory, 46 Me. 475.

Decree of Divorce cannot be varied or parties rights changed by showing prior contemporaneous agreement. Wilson *v.* Wilson, 45 Cal. 399.

Parol Agreement Between a Person Convicted of Illegal Sale of Intoxicating Liquors and the prosecuting officer that all offenses prior to a certain date should be merged in a conviction on a plea of guilty, is inadmissible. State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

5. Weakley *v.* Gurley's Admr., 60 Ala. 399.

Judgment by Agreement Cannot Be Varied by extrinsic proof of prior or contemporaneous agreement. Straub *v.* Terre Haute & L. R. Co., 135 Ind. 458, 35 N. E. 504.

Independent Agreement To Affect Ownership of judgment may be shown when record not contradicted. Brown *v.* Decker, 21 Hun (N. Y.) 199.

Private Arrangement as to Sale Under Execution may be shown by extrinsic evidence when not inconsistent with record. Flick *v.* Troxsell, 7 Watts & S. (Pa.) 65.

Parol Evidence Is Admissible To Show an Agreement to proceed before a less number of auditors of an account than were appointed by the court. Booth *v.* Tousey, 1 Tyler (Vt.) 407.

6. Seymour *v.* Brainerd, 66 Vt. 320, 29 Atl. 462.

7. Broxton *v.* Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97.

8. Esclich *v.* Mason City & Ft. D. R. Co., 75 Iowa, 443, 39 N W. 700.

9. Hatch *v.* Wayne Circuit Judge,

(C.) Orders of Court. — The general rule excluding parol evidence to vary or contradict a judicial record applies to an order of court.[10]

(D.) Minutes or Docket Entries. — Minutes of the court, where made a part of the record, cannot be enlarged or explained by parol evidence.[11] In such a case minutes as to the day of adjournment cannot be contradicted,[12] nor can an entry on the minutes of an order of rendition of judgment,[13] or of an order dismissing a suit,[14] or granting an appeal.[15] And the effect of the clerk's entry in the docket cannot be changed by parol evidence.[16] But neither the minutes of the court,[17] nor docket entries will be received in evi-

138 Mich. 184, 101 N. W. 228; Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470, *affirming* 23 Jones & S. 308.

That Certain Evidence of Plaintiff Was Not Produced or Discovered cannot be shown. Leech *v.* Armitage, 2 Dall. (U. S.) 125, 1 L. Ed. 316.

Rebutting Presumption. — Upon a plea of former recovery a presumption that matters which could have been introduced as evidence were so introduced is open to rebuttal and parol evidence is admissible to show the period of time for which the plaintiff claimed damages, the plaintiff being entitled to successive rights of action for continuous trespasses; the former controversy was confined to a period not embraced in the present litigation and this was applied to a judgment by default. Williams *v.* Dent Iron Co., 30 Mo. App. 662.

10. Deslonde *v.* Darrington's Heirs, 29 Ala. 92; Heirs of Bishop *v.* Hampton, 15 Ala. 761; Sargent *v.* Evanston, 154 Ill. 268, 40 N. E. 440; Lynch *v.* Kirby, 36 Mich. 238; Ainge *v.* Corby, 70 Mo. 257.

An Order Appointing Receivers being in writing speaks for itself and the judge who signed it cannot give parol evidence as to the grounds on which he entered such order. Blue Mountain I. & S. Co. *v.* Portner, 131 Fed. 57, 65 C. C. A. 295.

The testimony of the judge is not admissible to show real grounds on which he appointed a receiver by a written order. Blue Mountain Iron & S. Co. *v.* Portner, 131 Fed. 57, 65 C. C. A. 295.

11. *Illinois.* — Gillett *v.* Booth, 95 Ill. 183.

Iowa. — State *v.* Little, 42 Iowa 51.

Kentucky. — Handley *v.* Russell, Hard. 145.

Louisiana. — State *v.* Lazarus, 39 La. Ann. 142, 1 So. 361; Mann *v.* Mann, 33 La. Ann. 351; Green *v.* Reagan, 32 La. Ann. 974.

Tennessee. — Brook *v.* Claiborne County, 8 Baxt. 43.

Minutes of Evidence Returned With an Indictment by a grand jury and duly filed are records made conclusive by law and cannot be contradicted or varied by parol proof. State *v.* Miller, 95 Iowa 368, 64 N. W. 288.

Where Docket Entries in an equity case offered in evidence show that an injuncton had been dissolved it cannot be shown by parol that the case abated before dissolution. Burgess *v.* Lloyd, 7 Md. 178.

12. Jones *v.* Williams, 62 Miss. 183.

13. Herron *v.* Walker, 69 Miss. 707, 12 So. 259.

14. Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210, 218, 25 N. E. 788.

15. Weil *v.* Levi, 40 La. Ann. 135, 3 So. 559.

Formalities as to Right of Appeal. Parol evidence is inadmissible to impeach a magistrate's entry upon the matter of formalities as to a right of appeal. Long *v.* Weaver, 52 N. C. 626.

16. Ellis *v.* Madison, 13 Shep. (Me.) 312. See Walker *v.* Smith, 50 Ga. 487, holding that extraneous evidence is inadmissible to show the date of entry, of the filing in the clerk's office of a bill of exceptions, to be erroneous.

17. State *v.* Miller, 95 Iowa 368,

dence for the purpose of contradicting a record made conclusive by law.[18] But where matters relating to a sheriff's return and bond of release appear only by the minute or note of the clerk of the court, it is decided that parol evidence is admissible to support the return.[19]

(E.) Time of Entering Judgment. — In the absence of fraud or collusion a record is generally the only competent evidence as to the time of entering judgments.[20] And a record showing the entry of a judgment prior to the issuance of an execution will be regarded as importing verity and cannot be contradicted by extrinsic evidence; parol evidence is inadmissible to contradict a record and show judgment entered on a day different from that named in the record.[21] But the exact hour of the entry of a judgment may be proven as matters *dehors* the record by competent evidence.[22]

(F.) Recognizance. — It is decided that extrinsic evidence is not admissible to contradict or impeach a record of recognizance,[23] so it cannot be shown that sureties did not acknowledge the recognizance,[24] nor is parol evidence admissible to show that a recognizance was taken by the clerk out of court;[25] so a record of recognizance on granting *audita querela* is conclusive.[26] But it is also held that a certificate of recognizance, being only a ministerial act, it can be contradicted by parol.[27]

(G.) Judicial Sales. — Extrinsic or parol evidence is held inad-

64 N. W. 288; Den *v.* Downam & Cambloss, 13 N. J. L. 135.

A Vacatur not enrolled but being only an entry on the court's minutes cannot be received to contradict the enrollment of a judgment. Crosswell *v.* Byrnes, 9 Johns. (N. Y.) 287.

18. Willard *v.* Whitney, 49 Me. 235; Southgate *v.* Burnham, 1 Greenl. (Me.) 369; Mandeville *v.* Stockett, 28 Miss. 398.

Evidence That a Docket Entry Has Been Erased cannot be received to contradict court records when once extended. Willard *v.* Whitney, 49 Me. 235.

19. Ware & Son *v.* Wilson, 22 La. Ann. 102.

20. MacVeagh *v.* Locke, 23 Ill. App. 606.

21. Dillman *v.* Nadelhoffer, 23 Ill. App. 168.

Extrinsic Evidence Inadmissible To Show That Order Judgment or Decree was entered on different day from that stated in record (Steinbarger *v.* Steinbarger, 19 Ohio 106. See also Wiley *v.* Southerland, 41 Ill. 25; Buck *v.* Holt, 74 Iowa 294, 37 N. W. 377); or to show that no such judgment as that set out in the record had been rendered and that judgment had not been signed forthwith, where no time prescribed by law for entry thereof (Den *v.* Downam, 13 N. J. L. 135); or to show that no judgment was pronounced where record shows to the contrary. Nolan *v.* Babin, 12 Rob. (La.) 531. And an averment in writ of error contrary to record is not admissible to show that judgment was not entered up at time stated. Bush *v.* Byvanks, 2 Root (Conn.) 248.

22. Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850.

23. Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447; Sewall *v.* Sullivan, 108 Mass. 355; Hinman *v.* Swift, 18 Vt. 315.

24. McMicken *v.* Com., 58 Pa. St. 213.

25. Douglas *v.* Wickwire, 19 Conn. 489.

26. Beech *v.* Rich, 13 Vt. 595.

27. Gregory *v.* Sherman, 44 Conn. 466. *Examine* Kirkland *v.* Candler, 114 Ga. 739, 40 S. E. 734.

missible in a collateral proceeding to contradict, impeach or vary the record of a judicial sale.[28] But it is also decided that parol or extrinsic evidence is admissible where it does not tend to impeach or dispute the court's judicial action;[29] and such evidence is admissible for the purpose of identification;[30] but it being presumed that the record shows all steps taken in connection with a sale, parol will not be received to supply the silence of the record as to certain necessary proceedings.[31]

(H.) OFFICER'S RETURN. — (a.) *When Extrinsic Evidence Inadmissible.* Generally an officer's return, as between parties and privies, is conclusive and cannot be collaterally impeached or contradicted by extrinsic evidence.[32] And especially so as against third persons

28. An Order of Sale authorizing an administrator to sell land as shown by the records and the proceeding in connection therewith cannot be varied by evidence showing that other land than that which is clearly described was intended to be sold. Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877. Myers *v.* Lindsay, 5 Lea (Tenn.) 331, *holding* that where an order of sale for partition is made by a commissioner appointed to make sale and the report is confirmed showing a sale by the acre, it cannot be contradicted by parol. See Ackerman *v.* Peters, 113 La. 156, 36 So. 923.

Answers of a Party to Interrogatories in Open Court, on facts and articles, relative to a verbal sale alleged to have been made by him of immovable property which negatived such a sale, cannot be contradicted by parol evidence. Wright-Blodgett Co. Ltd. *v.* Elms, 106 La. 150, 30 So. 311.

Title to Real Estate. — Parol evidence though admissible to support an adjudication made is not admissible to contradict or alter its legal results as flowing from its recitals by substituting as adjudicata of property another person than the one to whom the property was ajudicated, as appears from the proceedings. Gaudet *v.* Dumoulin, 49 La. Ann. 984, 22 So. 622.

That Certain Property Was Not Intended To Be Conveyed to the Adjudicata and that he was but a person interposed and not the real purchaser and merely held the naked title for conveyance to another, cannot, in the absence of fraud or error, be shown by parol to contradict an authentic sale made of a lunatic's property under regular and valid proceedings by order of a competent court. McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65.

29. Where there is a decretal sale of land and the finding shows that the land was struck off to a certain party and transferred to another by a writing, proof on this question is admissible as it does not tend to impeach the judgment of confirmation or dispute the judicial action of the court. Bagby *v.* Warren Deposit Bk., 20 Ky. L. Rep. 1357, 49 S. W. 177.

30. A party summoned to answer in supplementary proceedings, as to his indebtedness to a judgment debtor, may, in a subsequent action against him on such debt show by parol proof a mistake in describing such debt in said supplementary proceedings. Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378.

31. Where a Sale for City Taxes has by law the force of a sale under execution by the court, and the statute requires certain proceedings, parol evidence is inadmissible to show that they were had in order to correct and sanction the assessment where the record is silent in regard thereto. Parker *v.* Doe *ex dem.* Burgen & Pearsall, 20 Ala. 251.

32. Craven *v.* Higginbotham, 83 Ala. 429, 3 So. 777; State *ex rel.* Danforth *v.* Ruff, 6 Ind. App. 38, 33 N. E. 124; Simmons *v.* Richards, 171 Mass. 281, 50 N. E. 617; Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373. See Salina Nat. Bk. *v.* Prescott, 60 Kan. 490, 57 Pac. 121, 10 Am.

who have acquired rights under judgment of the court.[33] The general rule has been applied to preclude evidence falsifying a return as to service of summons, in the absence of deception;[34] varying a return on attachment of property;[35] contradicting a marshal's return as to the seizure of a vessel;[36] contradicting return on a levy of execution,[37] contradicting a sheriff's deed and his entry on *fieri facias;*[38] showing time when a stay-bond was filed[39] in order to overcome the plea that the action is barred by limitations,[40] and to preclude the contradiction or variance of an officer's return in an action against a surety on a poor debtor's recognizance.[41]

& Eng. Corp. Cas. N. S. 696, *reversing* 53 Pac. 769; Cox *v.* Patten (Tex. Civ. App.), 66 S. W. 64.

33. Rivard *v.* Gardner, 39 Ill. 125.

34. Ramsburg *v.* Kline, 96 Va. 465, 31 S. E. 608, 4 Va. Law Reg. 584.

35. Schneider *v.* Ferguson, 77 Tex. 572, 14 S. W. 154.

Cannot Show That More Goods Attached than apparent on officer's return. Matthews *v.* Boydstun (Tex. Civ. App.), 31 S. W. 814.

36. The Lindrup, 70 Fed. 718.

37. Dillman *v.* Nadelhoffer, 23 Ill. App. 168, *holding* that validity of execution cannot be established by parol contrary to record.

Sheriff's Return to Writ of Execution Is Part of Record and cannot be contradicted by parol. Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

In Levy of Execution on Land in Order to Transfer Title there must appear of record a substantial compliance with the statutory requirements and if it does not so appear the defect cannot be supplied by parol proof. Munroe *v.* Reding, 15 Me. 153. See Carroll *v.* Miner, 1 Super. Ct. (Pa.) 439, 38 W. N. C. 196.

Plaintiff Who Had Recognized for Appearance of One Arrested on Execution, if injured by officer's false return, may have an action against the officer for a false return. Simmons *v.* Richards, 171 Mass. 281, 50 N. E. 617.

Levy. — Appraiser's Estimates. Unless apparent on the appraisement or officers return, parol evidence is not admissible to show that appraisers on execution, in estimating the value of the land made deductions on account of a supposed defect of title. (Tibbets *v.* Merril, 12 Me. 122. See to substantially the same point Boody *v.* York, 8 Me. 272). Nor is extrinsic evidence admissible to show error in estimates or an over estimate of value of certain interests (Fletcher *v.* State Capitol Bk., 37 N. H. 369, 400).

38. Parler (Porter) *v.* Johnson, 81 Ga. 254, 7 S. E. 317, *holding* that sheriff's deed and his entry upon *fieri facias* cannot be overcome by testimony of a single witness even though such entry was made after twenty years.

39. Maynes *v.* Brockway, 55 Iowa 457, 8 N. W. 317, *holding* that parol evidence is inadmisible to show that a stay-bond was not filed at the time stated by the records where the statute requires such bond to be recorded and indexed as in case of other judgments.

40. In Order To Prevent Action Being Barred, Sheriff's Return cannot be impeached by evidence of his negligence or default. Johnson *v.* Mead, 73 Mich. 326, 41 N. W. 487. But *compare* Johnson *v.* Turnell, 113 Wis. 468, 89 N. W. 515.

41. In an action against a surety on a prior debtor's recognizance the officer's return is conclusive as between the parties and their privies that the debtor was duly arrested and duly admitted to bail, and evidence contradicting such return, as where it is attempted to show an escape, is inadmissible. If any remedy exists it must be in an action against the officer for a false return. Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46. See also Speirs Fish Co. *v.* Robbins, 182 Mass. 128, 65 N. E. 25; Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447.

(b.) *When Extrinsic Evidence Admissible.* — It is held that an officer's return is only *prima facie* evidence as to persons not parties or privies,[42] and that extrinsic evidence even in a collateral proceeding, and as between either parties or strangers, is admissible to support the return;[43] to aid in establishing it;[44] to aid it when ambiguous;[45] to apply an ambiguous description;[46] to supplement the return and supply omitted facts,[47] or deficiencies,[48] where the record is silent;[49] to prove manner of sale where record is silent;[50] to supply a jurat absent in the return;[51] to explain the record[52]

42. Phillips *v.* Elwell, 14 Ohio St. 240, 84 Am. Dec. 373. See New York Stamping Co. *v.* Goldberg (Ill. Super. Ct.) 9 Nat. Corp. Rep. 146, 27 Chicago Leg. News, 67; State *ex rel.* Clement *v.* Rainey (Mo. App.), 73 S. W. 250; Dowell *v.* Goodwin, 22 R. I. 287, 47 Atl. 693, 51 L. R. A. 872, 84 Am. St. Rep. 873.

43. Where the sheriff's return, on a writ of sequestration to which a bond for release of property under seizure is attached, appears only by the minute or note of the clerk of the court, and does not show that the property was released, but on the contrary shows that a keeper thereof was appointed, and makes no mention of a bond of release, in a suit to make the sheriff liable on such bond, it is competent for him, upon such return and upon his answer, to introduce parol evidence that he never parted with possession of the property but still held it by virtue of the writ; such evidence does not contradict but supports the return; and he may be permitted to show how the bond made its appearance among the papers of the suit or was attached to the writ, the return on which, and not the recitals of the bond, must control. Ware & Son *v.* Wilson, 22 La. Ann. 102.

44. Extrinsic evidence is admissible to aid in establishing return of a levy which does not sufficiently describe the goods seized by showing that a paper referred to by the sheriff in his return had become detached from the original, especially so when the contents are not sought to be proven. Wilson *v.* Stricker & Co., 66 Ga. 575.

45. Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

46. Wildasin *v.* Bare, 171 Pa. St. 387, 33 Atl. 365.

47. Brusie *v.* Gates, 80 Cal. 462, 22 Pac. 284, *holding* that extrinsic evidence is admissible to supply omitted facts to supplement officer's return, where there is only a general certificate of attachment and statements insufficient to make a valid attachment under the statute, where such evidence does not vary or contradict the return but the parol evidence in such case must be clear and satisfactory.

Omission of Any Material Part by Mistake, of an Inquisition upon a judgment and *fieri facias* may be corrected by parol evidence, such inquisition being a matter *in pais.* Hale *v.* Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289.

48. Smith *v.* DeKock, 81 Iowa 535, 46 N. W. 1056, *holding* extrinsic evidence admissible to supply deficiencies in sheriff's return of land sold on execution to show order in which different parcels were offered for sale.

49. Extrinsic evidence is admissible to prove facts as to which an officer's return or execution is silent where it does not contradict the return. Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

50. Gelstrop *v.* Moore, 26 Miss. 206, 59 Am. Dec. 254, *holding* that parol or extrinsic evidence is admissible to prove manner of sale of personalty of deceased under order of sale where record is silent as to notice or manner of sale.

51. Lake Winola Assn. *v.* Mott, 1 Super. Ct. (Pa.) 304.

52. Shoemaker *v.* Ballard, 15 Pa. St. 92.

Admissible To Show Number of Tax Certificates Sold on execution,

where the same is ambiguous,[53] or there are seeming contradictions;[54] to rebut legal presumptions;[55] to impeach return of service of summons;[56] to impeach such return either in a proceeding in equity for relief from the judgment in the action in which such return was made, or in a collateral proceeding in equity;[57] to contradict a sheriff's receipt of payment;[58] to show what property was attached,[59] or not attached;[60] to establish a settlement and discharge of an attachment;[61] to show the true date;[62] that execution was antedated;[63] or the time when an inquisition on *fieri facias* was held;[64] or an apparent discrepancy between the date and notice of

what they sold for and their actual value, to explain officer's return. Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

53. Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

54. Carroll *v.* Miner, 1 Super. Ct. (Pa.) 439, 38 W. N. C. 194.

55. Legal presumptions arising from a record or sheriff's return may be rebutted by parol proof and such evidence is excluded only when it directly tends to contradict a fact found by the record or stated in the return. Jordan *v.* Minster, 5 Pa. L. J. 542.

56. Schnack *v.* Boyd, 59 Kan. 275, 52 Pac. 874.

Upon a Defense of the Bar of the Statute of Limitations where the actual fact whether a summons was delivered to the officer is the material thing, such fact, as regards the time when the action was commenced or attempted to be commenced, may be established by parol evidence. Johnson *v.* Turnell, 113 Wis. 468, 89 N. W. 515. But *compare* Johnson *v.* Mead, 73 Mich. 326, 41 N. W. 487.

57. May Be Impeached in Equity. "Parol evidence cannot be submitted to contradict the court record, for so long as it remains, it is conclusive upon the parties, and in order to change it some appropriate proceeding acting directly upon the record must be instituted. It is to be observed, however, that the rule as thus laid down in the cases relied on applies to common law actions. . . . . Can a court of equity ever interfere and grant relief by way of permitting the record of a common law court to be impeached as to the officer's return on the writ, or as to any other part of the record? We think this question must be answered in the affirmative." Dowell *v.* Goodwin, 22 R. I. 287, 47 Atl. 693, 84 Am. St. Rep. 842, 51 L. R. A. 873, (*holding* that officers' return might be contradicted in a bill for relief from a judgment) *quoted* in Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635, where relief was granted in equity permitting record of a common law court to be impeached for want of jurisdiction.

58. Clossen *v.* Whitney, 39 Minn. 50, 38 N. W. 759, *holding* that although a sheriff's report shows a receipt of money and payment over thereof still it may be shown by parol that no money was paid by the judgment creditor but that the amount of his bid for part of the property was applied on the judgment.

59. Whiteside *v.* Lowney, 171 Mass. 431, 50 N. E. 931, *holding* that parol evidence is admissible to show that certain goods were in fact attached though the return does not enumerate them. See also Carpenter *v.* Scott, 86 Iowa 563, 53 N. W. 328.

60. Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475.

61. Melhop *v.* Seaton, 77 Iowa 151, 41 N. W. 600.

62. Macomber *v.* Wright, 108 Mich. 109, 65 N. W. 610.

Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650.

63. Sprinz *v.* Heyman, 81 Ga. 162, 7 S. E. 177; Welch *v.* Butler, 24 Ga. 445.

64. When there is a blank left in the inquisition the time when such inquisition on a *fieri facias* was held may be shown by parol evidence.

sale;[65] to show actual levy, sale, and purchase, notwithstanding recitals in deed;[66] to impeach recitals of certificate of redemption;[67] to show a previous levy was not productive,[68] and a demand of other property.[69]

(I.) Transcript. — A transcript of an official record duly authenticated cannot be invalidated by the testimony of the clerk of the court.[70] So deficiencies in a transcript of record certified by the clerk of a probate court as a full and complete copy of all orders and decrees cannot be contradicted by parol evidence of the clerk that it is incomplete.[71]

(11.) Probate and Like Courts. — (A.) General Rule — Ordinarily In the absence of matter in the record itself to the contrary, a conclusive presumption exists in favor of the conclusiveness of the records of a court of probate jurisdiction and extrinsic evidence is inadmissible to contradict them.[72]

Thomas *v.* Wright, 9 Serg. & R. (Pa.) 87.

Upon an execution, where an appraiser was chosen by the debtor, who died before the appraisers were sworn, parol evidence is admissible to avoid the extending of an execution on real estate; and the officer's return or execution is conclusive; it is not evidence of the time of the decease of the judgment debtor which is a fact that may be proved *in pais*. Allen *v.* Portland Stage Co., 8 Me. 207.

65. Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 541, 40 U. S. App. 427. Such evidence did not impeach any matter of record, it explained an apparent discrepancy between the date of notice of sale appended to return and the date of the first issue of the paper in which the notice of sale was published.

66. Phillips's Heirs *v.* Jamison, 14 B. Mon. (Ky.) 579.

67. Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

68. Perryman *v.* Morgan, 103 Ga. 555, 29 S. E. 708.

69. Where a *vendi exponas* commanded the sale of certain specified property, parol proof of the demand of other property than that named in the writ is competent; it being proof of an extrinsic fact not required to be made part of the return of the officer, and not an attempt to enlarge the return by parol. Darling *v.* Peck, 15 Ohio 65.

70. Shirley *v.* Fearne, 33 Miss. 653, 667, 69 Am. Dec. 375; Mandeville *v.* Stockett, 28 Miss. 398, 408.

71. Carroll *v.* Pathkiller, 3 Port. (Ala.) 279.

72. *Louisiana.* Wood *v.* Harrell, 14 La. Ann. 61.

Minnesota. — Dayton *v.* Mintzer, 22 Minn. 393.

Mississippi. — McFarlane *v.* Randle, 41 Miss. 411.

Missouri. — Lamothe *v.* Lippott, 40 Mo. 142.

New York. — Matter of Sanford, 100 App. Div. 479, *s. c.* (under title, *In re* Morris), 91 N. Y. Supp. 706.

Ohio. — Shroyer *v.* Richmond & Staley, 16 Ohio St. 455.

Pennsylvania. — Leedom *v.* Lombaert, 80 Pa. St. 381.

Texas. — Dickson *v.* Moore, 9 Tex. Civ. App 514, 30 S. W. 76.

In Alabama, "The jurisdiction of probate courts of the subject-matter of the grant of administration is derived from the constitution and not from the statutes. The latter merely designate the particular cases in which the courts have authority to grant administration in their respective counties. Hence in this respect the jurisdiction of these courts is original, unlimited and general, and being such, their orders and decrees granting administration are entitled to the same presumptions, when collaterally assailed, as are extended to the decrees of other courts of general and unlimited jurisdiction. Whatever, within the jurisdiction has been done will be presumed

(B.) When Extrinsic Evidence Admissible. — In the matter of records of courts of probate jurisdiction extrinsic evidence is held admissible to apply a judgment to its subject-matter;[73] to remove uncertainty as to items omitted in a judgment;[74] to show that cer-

rightfully done until the contrary is shown, and facts necessary to give the court jurisdiction to grant the administration, and which must have been ascertained by the court to exist, will be conclusively presumed on collateral attack, to have been ascertained, unless the record itself affirmatively discloses the contrary." Beasley *v.* Howell, 117 Ala. 499, 22 So. 989, *citing* Kling *v.* Connell, 105 Ala. 590, 17 So. 121, 53 Am. St. Rep. 144; Barclift *v.* Treece, 77 Ala. 528; Burnett *v.* Nesmith, 62 Ala. 261; Broughton *v.* Bradley, 34 Ala. 694, 73 Am. Dec. 474; Ikelheimer *v.* Chapman's Admr., 32 Ala. 676.

In a Suit Against an Administrator he will not be permitted to contradict the record of the grant of administration by him, by proving that the bond required by law was not executed until afterwards and that the official oath was not then administered. Eslava *v.* Elliott, 5 Ala. 264, 39 Am. Dec. 326.

Parol Evidence Offered To Contradict Recitals in orders and entries made during the progress of a cause in such court, is inadmissible. Deslonde & James *v.* Darrington's Heirs, 29 Ala. 92.

Order Settling an Executrix's Account and Allowing a Claim, is conclusive against all except those under disability and cannot be impeached or contradicted by parol evidence. *In re* Couts, 100 Cal. 400, 34 Pac. 865.

Decree of Assignment of Dower cannot be questioned or contradicted by parol evidence on a writ of dower afterwards brought, where the proceedings in the probate court are regular. Fuller *v.* Rust, 153 Mass. 46, 26 N. E. 410.

Appointment and Appearance of Guardian. — Defect in Jurisdiction of court which appears of record cannot be cured or supplied by facts resting in parol. This applies to records of probate courts in matter of settlement of guardian's account which fail to show the appointment and appearance of a guardian *ad litem* for the ward. Hutton *v.* Williams, 60 Ala. 133.

That There Was No Hearing or Witnesses Cannot be shown contrary to recitals in probate record. Gallup *v.* Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353.

When a Petition for Seizure and Sale of Mortgaged Property of a Deceased person was filed in a United States Circuit Court against the executor, if no objection was made to the jurisdiction on the ground of residence of the parties alleged to be citizens of different states, a curator appointed in place of the executor cannot, as against a third person, a purchaser at the sale, raise such objection in a state court or introduce evidence *dehors* the record to show that the United States court had no jurisdiction. Erwin *v.* Lowry, 7 How. (U. S.) 172.

Judgment of probate court erroneously allowing claims cannot be collaterally attacked. Covington *v.* Chamblin, 156 Mo. 574, 57 S. W. 728.

A decree of a probate judge, granting leave to bring an action upon the administrator's bond, and dated prior to commencement of such action, cannot be shown by parol in such action not to have been written up until after commencement of such action. Richardson *v.* Hazelton, 101 Mass. 108.

73. Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767, *holding* that where by the judgment of a court of ordinary it appears in general terms that the whole of defendant's property was set aside to the widow and child any competent evidence is admissible to apply the judgment to its subject-matter.

74. Where a judgment is general and the record does not show that any of the items of distinct claims against an estate, not presented as a single claim, was dismissed or withdrawn parol evidence is admissi-

tain items were not considered in adjudicating a claim;[75] whether a certain fund belongs to an estate;[76] that a grant of administration is valid, on estate of one dying without the state;[77] non-investigation of merits of disallowed claim;[78] to establish the invalidity of a will admitted to probate;[79] that, notwithstanding confirmation of accounts, an executor agreed to exonerate the estate from payment of counsel fees;[80] or to show want of notice to heirs in probating paper as a will.[81] An absolute want of jurisdiction of the court to render such a decree may be shown by extrinsic evidence in a collateral proceeding.[82]

(12.) Courts of Justices of the Peace. — (A.) RULE. — Where the record of a justice of the peace shows jurisdiction of the person and the subject-matter, and the essential proceedings had, it cannot be impeached or contradicted or varied by parol or extrinsic evidence.[83]

ble to show that one of such items was not considered by the court but was withdrawn before judgment, as such evidence does not contradict the record. Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390.

75. Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390.

76. Pattison *v.* Coons, 56 Mo. 169.

77. Where a person dies without the commonwealth and letters of administration have been granted, in any county, on his estate it may be shown by parol that deceased left estate within such county and so the grant of administration was valid even though no such estate was included in the inventory exhibited to the judge. Harrington *v.* Brown, 5 Pick. (Mass.) 519.

78. Snorgrass *v.* Moore, 30 Mo. App. 232.

79. Under Florida statutes the probate of a will is only *prima facie* evidence of its validity so far as it extends to real property and parol evidence will be received to show that it was revoked by the testator's subsequent marriage. Belton *v.* Summers, 31 Fla. 139, 12 So. 371, 21 L. R. A. 146.

80. Reilly, McGlatherty *v.* Daly, 2 Super. Ct. (Pa.) 540.

81. Medlock *v.* Merritt, 102 Ga. 212, 29 S. E. 185.

82. Absolute want of jurisdiction of a probate court to grant letters may be shown on collateral attack. Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

Notwithstanding the conclusive presumption in favor of the existence of facts sufficient to give a probate court "jurisdiction, it is not conclusive as to the non-existence of facts which are not necessarily involved in the determination by the court granting the administration, of the question of its jurisdiction to grant the same, and which if they existed, would exclude the jurisdiction of the court to grant the administration in a particular case, and render its act a nullity. Where the record is silent as to such facts, —and in ordinary cases it is silent,— their existence may be proven, even on a collateral attack, for the purpose of showing an entire want of jurisdiction, and thereby impeaching the validity of the grant." Beasley *v.* Howell, 117 Ala. 499, 22 So. 989.

83. *Alabama.* — *Ex parte* Davis, 95 Ala. 9.

Connecticut. — Douglass *v.* Wickwire, 19 Conn. 489.

Illinois. — Garfield *v.* Douglass, 22 Ill. 100, 74 Am. Dec. 137 and note; Saterlee *v.* Hickman, 38 Ill. App. 139.

Maine. — Dolloff *v.* Hartwell, 38 Me. 54; Carey *v.* Osgood, 18 Me. 152.

Massachusetts. — May *v.* Hammond, 146 Mass. 439, 15 N. E. 925.

Missouri. — Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052; Cooksey *v.* Kansas City, St. J. & C. B. R. Co., 74 Mo. 477.

New York. — Smith *v.* Compton, 20 Barb. 262.

North Carolina. — Jones *v.* Judkins, 20 N. C. 454.

(B.) Statutory Requirements. — Ordinarily where the statute requires a record to be kept by a justice it cannot be impeached,[84] but where the docket is silent in regard thereto, it may be shown by parol that certain proceedings were had which the justice omitted to enter.[85]

(C.) As to Particular Matters. — (a.) *Jurisdiction.* — Extrinsic or parol evidence is held inadmissible to impeach or destroy the jurisdiction when sufficiently apparent upon the face of the proceedings of a justice;[86] but it is also decided that there is no presumption favoring jurisdiction of courts of inferior and statutory jurisdiction, and that the findings of such courts are only *prima facie* proof of the facts found and may be disproved by parol evidence,[87] even when such evidence tends to contradict the minutes or record.[88]

(b.) *Service of Process and Appearance.* — Extrinsic evidence is not admissible to show non-service of process contrary to the recitals

Ohio. — Herig *v.* Nongaret, 7 Ohio St. 480.

Pennsylvania. — Gardner *v.* Davis, 15 Pa. St. 41; Coffman *v.* Hampton, 2 Watts & S. 377. 37 Am. Dec. 511.

Tennessee. — Witt *v.* Russey, 10 Humph. 208, 51 Am. Dec. 701.

Texas. — Irion *v.* Bexar County, 26 Tex. Civ. App. 527, 63 S. W. 550.

Vermont. — Owen *v.* State, 55 Vt. 47; Eastman & Paige *v.* Waterman, 26 Vt. 494; Spaulding *v.* Chamberlin, 12 Vt. 538, 36 Am. Dec. 358.

Justice's Record Conclusive Where It Shows trial, testimony, judgment and sentence. *In re* Macke, 31 Kan. 54, 1 Pac. 785.

Mistake in Name. — It cannot be proved by parol that a judgment of a justice of the peace was entered by mistake in a wrong name. Gates *v.* Bennett, 33 Ark. 475.

As to Mistakes see further IV, 1, C, f., *infra.*

Not Exclusive. — "If it ought to be entered in the docket, other evidence could be heard to prove it, where the docket is silent. Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

84. Gardner *v.* Davis, 15 Pa. St. 41.

Applied in case of docket entries, Clark *v.* Holmes, 1 Dougl. (Mich.) 390; Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052.

85. Where a Justice's Docket Is Only Primary Evidence, Omissions of the justice in making the requisite entries may be supplied from other sources when necessary. Blair *v.* Hamilton, 32 Cal. 49.

86. People *v.* Haas, 79 Mich. 449, 44 N. W. 928, applying this rule to the issuance of a warrant based upon a written complaint showing jurisdiction. See also Ritter *v.* Keller (Pa. C. P.) 2 Pa. Dist. R. 519, 12 Pa. Co. Ct. 239.

Justice's Judgment in Criminal Case which shows jurisdiction and is regular on its face cannot on *habeas corpus* be contradicted by parol evidence showing that it was rendered by the justice outside of his own precinct and subsequently entered by him on his docket. *Ex parte* Davis, 95 Ala. 9, 11 So. 308.

87. Sears *v.* Terry, 26 Conn. 273. See Stouffer *v.* Beetem, 18 Pa. Co. Ct. 605; Baker *v.* Thompson & Sons, 89 Ga. 486, 15 S. E. 644.

Affirmative Recitals of a justice's jurisdiction are only *prima facie* evidence. Visart *v.* Bush, 46 Ark. 153.

Recital of necessary jurisdictional facts, in contempt commitment by justice of the peace does not preclude on *habeas corpus,* an inquiry into court's jurisdiction. People *v.* Cassells, 5 Hill (N. Y.) 164.

A party may so far contradict a record of conviction of a justice of the peace or court of inferior jurisdiction, as to prove that the court had no jurisdiction of the offence or of the person. People *v.* Powers, 7 Barb. (N. Y.) 462.

88. Clark *v.* Holmes, 1 Dougl. (Mich.) 390.

in the record of a justice of the peace.[89] And where such justice finds and enters facts of personal appearance and pleading in a case, they cannot be disproved where the docket also shows regular proceedings to judgment.[90]

(c.) *Notice.* — Where a record of a justice is legally sufficient to show jurisdiction, parol evidence to impeach and contradict the record by showing that there had been no service of notice of the time set for trial is not admissible on *certiorari*.[91] But it has been held that parol evidence is admissible in a direct or a collateral proceeding to contradict the record of a justice by showing that the defendant against whom the justice had rendered judgment had no notice of the action.[92]

(D.) To Validate. — Where a judgment in court of a justice of the peace is void for irregularities oral evidence is incompetent to give validity to the record by showing a different state of facts from that disclosed by the record.[93] So jurisdiction not apparent on the face of the judgment cannot be shown on *certiorari* by parol evidence in contradiction of the record.[94]

(E.) Qualifications and Exceptions. — (a.) *Generally.* — A judgment of a justice of the peace may be explained by evidence showing upon which one of two defenses it is based,[95] and parol evidence is held admissible to explain entries in the docket of a justice.[96]

(b.) *Where Record Is Silent.* — It is held that where the record is silent on the subject, jurisdiction will not be conclusively presumed, and extrinsic evidence will be heard to contradict the records of courts of justices of the peace, and show that there was in

89. Payne *v.* Taylor, 34 Ill. App. 491.

Jones *v.* Judkins, 20 N. C. (4 Dev. & B. L.) 454, 34 Am. Dec. 302, *holding* that record cannot be impeached by evidence that warrant not served and that constable's character was bad and he was not to be trusted.

Judgment of Justice of Peace Cannot Be Impeached in a collateral proceeding by showing that warrant was not served. Lightsey *v.* Harris, 20 Ala. 409.

90. Facey *v.* Fuller, 13 Mich. 527.

Record of justice of the peace cannot be contradicted by evidence to show an appearance when record shows default of appearance. Douglass *v.* Wickwire, 19 Conn. 489.

91. City of Los Angeles *v.* Young, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234.

92. Salladay *v.* Bainhill, 29 Iowa 555.

Upon petition brought under a statute, to set aside a judgment of a justice of the peace, parol evidence is admissible to disprove notice to defendant, notwithstanding the justice certified that notice of the pendency of the suit was given. Mosseaux *v.* Brigham, 19 Vt. 457.

Want of Notice May Be Shown in a direct proceeding to question jurisdiction. Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302.

93. Pfeiffer *v.* McCullough, 115 Ill. App. 251.

Irregularity of Proceedings Before justice of the peace to assail title acquired cannot be shown by extrinsic evidence. Murray *v.* Laften, 15 Mo. 621.

94. Holmes *v.* Cole, 95 Mich. 272, 54 N. W. 761.

95. Humpfner *v.* Osborne & Co., 2 S. D. 310, 50 N. W. 88.

96. Damm *v.* Gow, 88 Mich. 99, 50 N. W. 140. See *contra* on *certiorari* Evans *v.* Brobst, 12 Lanc. L. Rev. (Pa. C. P.) 278.

fact no jurisdiction.[97] But on the other hand it has also been decided that jurisdiction of a justice may be proved by extrinsic evidence where the record is silent.[98]

(F.) Date. — Parol evidence is held inadmissible to contradict the record as to the date of entry of a judgment of a justice.[99] And a like rule has been held applied to an order taxing costs.[1] But it is also decided that the true time when the record was made can be proven.[2] So a mistake in the entry of a justice's judgment, and the time when it was in fact rendered may be shown by extrinsic evidence.[3]

An affidavit may be received to show that the actual date of trial was prior to that stated on the docket entry and that the decision was actually rendered on the day specified.[4]

(G.) Effect of Certificate. — It is held that parol evidence is inadmissible to contradict a certificate of a justice of the peace as to proceedings in a case before him,[5] although a justice of the peace may explain under what circumstances he certified a notarial certificate, even though the credit of the certificate be impaired thereby.[6]

(H.) Appeal. — Whether a judgment rendered by a justice of the peace has been appealed from, cannot be shown by parol evidence but must be ascertained by the record,[7] and such record is

97. Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803. See also Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

98. Liss *v.* Wilcoxen, 2 Colo. 7.

99. Irion *v.* Bexar County, 20 Tex. Civ. App. 527, 63 S. W. 550.

Docket Entry of Time of Rendition of Such Judgment cannot be contradicted by return. Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 905.

Jurisdiction. — Docket entry of justice, of date when judgment was rendered cannot be changed by his return to a writ of *certiorari* so as to show a different date and erroneous entry on the docket, and that he was, on the day named, beyond his jurisdiction. A justice of the peace cannot change his docket for the purpose of taking away or conferring jurisdiction. Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302, a direct proceeding to question jurisdiction.

1. An order taxing costs must be made in writing as an official duty of a justice of the peace and such written order or entry constitutes a part of the files in the case and is the only competent evidence of the date when made, the records not being silent. State to use of Wheless *v.* Stinebaker, 90 Mo. App. 280.

2. Morton *v.* Edwin, 19 Vt. 77, *holding* that parol evidence is admissible to show the true time when the record of a justice of the peace was made; his certificate of the time when an execution and return of levy of execution was recorded in the office being only *prima facie* evidence.

Baker *v.* Thompson & Sons, 89 Ga. 486, 15 S. E. 644.

3. Raum *v.* Eyermann, 2 Mo. App. 476.

4. Wilkinson *v.* Carter, 22 Neb. 186, 34 N. W. 351.

5. M'Lean *v.* Hugarin, 13 Johns. (N. Y.) 184.

A Certificate of Conviction by a justice of the peace in the statutory form and legally filed cannot be contradicted by parol evidence showing no trial or conviction. People *v.* Powers, 7 Barb. (N. Y.) 462.

Justice's Certificate as to Examination of a Poor Debtor prior to taking the oath is conclusive and cannot be contradicted by parol evidence. Burnham *v.* Howe, 23 Me. 489.

6. Wood *v.* American Life Ins. Co., 7 How. (Miss.) 609.

7. Gammon *v.* Chandler, 30 Me. 152.

conclusive evidence in an action against the justice for refusing an appeal where it is silent as to an appeal being taken.[8] And duly authenticated copies of the record on appeal from a justice of the peace cannot be explained or contradicted by extrinsic evidence.[9]

Errors in fact not affecting the merits and not within the knowledge of the justice may be determined upon affidavits, so that to show no jurisdiction, the affidavit of a defendant showing the residence of the parties is competent.[10]

(13.) Police Court Records. — It is decided that police court records cannot be contradicted by parol testimony.[11]

(14.) Inquisitions in Lunacy. — As to whether or not the records of inquisition in lunacy fall within the rule and are conclusive as against collateral attack, the authorities are in conflict.[12]

(15.) Condemnation Proceedings. — Where the record in a condemnation suit shows upon its face the cause of action, the matters litigated and the judgment of the court, it is conclusive as to parties and cannot be impeached or contradicted by parol evidence,[13] although extrinsic evidence may be admissible as an aid in applying

8. Wells *v.* Stevens, 2 Gray (Mass.) 115.

9. Holden *v.* Barrows, 39 Me. 135; Young *v.* Conklin, 23 N. Y. Supp. 993, 3 Misc. 122. The court said: "The return made by a justice is the record of the evidence and the proceedings in the court below and being an official act it is held to be conclusive. 2 Wait, Law & Pr. 805. The operation of this rule is to exclude all extrinsic evidence which may be offered for the purpose of contradicting the facts stated in it. 2 Wait, Law & Pr. 805.

10. Larocque *v.* Harvey, 57 Hun 366, 10 N. Y. Supp. 576, 32 N. Y. St. 415.

11. Tufts *v.* Hancox, 171 Mass. 148, 50 N. E. 459; Com. *v.* O'Brien, 152 Mass. 495, 25 N. E. 834.

12. Inquisitions of Lunacy. The record of the selectmen, they being required to keep a record of their proceedings in inquisitions of lunacy, are those of a judicial tribunal and such record cannot be impeached by parol evidence. Eastport *v.* Belfast, 40 Me. 262.

An Inquisition in Lunacy is not conclusive against any person not a party to it, and the party against whom the inquisition is used in evidence may controvert the same by proof in contradiction thereof. Den *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417.

13. Record of Condemnation Suit which shows cause of action, the matters litigated, and the judgment rendered, cannot be impeached by a party thereto by extrinsic evidence in a collateral proceeding. Rubel *v.* Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033, *affirming* 101 Ill. App. 439.

In Proving a Former Adjudication as to boundary lines in condemnation proceedings if their record is definite and certain, admission of oral testimony to explain and enlarge it, is erroneous. Cincinnati *v.* Hosea, 19 Ohio Cir. Ct. R. 744, 10 O. C. D. 618.

Commissioners' Report Is Conclusive and precludes parol evidence of their intention to enlarge easements and rights acquired. C. G. Larned Mercantile R. E. & L. S. Co. *v.* Omaha, H. & G. R. Co., 56 Kan. 174, 3 Am. & Eng. R. Cas. N. S. 23, 42 Pac. 712.

Written Order of Court Appointing Commissioners in condemnation proceedings cannot be impeached by evidence that one of the appointees had departed the jurisdiction and that one of the commissioners signing the award was appointed by the judge in place of the one named in the order, there being no proof of the loss of the written order substituting such

written terms of such proceedings and the deed to the subject-matter.[14]

C. Qualifications and Exceptions. — a. *Fraud.* — Fraud is held to constitute a ground for impeaching a record by parol or extrinsic evidence even though such evidence contradicts the record.[15] But it is also decided that the question whether the judgment sued on is based on fraud can only be determined by the record and not by parol;[16] and that fraud in making up a record cannot be proved by parol evidence in a collateral proceeding, nor in an action founded on it.[17] So parol evidence to show no fraud is inadmissible to contradict a judgment recovered for defendant's fraud.[18]

b. *Forgery.* — Parol evidence is admissible to show that a paper offered as a certified copy of a decree is a forgery.[19] And forgery of an indorsement of a waiver on a writ may be shown.[20]

c. *Alteration of Record.* — The alteration of a record may be shown by parol evidence, such evidence not being within the rule excluding evidence to vary the record but for the purpose of showing that the record in question is not the true record which was actually made.[21]

new commissioner. But where such award is introduced in evidence to show title, the written order of the judge appointing commissioners is admissible to show that one of the persons signing the award was not one of such appointees. Lewis *v.* St. Paul M. & M. R. Co., 5 S. Dak. 148, 58 N. W. 580, 57 Am. & Eng. R. Cas. 612.

Inadmissible to Vary Terms of condemnation proceedings and deed. Farrand *v.* Clarke, 63 Minn. 181, 65 N. W. 361.

Where a Record of Condemnation Proceedings Shows the Items of Compensation parol evidence cannot be received to show that certain matters were included when the record is silent thereupon. Rubel *v.* Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033, *affirming* 101 Ill. App. 439.

14. Farrand *v.* Clarke, 63 Minn. 181, 65 N. W. 361.

"Where the adjudication of some material fact or matter is relied upon as an estoppel between the same parties parol evidence of what occurred at the former trial, what was actually determined and submitted is always admissible." Leopold *v.* City of Chicago, 150 Ill. 568, 37 N. E. 892.

15. Supreme Council *v.* Beggs, 110 Ill. App. 139; Lowry *v.* McMillan, 8 Pa. St. 157, 49 Am. Dec. 501; Mitchell *v.* Kintzer, 5 Pa. St. 216, 47 Am. Dec. 408; Meyers *v.* Meyers, 24 Pa. Super. Ct. 603.

Fraudulent Antedating of Writ may be shown under certain circumstances. Warren *v.* Kimball, 59 Me. 264.

Evidence Which Tends to Show Directly Within the Issues a collusive arrangement between one of certain creditors and his debtors with regard to a prior common law judgment or the return of the executor thereon, or the filing of an equity complaint thereafter is clearly admissible. Childs *v.* Latham, 56 Hun. 644, 9 N. Y. Supp. 619, 31 N. Y. St. 150.

16. Forsyth *v.* Vehmeyer, 75 Ill. App. 308.

17. Morris *v.* Galbraith, 8 Watts (Pa.) 166.

18. Case *v.* Gorton, 33 Mo. App. 597.

19. State *v.* Gonce, 79 Mo. 600.

20. Zuver *v.* Clark, 104 Pa. St. 222.

21. Louisville & N. R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897; Olmsted *v.* Hoyt, 4 Day (Conn.) 436; Sebastian *v.* Rass, 57 Ill. App. 417; Brier *v.* Woodbury, 1 Pick. (Mass.) 363; Town of Woodville *v.* Town of

d. *To Determine What Constitutes a Record.* — Parol evidence is admissible to determine what is or is not a record.[22]

e. *Date of Record.* — As to whether parol evidence is admissible to contradict or vary the statements of the record as to dates, there is much conflict, many cases holding parol or extrinsic evidence inadmissible to contradict the filing date endorsed upon a document, as for instance, a return of process;[23] or to contradict the record as to the date of trial;[24] or the date of a judgment;[25] or to show that judgment antedated the time when it was written up and the date when execution issued;[26] or that a motion for a new trial had not been filed at the time that the records showed it to have been done.[27] So the date of an order of dismissal has been held conclusive in collateral or direct proceedings.[28]

In some cases a contrary rule is laid down and extrinsic or parol evidence is held admissible to contradict file marks;[29] to show the true date of filing where the certificate of the judge is insufficient;[30] the time of filling up a process and placing it in the officer's hands for service, and this irrespective of the date of process;[31] the time

Harrison, 73 Wis. 360, 41 N. W. 526.

Of a Bill of Exceptions. — Parol evidence is admissible to show that the bill of exceptions was altered by the presiding judge after it became a part of the record by being signed by him, or that it was in fact signed at a time when the judge had no power to act. Louisville & N. R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897.

22. "A record is conclusive evidence but what is or is not a record is matter of evidence and may be proved like other facts." Brier *v.* Woodbury, 1 Pick. (Mass.) 363, *per* Parker C. J. *quoted* in Dyer *v.* Brogan, 70 Cal. 136, 11 Pac. 589.

This Applies to a spoliation or forgery imposed upon the court as a genuine record by one not authorized as in case of an intruder or usurper. Herring *v.* Lee, 22 W. Va. 661.

23. Parol evidence is inadmissible in a direct proceeding attacking the validity of a judgment to contradict the filing date placed by the clerk upon a return of the sheriff where the filing becomes part of the records of the court. Sweet *v.* Gibson, 123 Mich. 699, 83 N. W. 407. "It is important that the evidence of when papers relating to litigation are filed in the clerk's office shall be of a fixed and permanent character." In this case a rule of court required the clerk to indorse on every paper the date on which the same was filed.

24. Com. *v.* Lane, 151 Mass. 356, 24 N. E. 48.

25. Wiley *v.* Southerland, 41 Ill. 25.

Where Omission as to Time When Grant of Administration was made has been cured by a judgment *nunc pro tunc* the record cannot be contradicted by evidence of the date of the entry preceding and of that following the judgment. Eslava *v.* Elliott, 5 Ala. 264, 39 Am. Dec. 326.

Date of Rendition of a Judgment Is That of the Debt where it does not otherwise appear in the record. Buie *v.* Scott, 107 N. C. 181, 12 S. E. 198.

26. Knights *v.* Martin, 155 Ill. 486, 40 N. E. 358, *affirming* 56 Ill. App. 65.

27. Farley Morris & Co. *v.* Budd, 14 Iowa 289.

28. Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210, 25 N. E. 788, *affirming* 31 Ill. App. 364.

29. Franke *v.* Alexander, 88 Mo. App. 35, *holding* that file marks are only *prima facie* evidence of when the petition was in fact lodged in the clerk's office, and may be contradicted by parol to show mistake.

30. Truss *v.* Harvey, 120 Ala. 636, 24 So. 927.

31. Porter *v.* Kimball, 3 Lans. (N. Y.) 330.

of commencement of judicial proceedings, to avoid a statutory bar;[32] the true date,[33] or time of issuing a writ;[34] to explain a record entry of the date of judgment where such evidence does not contradict the record;[35] the actual date of the issuance of an execution;[36] that execution was issued before judgment was written up, when record is not contradicted,[37] or to prove the date of a levy.[38]

f. *Mistakes and Clerical Errors.* — It is held in certain jurisdictions that parol or extrinsic evidence is admissible to amend, explain or correct mistakes or clerical errors in judicial proceedings.[39]

32. Witters *v.* Sowles, 32 Fed. 765. See Gardner *v.* Webber, 17 Pick. (Mass.) 407; Day *v.* Lamb, 7 Vt. 426.

33. Parkman *v.* Crosby, 16 Pick. (Mass.) 297.

34. The pleadings may be such as to preclude parol testimony as to the time of suing out the writ, the test of the writ being the proper evidence thereof, unless the writ is sued out in vacation and the fact is material and in issue, when it may be proved by parol, and also in case the question arises collaterally on trial. Crosby *v.* Stone, 3 N. J. L. 720. (Head note to case is "The true time of issuing a writ may be shown by parol").

35. Raum *v.* Eyermann, 2 Mo. App. 476; Wilkinson *v.* Carter, 22 Neb. 186, 34 N. W. 351.

When Material the Particular Day on Which Judgment Rendered may be shown, the record being of a judgment of a term generally. Young *v.* Kenyon, 2 Day (Conn.) 252.

36. Evidence is admissible to show when in fact an execution issued, either by proving mistake of the clerk in the test of the writ or that it had been subsequently altered. Harrell *v.* Martin, P. & Co., 6 Ala. 587.

As Between Parties and Privies parol evidence is admissible to show the hour of the day on which execution was issued for the purpose of showing its irregularity; but the title of innocent purchasers without notice cannot be affected, and *quare* where objection can be taken collaterally or upon direct motion to set aside execution. Allen *v.* Portland Stage Co., 8 Me. 207.

Subsequently Antedating an Entry on an Execution by the officer permits the admission of parol evidence. Sprinz *v.* Heyman, 81 Ga. 162, 7 S. E. 177.

37. Knights *v.* Martin, 155 Ill. 486, 40 N. E. 358, *affirming* 56 Ill. App. 65.

38. The date of a levy may be proved by parol, as also the proceedings at the time of the levy, where the law does not make the return on the writ evidence of the facts recited but only evidence of the essential facts required to be stated. Bilby *v.* Hartman, 29 Mo. App. 125.

39. Parol or Extrinsic Evidence Is Admissible to show error or mistake of a ministerial officer of a state court as to facts in making up record. Stephens *v.* St. Louis & S. F. R. Co., 47 Fed. 530, 14 L. R. A. 184; to correct mistake in judicial record of error in parties' names (*Ex parte* Nall, 36 Ala. 299. Riley *v.* Gourley, 9 Conn. 154); to show mistake in record in entering wrong number of lot sold under *fieri facias* (Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715); to show mistake in describing debt in supplementary proceedings (Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378); and also a misdescription in act of sale of the land really sold, there being an error on the face of the act itself. (Sutton *v.* Calhoun, 14 La. Ann. 209.) Where a judgment by default was overlooked and its remaining on the docket was a clerical error evidence not to contradict such record is competent to show such error and restore consistency (Clammer *v.* State, 9 Gill [Md.] 279); so where plaintiff in replevin was suing the same defendant in assumpsit a mistake in treating the value of the

In other jurisdictions, however, such evidence is held inadmissible for such purpose.[40]

g. *Payment or Satisfaction.* — Payment or satisfaction of a judgment or execution may be proved by parol evidence.[41] And conversely parol evidence is admissible to explain or contradict an entry of satisfaction or payment,[42] of a judgment,[43] or execution,[44]

property as a set-off may be shown to be a mistake (McDonald *v.* McDonald, 55 Mich. 155, 20 N. W. 882). So merely clerical errors in administrator's deed containing recital of irreconcilable dates may be corrected by extrinsic evidence (Moore *v.* Wingate, 53 Mo. 398). And parol evidence is admissible to explain a mistake patent on the record, but not to prove existence of a mistake (McNulty *v.* Prentice, 25 Barb. [N. Y.] 204). Again, where a record by default of the clerk omits to show the execution of a sentence, it may be shown by witnesses (Keith *v.* Goodwin, 51 N. C. 398). And mistake in using general words in a judgment by confession as to class of creditors intended to be secured may be shown (Fox's Appeal, 141 Pa. 266, 48 Phila. Leg. Int. 372, 22 Pitts. L. J. N. S. 55, 28 W. N. C. 143). It may also be shown that indorsement "satisfied," on an execution was made by mistake (Moore *v.* Edwards, 1 Bailey Law [S. C.] 23). Wrong recitals of date of levy of execution may also be proven by parol evidence (Davidson *v.* Chandler, 27 Tex. Civ. App. 418, 65 S. W. 1080; Holmes *v.* Buckner, 67 Tex. 107, 2 S. W. 452).

40. Parol or Extrinsic Evidence Is Not Admissible to amend, explain or correct clerical errors in judicial proceedings, but if an inspection of the entire record clearly discloses their nature and extent, the record may correct itself. King *v.* Martin, 67 Ala. 177. So a decree of court of general jurisdiction cannot be changed or altered on the ground of clerical mistake, except by evidence in some written record, minute entry, memorandum or paper in the case (Board of M. R. *v.* Drummond, 167 Mo. 54, 66 S. W. 930). And parol evidence of judge of court is not admissible to prove, contrary to the record, that the court was in session on a certain day, but by mistake in writing up the records they failed to state that fact (Ainge *v.* Corby, 70 Mo. 257). An order made by a judge acquiesced in by both parties, even if not a record, cannot be contradicted by parol evidence, showing a mistake in the judge's trial list (Finley *v.* Hanbest, 1 Phila. 400). Nor is such evidence admissible to show mistake of clerk in contradiction of recital in entry as to amount. State *v.* Disney, 5 Sneed (Tenn.) 598. See also Bank of Tenn. *v.* Patterson, 8 Humph. (Tenn.) 363, 47 Am. Dec. 618.

41. King *v.* Greer, 49 Ga. 545; Morrison *v.* King, 4 Blackf. (Ind.) 125; Hollenbeck *v.* Stanberry & Son, 38 Iowa 325; Vidichi *v.* Cousin, 6 La. Ann. 489; Gates *v.* Brinkley, 4 Lea (Tenn.) 710; Imperial Rolling Mill Co. *v.* First Nat. Bk., 5 Tex. Civ. App. 686, 27 S. W. 49. See Pitts *v.* Clark, 2 Root (Conn.) 221, *holding* that parol evidence is not admissible to prove that an execution has been paid.

A Person Who Has Endorsed a Writ may prove payment, or accord and satisfaction, by parol evidence. Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396.

Accord and Satisfaction of a Judgment by Payment of Less Sum than the amount of the judgment may be proved by parol. Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744.

Where Upon a Trial the Only Issue Is the Title to Land it cannot be shown that the judgment on which the land was sold has been paid. Hale *v.* Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289.

42. Lapping *v.* Duffy, 65 Ind. 229; Stewart *v.* Armel, 62 Ind. 593.

43. Dane *v.* Holmes, 41 Mich. 661, 3 N. W. 169.

44. Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

An indorsement "satisfied" on an

since such an entry is regarded as being merely a receipt.[45]

D. Evidence Aiding or Explaining Record. — a. *In General.* Parol evidence which is not inconsistent with a record is frequently admissible in aid thereof,[46] or to explain the same where its meaning is obscure or ambiguous.[47] Thus a variance or inconsistency which is not material to the validity of the record may be explained by evidence *dehors* the record,[48] where the proof is not contradictory thereof,[49] and provided that the variance is not a fatal one.[50] And the identity of the subject-matter of a record may be ascertained by the aid of parol evidence,[51] as may also the identity of the parties

execution may be contradicted by parol evidence. Moore *v.* Edwards, 1 Bailey's Law (S. C.) 23.

45. Dane *v.* Holmes, 41 Mich. 661, 3 N. W. 169; Pierrepont *v.* Sassel, 1 White & Wils. Civ. Cas. (Tex.) § 1294.

46. *Alabama.* — Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; *Ex parte* Nall, 36 Ala. 299.

Arkansas. — Gates *v.* Bennett, 33 Ark. 475.

Connecticut. — Olmsted *v.* Hoyt, 4 Day 436.

Iowa. — Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

Louisiana. — Ware & Son *v.* Wilson, 22 La. Ann. 102.

New Hampshire. — King, Admr., *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

Vermont. — Booth *v.* Tousey, 1 Tyler 407.

The Particular Day on Which a Judgment Was Rendered may be shown by parol evidence when material. Young *v.* Kenyon, 2 Day (Conn.) 252.

47. Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318, 56 U. S. App. 529; Long *v.* Long, 141 Mo. 352, 44 S. W. 341; Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395.

Parol evidence is admissible to explain the inducement and circumstances of a record entry made by mutual consent where such evidence has no tendency to contradict or vary the record. Porter *v.* Sigler, 1 G. Gr. (Iowa) 261.

In order to construe and interpret a decree in another action awarding priorities in water rights, the court may consider in connection therewith the statements of claims of priorities filed with the referee and upon which the decree was based. New Mercer Ditch Co. *v.* Armstrong, 21 Colo. 357, 40 Pac. 989.

48. Ryan *v.* Staples, 76 Fed. 721, 729, 23 C. C. A. 541; DeLoach *v.* Robbins, 102 Ala. 288, 48 Am. St. Rep. 46, 14 So. 777; Gates *v.* Bennett, 33 Ark. 475; People *v.* Young, 72 Ill. 411.

A difference between the amount of a judgment recited in an execution and the record of a judgment may be explained by parol and the facts shown that the execution is upon judgment misdescribed in it. Humbert's Lessee *v.* Methodist E. Church, Wright (Ohio) 213.

Two Inconsistent Judgments. Parol evidence is admissible to show that a judgment was agreed to be final by confession and that in recording a subsequent final judgment ascertaining damages it was intended to supersede the default judgment and that its remaining on the docket was a clerical error. Clammer *v.* State, 9 Gill. (Md.) 279.

49. Singleton *v.* Smith, 4 La. (O. S.) 430, 2 N. S. 644.

50. Stuart *v.* Morrison, 67 Me. 549, *holding* that where the description in a writ on logs on which plaintiff claims a lien, embrace one lot of logs and one mark only, and there is nothing in the description to separate the several marks or characters used, parol evidence is not competent to explain the marks and the variance between the description in the writ and the proof is fatal.

51. Laughlin *v.* Hawley, 9 Colo. 170, 11 Pac. 45; Mandeville *v.* Slockett, 28 Miss. 398; Marsh *v.* Mandeville, 28 Miss. 122; Watt *v.* Greenlee, 7 N. C. 246.

"Parol evidence is always admis-

where not clearly definite from the record itself.[52] Thus where a judgment is introduced collaterally as evidence, the fact that some other person than the one in whose favor such judgment was recovered was beneficially interested in, or entitled to claim the money may be shown by parol evidence as such proof is not inconsistent with the judgment.[53]

b. *Supplying Omissions.* — Where there is no record at all of an alleged judicial proceeding, parol evidence is not admissible to show that such proceeding was had and what judgment was rendered therein.[54] But parol evidence is in many cases admissible to aid the record by showing certain facts which do not appear therein,[55] but not to supply a defect in the record as to a matter which

sible to point out and connect the writing with the subject-matter, and identify the object proposed to be described." DeLoach *v.* Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46.

Evidence is admissible in an action to try title to land to show that a judgment was upon a purchase money note to secure which a vendor's lien was retained. Howard *v.* Herman, 9 Tex. Civ. App. 79, 29 S. W. 542.

52. Lynn *v.* Risberg, 2 Dall. (U. S.) 180; Mobile & M. R. Co. *v.* Yeates, 67 Ala. 164; Shirley *v.* Fearne, 33 Miss. 653, 69 Am. Dec. 375; Sawyer *v.* Boyle, 21 Tex. 28.

Where defendant in an action for partition brought against "Odd Fellows' Building and Exchange Association" had appeared and consented to judgment it is proper, in a subsequent action of trespass to try title to permit parol testimony that the O. F. B. and E. Company was the real defendent in the former suit. Cobb *v.* Bryan (Tex. Civ. App.), 97 S. W. 513.

53. Insurance Co. *v.* Wallis, 23 Md. 173, 183; Groshon *v.* Thomas, 20 Md. 234.

A Defendant May Defend Against an Alleged Estoppel by showing how she became a party to the former suit and that the suit was really brought in the interests and at the instigation of the plaintiff setting up the estoppel, and by establishing such fact estop such plaintiff. Grippen *v.* Benham, 5 Wash. 589, 32 Pac. 555.

54. Sayles *v.* Briggs, 4 Metc. (Mass.) 421, *holding* parol inadmissible in an action for malicious prosecution to show that plaintiff had been prosecuted on three complaints, there being no record of such prosecution.

That Judgment Exists cannot be shown by parol. Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178; Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810.

55. Humphreys *v.* Third Nat. Bk., 75 Fed. 852, 21 C. C. A. 538, 43 U. S. App. 698; Blair *v.* Hamilton, 32 Cal. 49; Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640; Knott *v.* Sargent, 125 Mass. 95; Harris *v.* Doyle, 130 Mich. 470, 90 N. W. 293; Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601.

Where the record in proceedings for partition does not show that *tutors ad hoc* were duly sworn, the oath not being in the record, secondary evidence of its existence and contents is admissible. State *ex rel.* Bailey *v.* Canal Bk. & T. Co., 114 La. 853, 38 So. 584.

Where presence of county judge is necessary to constitute a full court, his attendance may be shown by parol evidence to supply failure of record of county commissioners court to affirmatively show such presence. School District No. 1 *v.* Wimberly, 2 Tex. Civ. App. 404, 21 S. W. 49.

An affidavit of constructive notice by publication, as required by code, must be in writing, filed and sworn to, but the jurat is no part of the affidavit itself, and where the clerk has omitted to attach his jurat that the oath had been taken it may be proved by parol that it was in fact sworn to when the affidavit was filed. Bantley *v.* Finney, 43 Neb. 794, 801-806, 62 N. W. 213.

is essential to its validity or which is required by law to appear,[56] as this constitutes a fatal defect which cannot be supplied by evidence *dehors* the record.[57] Nor can extrinsic evidence be received

Where it is sought to include party by constructive notice by publication it is necessary that the jurisdictional facts required by law affirmatively appear and parol testimony cannot be received to supply the omission or defect in proof of publication disclosed upon the face of the record. Cassell v. Pulaski County, 3 McCrary 448, 449, 450, 10 Fed. 891.

State v. Doyle, 42 La. Ann. 640, 7 So. 690; Gardner v. Cheatham, 37 S. C. 73, 16 S. E. 368.

As to Allowance of Credits in Judgment. — Where the facts do not appear upon the face of the judgment itself, oral evidence is competent to show how certain credits in the judgments came to be allowed, and for what they were allowed. Humphreys v. Third Nat. Bank, 43 Fed. 854, 21 C. C. A. 538, 43 U. S. App. 598.

When a judge in open court orally directs the clerk to enter up a judgment and the clerk omits to make the proper entry the fact that such order was given may be shown by parol; a distinction exists between proving a judgment by parol and proving by parol that a judgment has been ordered to be entered. Stem v. Bennington, 100 Md. 344, 60 Atl. 17. See Marshall v. Taylor, 98 Cal. 422, 33 Pac. 305.

Where the grounds of a decision in a prior case do not appear of record they may be testified to by the judge who tried the case, the trial being by the court. Black v. Miller, 75 Mich. 323, 42 N. W. 837.

Omission in docket of justice may be supplied by extrinsic evidence. Belgrner v. Nordloh, 12 Colo. 352, 21 Pac. 37.

56. *United States* — Green's Son v. Salas, 31 Fed. Rep. 206.

Alabama. — Jones v. Rimer's Admr. 56 Ala. 270.

Illinois. — Young v. Thompson, 14 Ill. 380.

Louisiana — Temple v. Marshall & James, 11 La. Ann. 641.

Maine — Munroe v. Reding, 13 Me. 353.

North Carolina. — State v. McAlgon, 20 N. C. 140.

Ohio. — Kellogg v. McLaughlin, 8 Ohio 114.

Tennessee. — Estell v. Giles County, 3 Head 588.

The naturalization of an alien is a judicial act and deficiencies in the record of such an act cannot be supplied by parol evidence, the proper remedy in such case being by appropriate proceedings in the court in which the judgment was pronounced. Greenes' Son v. Salas, 31 Fed. 106.

The ground on which a demurrer was sustained, not appearing in the record, cannot be shown by parol. Carr v. Emory College, 32 Ga. 557.

The grounds of dismissal of a suit cannot be shown by parol, where the order is silent. Sheppard v. Whitfield, 30 Ga. 311.

Parol evidence is not admissible to supply jurisdictional defects appearing in the record of judgment in another case introduced in evidence. The record must be complete in itself. Montgomery v. Merrill, 36 Mich. 97.

57. Clark v. Melton, 19 S. C. 498. See Hutton v. Williams, 60 Ala. 153; Cunningham v. The Pacific R., 61 Mo. 33.

Where there is no sufficient description of lands in a *scire facias* against co-tenants, appearing of record either by the sheriff's return or in the pleadings to justify the entry of judgment by the court or to support the record, evidence offered to the jury cannot be resorted to, to obtain a description of the land against which to record judgment. Thomas v. Farmers' Bk. of Md., 46 Md. 43, 58.

Where an order of the judge fixing amount of bail must be in writing and the clerk had omitted to enter the same on the minutes, such omission cannot be supplied by parol. State v. Lougineau, 6 La. Ann. 700.

Where the fact of notice to heirs in case of a sale of real estate must

to validate a judgment which is void upon its face,[58] or to render a void conviction valid.[59]

c. *Illegible Record.* — Where a record has become illegible, parol evidence is admissible to supply the defect.[60]

d. *As to Issues.* — The rule that parol evidence will not be received to vary or contradict a judgment does not apply to such matters as were not properly in issue in the suit in which it was rendered, although they may be incidentally referred to in such judgment.[61]

Where a judgment is offered in evidence as an estoppel, parol evidence may be admitted to show what questions were actually litigated and decided in the action in which it was rendered,[62] and

appear affirmatively of record, parol evidence is inadmissible to supply the omission. Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

58. Gardner *v.* McKinney, 4 Ky. Law Rep. 260.

59. A conviction void because of a trial by eleven jurors cannot be made valid by parol evidence of a clerical error in omitting one name. Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649.

60. Little *v.* Downing, 37 N. H. 355, *holding* that in such a case the testimony of one who examined and copied it while legible is admissible.

Where an unintelligible mark appears on the face of an execution testimony of the justice that it was meaningless and only intended to fill a blank space is admissible. Tarr *v.* Eddy, 142 Pa. St. 410, 21 Atl. 993.

61. Werckmeister *v.* American Tobacco Co., 138 Fed. 162; Woman's Christian Nat. Library Assn. *v.* Fordyce (Ark.), 86 S. W. 417; King Admr. *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675. See Bank of Visalia *v.* Smith, 146 Cal. 398, 81 Pac. 542.

62. *United States.* — Equitable Trust Co. *v.* Chytraus, 77 Fed. 677, 23 C. C. A. 394, 46 U. S. App. 361.

Alabama. — Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8.

Connecticut. — Perkins *v.* Brazos, 66 Conn. 242, 33 Atl. 908; Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509; Damon *v.* Denny, 54 Conn. 253, 7 Atl. 409.

Florida. — Fulton *v.* Gesterding, 47 Fla. 150, 36 So. 56.

Georgia. — McWilliams *v.* Walthall, 65 Ga. 109.

Illinois. — Rubel *v.* Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033; Chicago B. & Q. R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. 239; Eaton *v.* Harth, 43 Ill. App. 355.

Maine. — Embden *v.* Lisherness, 89 Me. 378, 36 Atl. 1101, 56 Am. St. Rep. 442.

New York. — Carleton *v.* Lombard, A. & Co., 149 N. Y. 137, 43 N. E. 422.

Ohio. — Mahaffey *v.* Rogers, 2 Ohio Dec. 188, 10 Ohio C. C. 24.

Rhode Island. — Jepson *v.* International F. A., 17 R. I. 471, 23 Atl. 15.

South Dakota. — Taylor *v.* Neys, 11 S. D. 603, 79 S. W. 998.

"It is clear from the authorities that where a judgment is pleaded or offered in evidence in bar of a claim, and it is uncertain from the record what was adjudged at the time the judgment was entered, parol evidence is admissible to show what matters were in controversy, what testimony was given and what questions were submitted to the court for its determination at the time the judgment was rendered." Rubel *v.* Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033.

"Ordinarily the pleadings in the former suit, when introduced, will show what was within the issue tried and determined therein. A fact or question is no less at issue, or within the conclusive effect of the verdict and judgment, because the averments of the declaration and traverse are general. The difference between cases where the issue is the general, and those where it is limited by the pleadings, to a single point, is that the matter which appears by the mere inspection of the record in the latter, must in the former be estab-

thus to identify the issues involved,[63] or to show that they were not the same,[64] where such facts do not appear from the records.[65]

While, however, parol evidence may be received to show what was litigated upon a former trial, it must be consistent with the record and cannot be admitted to contradict it.[66] And where the

lished by evidence. Parol evidence of what occurred upon the former trial and what was actually decided is always admissible in such cases." Wright *v.* Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228.

"Various causes of action may be joined in one declaration; the verdict and judgment will not always show what demands were actually passed upon, and hence it afterwards becomes necessary to prove what the fact was and this may be done by parol evidence. This does not contradict or vary the record, by making it mean something different from what is expressed upon its face, but is consistent with its absolute verity." Wallace *v.* Coil, 24 N. J. L. 600.

Parol evidence is admissible to show what was adjudicated upon the prior action where the record does not distinctly show it; or to determine whether a question was determined in a former suit; or to give the record effect, or to show upon what issue it was grounded, or upon which one of a number of issues the finding was made; or, if it appears *prima facie* that a question was adjudicated, to show it was not in fact decided; or to rebut the presumption that certain matters were proved. "The record may be explained and its generalities, obscurities or deficiencies may be helped out by parol, but where it is positive it cannot be contradicted." West *v.* Moser, 49 Mo. App. 201.

Distinction To Be Observed. — As to matters apparently within the issues, parol evidence is inadmissible against the conclusiveness of the judgment to show that certain of these matters were withdrawn or not considered, but this distinction exists on the other hand, that if the record is such that on its face the judgment may have proceeded upon one of several grounds, then it is admissible to show *aliunde* which of such grounds the consideration and judgment or decree of the court did really proceed so as to make such judgment or decree effective as an estoppel. Schwarz & Sons *v.* Kennedy, 142 Fed. 1027.

Although the issues may include the subject-matter of the second action, yet parol evidence is admissible to show whether such subject-matter was actually passed upon in the former suit especially where there are several distinct counts in the pleadings to either or all of which the evidence may have referred. Palmer *v.* Sanger, 143 Ill. 34, 32 N. E. 390.

The record in a former case may be supplemented in support of a plea of *res adjudicata* by extrinsic evidence showing that material facts in issue in the case defended were in issue in the former case and adjudicated in his favor. Storrs *v.* Robinson, 77 Conn. 207, 58 Atl. 746.

Where Trial Went Off on Technicality. — When not apparent upon the face of the record, parol evidence is allowable to show that a former trial went off on a technicality not involving the merits. Taylor *v.* Neys, 11 S. D. 605, 79 N. W. 998.

63. Packet Co. *v.* Sickles, 5 Wall. (U. S.) 580; Whitehurst *v.* Rogers, 38 Md. 503.

64. Susquehanna Mut. F. I. Co. *v.* Mardorf, 152 Pa. St. 22, 25 Atl. 234; McMakin *v.* Fowler, 34 S. C. 281, 13 S. E. 534.

65. *Connecticut.* — Perkins *v.* Brazos, 66 Conn. 242, 33 Atl. 908.

Maine. — Embden *v.* Lisherness, 89 Me. 578, 36 Atl. 1101, 56 Am. St. Rep. 442.

Missouri. — Brown *v.* Weldon, 34 Mo. App. 378.

Nebraska — Slater *v.* Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

New Hampshire. — King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

New York. — Bowe *v.* Wilkins, 105 N. Y. 322, 11 N. E. 839; Briggs *v.* Wells, 12 Barb. 567.

66. Harvey *v.* Drew, 82 Ill. 606; Stapleton *v.* King, 40 Iowa, 278;

parties and the trial court treat a former case as involving a certain issue, and no exception is taken, a claim that it was not properly in issue and could not properly be determined, will not be considered.[67]

e. *Opinions of Court.* — It is held that where a judgment is doubtful in its terms the opinion, or reasons for the judgment, may be looked to, where such reasons are required by the constitution to be adduced.[68] So the opinion of the court may be resorted to to show that a certain matter was intended to be adjudicated.[69] And in a federal court, upon demurrer, the opinion of the state supreme court, properly authenticated, may be looked to and considered by the court, in connection with the decree in such court, to ascertain what was intended and what was by that court decided, and to determine the issues where such decree merely sets out a reversal of the decree of the court below, and gives no information as to the issues in the case.[70] But it is also decided that the opinion of the court is inadmissible although it states the facts on which the

Embden *v.* Lisherness, 89 Me. 578, 36 Atl. 1101, 56 Am. St. Rep. 442; Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470.

Evidence to Prove That Damages expressly stated on the record to be for one cause, where in fact partly given for another cause directly contradicts and varies the record and is not admissible, but is to be distinguished from those cases where evidence is admitted to show what was really the matter in controversy where that is not apparent from the record itself. Wallace *v.* Coil, 24 N. J. L. 600.

67. Dime Sav. Bk. *v.* McAlenney, 78 Conn. 208, 61 Atl. 476.

68. Avery *v.* Police Jury, 15 La. Ann. 223, 35 Am. Dec. 202.

See also State *v.* Bank of Commerce, 96 Tenn. 591, 36 S. W. 719 (*holding* that opinion may be looked to); Gentry *v.* Pacific Live Stock Co., 45 Or. 233, 77 Pac. 115; Fowlkes *v.* State, 14 Lea (Tenn.) 14 (*holding* that opinion is of record and may be looked to).

Parol evidence is admissible to explain; and charge of judge which has been filed is part of the record for this purpose. Carmony *v.* Hoober, 5 Pa. St. 305.

69. Topliff *v.* Topliff, 4 Ohio Dec. (Civ. Ct.) 312 *affirmed* 51 Ohio St. 625.

70. Carson *v.* Three States Lumb. Co., 142 Fed. 893, *citing In re* Sanford Fork & Tool Co., 160 U. S. 247, (where it is said: "The opinion delivered by this court, at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; *cited* in *In re* Potts 166 U. S. 263). Gross *v.* United States Mtg. Co., 108 U. S. 477, (*holding* that it was the duty of the court to examine the opinion of a state supreme court in connection with other portions of the record to ascertain whether certain questions raised upon a writ of error were determined adversely to a right, title, or immunity, under the constitution or laws of the United States and specially claimed and set up by the party bringing the writ, but the case rested upon the state statute requiring the justices of the state supreme court to deliver and file written opinions and to spread them upon the records of the court. The court considers several cases where the opinion of the state court formed no part of the record. This case is cited in Land & Water Co. *v.* San Jose Ranch Co., 189 U. S. 177; Egan *v.* Hart, 165 U. S. 188; Sayward *v.* Denny, 158 U. S. 180; Kreiger *v.* Shelby R. Co., 125 U. S. 39; Philadelphia Fire Assn. *v.* New York, 119 U. S. 110; Nix *v.* Allen, 112 U. S. 129.

decree was based, and the decree does not show the facts, as the opinion is not evidence.[71]

E. Foreign Judgments and Judgments of Sister States. a. *Conclusiveness of Generally.* — Upon the question of the conclusiveness of foreign judgments or judgments of sister states it is held that extrinsic evidence is inadmissible to contradict or amend the record.[72]

b. *Jurisdiction.* — **(1.) Conclusiveness of Recitals** — (A.) Rule in Federal Courts. — It seems to be a settled rule in federal courts that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered, and the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist; and want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem* as to the thing.[73]

71. Buckingham's Appeal, 60 Conn. 143, 22 Atl. 509.

Judgment Not Restricted by Court's Opinion. — The broad terms of a decretal order dismissing a bill cannot be limited, qualified or restricted by the opinion filed in the equity case. The decree must be interpreted in its own proper sense; the reasons for signing the decree are no part of the judgment itself. Martin *v.* Evans, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36 L. R. A. 218.

General expressions in opinion not essential to disposal of case are not permitted to control judgments in subsequent suits. Harriman *v.* Northern Securities Co., 197 U. S. 244, *affirming* 134 Fed. 331.

72. Clark *v.* Barber, 21 App. Div. (D. C.) 274. See Caughran *v.* Gilman, 72 Iowa 570, 34 N. W. 423; Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500; Otto *v.* Trump, 115 Pa. 425, 8 Atl. 786. As to foreign judgments as evidence and conclusiveness thereof see article "Judgments," Vol. VII, p. 839.

Conclusiveness, Identification. Unless procured by fraud, a foreign judgment for a pecuniary demand, rendered by a competent court, the defendant being personally served with process within its jurisdiction, is conclusive upon the merits of the cause of action in a suit brought in another jurisdiction, for the collection of such judgment, but evidence was held admissible to identify plaintiffs to whom the judgment applied. Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

73. Thompson *v.* Whitman, 18 Wall. (U. S.) 457 *quoted* in Cooper *v.* Newell, 173 U. S. 555. For other citations of the principal case upon these points see Haddock *v.* Haddock, 201 U. S. 562, (in dissenting opinion); United States *v.* Ju Toy, 198 U. S. 253 (in dissenting opinion); National Ex. B. *v.* Wiley, 195 U. S. 257; Andrews *v.* Andrews, 188 U. S. 14; Bell *v.* Bell, 181 U. S. 175; Lynde *v.* Lynde, 181 U. S. 183; Clarke *v.* Clarke, 178 U. S. 186; Thormann *v.* Frame, 176 U. S. 350; Huntington *v.* Attrill, 146 U. S. 657; Reynolds *v.* Stockton, 140 U. S. 254; Simmons *v.* Saul, 138 U. S. 439, 448; Grover & Baker Sew. Mach. Co. *v.* Radcliffe, 137 U. S. 287; *In re* Sawyer 124 U. S. 200; Renaud *v.* Abbott, 116 U. S. 277; Kilbourn *v.* Thompson, 103 U. S. 168, 198; Pennoyer *v.* Neff, 95 U. S. 714, 730; Hall *v.* Lansing, 91 U. S. 160; Hill

(B) In Other Jurisdictions. — It is decided in New York that a want of jurisdiction may always be shown by extrinsic evidence, and even a recital in the judgment record of a court of general jurisdiction of a sister state in service of process upon, or appearance of defendant, or of any other jurisdictional fact is not conclusive but may be contradicted by parol.[74] And substantially the same rule is also supported by decisions in other states.[75] But in still other states there have been decisions to the contrary.[76]

2. Non-Judicial Records. — A. In General. — There is a class of records of proceedings or acts which public officials are by statute required to record, frequently and ordinarily termed official records, which cannot be contradicted or varied by parol evidence.[77]

v. Mendenhall, 21 Wall. (U. S.) 453; Knowles *v.* Gaslight & Coke Co., 19 Wall. (U. S.) 58.

Collateral Attack. — A foreign judgment or a judgment of a sister state which shows upon its face that the court had jurisdiction of the person of the defendant may be collaterally attacked upon the ground that the defendant did not in fact appear, or was not served. Cohen *v.* Portland Lodge, 140 Fed. 774.

Judgment of sister state is not conclusive as to jurisdictional facts, but is as to all matters going to merits of controversy and it may be shown that there was no personal service of process. Rose *v.* Northwest F. & M. Ins. Co., 67 Fed. 439.

Jurisdiction of State Court May Be Attacked in Federal Court. Evidence that a defendant in a state court was not a citizen or resident of the state at the commencement of the suit, that he was never served with process and had no knowledge of its institution and never authorized an appearance of an attorney, is admissible to contradict recitals in the judgment, when the jurisdiction is attacked in a federal court. Cooper *v.* Newell, 173 U. S. 555. As to state judgments in federal court see further article "Judgments," Vol. VII, p. 847.

74. Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Rep. 589, *reversing* 7 Hun 25.

See also Woodward *v.* Mutual R. L. Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519; Starbuck *v.* Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172.

75. Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Norwood *v.* Cobb, 15 Tex. 500. See Chicago T. & T. Co. *v.* Smith, 185 Mass. 363, 70 N. E. 426, 102 Am. St. Rep. 350.

76. May *v.* Jameson, 11 Ark. 368, *holding* that in an action upon a judgment of a court of record of another state the record cannot be contradicted as to personal service and appearance shown by the record.

Transcript. — Cannot contradict record of judgment of sister state reciting personal service of process or any other jurisdictional fact appearing on certified transcript of record. Zepp *v.* Hager, 70 Ill. 223.

Disputable presumption as to service by publication in recital in judgment of another state, see McHatton *v.* Rhodes, 143 Cal. 275, 76 Pac. 1036, 101 Am. St. Rep. 125.

77. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623; Young *v.* Thompson, 14 Ill. 380; Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210; Whitman *v.* Freese, 23 Me. 212; Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Bays *v.* Trulson, 25 Or. 109, 35 Pac. 26.

"The highest consideration of public policy requires that the officer himself, to whom the law has intrusted the performance of a public duty, and of the fulfillment of which a record has been made, should not be permitted to open his mouth to impeach it, and thus admit himself guilty of official misconduct or crime." McMicken *v.* Com., 58 Pa. St. 213, 224, *quoted* with approval in Bays *v.* Trulson, 25 Or. 109, 35 Pac. 26.

The question whether such records may be varied, contradicted or explained is ordinarily dependent upon provisions of the law in regard thereto. Thus it is decided that parol evidence is admissible to prove facts which are omitted from such a record, unless by the terms of the statute the record is made the only evidence.[78] And it has been decided that parol evidence may be admitted in aid of an official record by showing the date when it was made, it being declared that such evidence does not contradict the record,[79] or to prove that certain matters do not appear on the record.[80]

There is also another class of entries, sometimes called records, which are kept by public officials in the performance of their duties, and which are not accorded the conclusiveness accorded to judicial records.[81]

B. Particular Records and Matters. — a. *Assessments.* **(1.) In General** — Where commissioners are appointed to make assessments for public improvements, the record of the proceedings or acts of such commissioners cannot be varied by parol evidence.[82] It cannot be shown in contradiction of such record that the oath required was not taken.[83] Nor can the valuation of land as fixed

Records of a state board of agriculture cannot be collaterally attacked by showing that interlineations had been made and were therefore no part of the record. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

The report of commissioners assigning dower cannot be varied by evidence showing a different boundary than that stated therein. Farr *v.* Farr, 21 Ark. 573.

The records of a fire district showing that a meeting adjourned to a certain day cannot be altered by evidence that the vote was to adjourn "without day." Hunneman *v.* Fire District No. 1, 37 Vt. 40.

Unofficial letters of subordinate officers of the treasury are not admissible in a suit for defalcation against a disbursing agent to contradict or even to explain the official adjustment of his accounts as shown by the duly certified transcript. Strong *v.* United States, 6 Wall (U. S.) 788.

78. Gordon *v.* City of San Diego, 108 Cal. 264, 41 Pac. 301.

79. Gately *v.* Irvine, 51 Cal. 172.

80. Parol testimony of secretary of state is admissible to prove that the records of his office fail to show the creation of a corporation of a certain name, in order to show that in a certain deed to such corporation a differently named corporation was intended as grantee. Cobb *v.* Bryan (Tex. Civ. App.), 97 S. W. 513.

81. Account books kept by a public official as required by statute which makes them *prima facie* evidence of facts stated therein are not conclusive, but it may be shown by parol evidence that entries therein are false and fraudulent. People *v.* Fairfield, 90 Cal. 186, 27 Pac. 199. As to impeachment of book entries generally, see article "Books of Account," Vol. II.

An Ex-Parte Certificate of a public officer in relation to matters which depend upon the exercise of integrity, judgment and discretion are not given a conclusive effect. Clintsman *v.* Northrop, 8 Cow. (N. Y.) 45.

82. Reinhardt *v.* Buffalo, 39 N. Y. St. 304, 15 N. Y. 844.

Matters which the law does not authorize commissioners of assessment to do in discharging their duty cannot be put into their report by parol proof. Vorrath *v.* Hoboken, 49 N. J. L. 285, 8 Atl. 125.

83. Where commissioners are appointed by the court to make an assessment for a public improvement the objection cannot be raised that they did not take the oath required

by the commissioners for the purposes of assessments be varied by parol evidence other than in the manner prescribed by statute,[84] nor will one of the commissioners be allowed to impeach his own report as to the items included therein in making an estimate,[85] or generally to impeach the report where it has been acted upon and approved by the municipal authorities.[86]

(2.) Where Void on Face — Where a record of proceedings in connection with the levying of an assessment is void upon its face by reason of its failure to set forth matters which the law requires to appear therein, parol evidence is not admissible to validate it.[87]

b. *Birth and Marriage Record.*— Records of births and marriages, while competent to prove the facts included therein, are not conclusive thereof and may be disproved by parol evidence when attacked collaterally.[88] Thus the birth records are not conclusive as

by law where the paper which purports to be their oath had been signed by them and the notary public had certified under his seal that they had taken the oath "One of the commissioners cannot be heard to impeach his own report, nor can he impeach the foundation upon which the report rests." Ryder's Estate *v.* City of Alton, 175 Ill. 94, 51 N. E. 821.

84. The Valuation of Land for the purposes of assessments as fixed by the officers designated for that purpose acting under the sanction of their official oaths must be regarded as conclusive until it is changed by a method prescribed by law. Board of Comrs. *v.* Senn, 117 Ind. 410, 20 N. E. 276.

85. Latham *v.* Wilmette, 168 Ill. 153, 48 N. E. 311; Ryder's Estate *v.* City of Alton, 175 Ill. 94, 51 N. E. 821.

86. Quick *v.* River Forest, 130 Ill. 323, 22 N. E. 816. The court said: "The law required the commissioners to meet and act together in estimating the cost of the improvement and the costs of making and levying the assessments. Their duties required investigation, deliberation, and a final determination of the subject referred to them by the board of trustees, and we are aware of no authority which would sanction the calling of such persons to stultify themselves. It may be true that the statute does not, in terms, require such commissioners to be sworn; but their acts are none the less obligatory and binding. Their duties require as much honesty and fidelity where they are not sworn, as if they were acting under oath and we think it would be establishing a dangerous rule to allow such persons to come upon the witness stand and impeach their voluntary action, after such action has been approved and acted upon by the board of trustees."

The confirmation of the report of commissioners renders it conclusive and where it sets forth the matters required by law such as parties interested, whether owners or lessees and sums awarded to each evidence is not admissible to show that a part of the sum awarded to a landlord was intended for the lessee. Turner *v.* Williams, 10 Wend. (N. Y.) 139.

87. Record Void on Its Face. "There is no way in which a void proceeding can be made valid by evidence. If it were only *prima facie* or apparently void, evidence might aid it. The reason why it is void is the necessity that it shall show affirmatively on its face a compliance with the power conferred. For this reason the assessment itself is the only competent evidence to show a compliance with the charter." Saunderson *v.* Herman, 95 Wis. 48, 69 N. W. 977.

88. "There is another class of entries, sometimes called records, which are of a public nature and required by law to be kept by various non-judicial officers, which are of less solemn character, and not accorded the conclusiveness attaching

to the age of a person, and he may be shown by parol evidence to have been born at a different date from that specified in such record.[89]

A record of a marriage may be contradicted by evidence showing that the names given by the parties were not their real names.[90]

c. *Certificates.* — **(1.) Of Notaries and Justices of the Peace.** — The certificate of a notary public, or of a justice of the peace, administering oaths and taking acknowledgments as such is, where such certificate is required by law to be attached to a document, regarded as of the nature of a public record and is evidence of the fact that an acknowledgment was taken by the officer by whom it was certified and cannot be contradicted by him where neither fraud nor a denial of his signature is claimed.[91] But this rule apparently does not extend to the certificates of foreign notaries.[92]

(2.) Of Recording of Judgments. — A certificate by the recorder, or other official having charge of the records, that a judgment has been recorded is only *prima facie* evidence of the facts stated therein and may be contradicted by parol evidence.[93]

d. *Corporation Records.* — **(1.) Municipal Corporations.** — It is a general rule that parol evidence is not admissible, in a collateral proceeding, to contradict or vary the records of a municipal cor-

to judgments of courts of records. They are competent evidence of the facts recorded and required by law to be recorded, but not conclusive. To this class belong the records of births and marriages kept by clerks of towns. Sumner *v.* Sebec, 3 Me. 223; the record kept by a person employed in the signal service of the United States whose duty it is to record truly the facts therein stated; Evanson *v.* Gunn, 99 U. S. 660; calendar of prisoners kept by a jailer; Sandy White *v.* United States, 164 U. S. 100; Greenleaf on Ev. Vol. 1, § 484; and many others of like character." Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 409.

89. Parol evidence of the age of a person is admissible although the baptismal record contains a statement of the date of his birth. State *v.* Romero (La.), 42 So. 482.

90. Thus it has been so held in a prosecution for adultery. The court said: "Men and women are conjoined in matrimony, and a defendant charged with bigamy or adultery cannot in this country base a defense on the ground that he or his wife was married under an assumed name, not his or her real name. In such case evidence of the real names does not contradict the certificate, since the minister or other person authorized to perform the marriage ceremony is not required to guarantee the fact that the persons were married in their true names." People *v.* Stokes, 71 Cal. 263, 12 Pac. 71.

91. New York & Ontario Land Co. *v.* Weidner, 169 Pa. 359, 32 Atl. 557. See article "ACKNOWLEDGMENTS," Vol. I, p. 188.

Record of justice's certificate attached to a chatted mortgage is conclusive between the parties and their privies that the parties were sworn; the court said in this case: "the certificate was the record of the justice of the peace of an official act required by law to be done, and to be recorded upon the mortgage, and was conclusive of the fact certified and recorded, at least between the parties to the mortgage and their privies." Gilbert *v.* Vail, 60 Vt. 261, 14, Atl. 542.

92. A Certification by Foreign Notaries of a writing may be contradicted by extrinsic evidence. United States *v.* The Jason, Pet. C. C. 450, 26 Fed. Cas. 15,470.

93. Taylor *v.* Pearce, 15 La. Ann.

poration, whether it be a city or a town, as to matters required by law to appear on such records.[94] And although it is said that the

564; Morton *v.* Webster, 2 Allen (Mass.) 352.

94. Blaisdell *v.* Briggs, 23 Me. 123; Crommett *v.* Pearson, 18 Me. 344; Franklin Falls Pulp Co. *v.* Franklin, 66 N. H. 274, 20 Atl. 333; Sawyer *v.* Manchester & Keene R. Co. 62 N. H. 135, 13 Am. St. Rep. 541; Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210; Mayhew *v.* District of Gay Head, 13 Allen (Mass.) 129; Lebanon Light & Magnetic Water Co. *v.* City of Lebanon, 163 Mo. 246, 63 S. W. 809; Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

"When the law requires municipal bodies to keep records of their official action in legislative business conducted at their meetings, the whole policy of the law would be defeated if they could rest partly in writing and partly in parol, and the true official history of their acts would perish with the living witnesses, or fluctuate with their conflicting memories. No authority was found, and we think none ought to be which would permit official records to be received as either partial or uncertain memorials. That which is not established by the written records, fairly construed, cannot be shown to vary them. They are intended to serve as perpetual evidence and no unwritten proof can have this permanence." Stevenson *v.* Bay City, 26 Mich. 44.

Parol testimony cannot be received to supply, modify or extend the records of judicial acts of municipal boards or of county commissioners. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

Returns of Election Authorizing Issue of Bonds. — Where the minutes of the board of aldermen, as required by statute, recite that the returns of an election authorizing the issue of bonds were canvassed by the mayor and the board of aldermen who found that due notice of the election was given as required by law and that the election was formally and legally held and conducted, parol evidence is not admissible to contradict the same. Clarksdale *v.* Pacific Improv. Co., 81 Fed. 329, 52 U. S. App. 214, 26 C. C. A. 434.

That assessors were legally chosen by the inhabitants of a town must appear from the records and if so shown it cannot be contradicted by parol. Thayer *v.* Stearns, 1 Pick. (Mass.) 109.

The record made by a town clerk "is conclusive of the facts therein stated, not only upon the town, but upon all the world, so long as it stands as the record. Its accuracy cannot be drawn in question collaterally. It can be contradicted or impeached only in proceedings instituted directly for the purpose and to the end that it may be corrected. So long as it is in existence and can be produced it is the only competent evidence of the action of the town. If it is destroyed or lost, parol evidence may be received to show what it was but not to prove what the vote was except so far as such proof may tend to establish the contents of the record." Sawyer *v.* Manchester & Keene R. Co. 62 N. H. 135, 13 Am. St. Rep. 541.

A certificate of township trustees that the items in a bill to supervisors of a county for aid furnished a pauper were necessary and proper and were furnished to the claimant at their request is held to be conclusive on the county and cannot be contradicted by testimony of the trustees that the aid was not furnished at their request or on their order. Mussel *v.* Tama County, 73 Iowa 101, 34 N. W. 762.

Compare. — Westerhaven *v.* Clive, 5 Ohio 136, *holding* that township records are not of such absolute verity that the truth of the matters contained therein cannot be shown by extrinsic or parol evidence, and that this applies where no written entry is made of the approval of a constable's bond required by law to be approved, and that parol evidence is admissible to show whether such bond was rejected or received.

Records of a parish as to grants of money may be contradicted and

authorities are not in harmony,[95] it may be stated as a general proposition that the rule operates to exclude evidence varying or contradicting the records of proceedings of, or action taken by, the municipal council, or other governing body of a municipal corporation,[96] especially where such records are by law made the only evidence of the matters required to be recited therein.[97] And this rule excludes the admission of parol evidence for the purpose of contradicting or varying a municipal ordinance[98] or resolution,[99] to

falsified by parol evidence showing the specific purpose for which such moneys were granted, and that they were not in fact granted purposes for which parishes are empowered to grant money. Bangs *v.* Snow, 1 Mass. 181.

95. "The authorities are not in harmony as regards whether evidence *aliunde* the official records is permissible to show proceedings, where the law requires such a record to be kept. The rule here is that such evidence is not admissible where the effect thereof will be to vary or contradict the records, but may otherwise be received for the purpose of showing occurrences which through oversight, or some other cause, were not recorded (Duluth S. S. & A. R. Co. *v.* Douglas Co., 103 Wis. 75, 79 N. W. 34; Bartlett *v.* Eau Claire Co. 112 Wis. 237, 88 N. W. 61; Nehrling *v.* Herold Co. 112 Wis. 558, 88 N. W. 614); That is fraught with so much danger that the rule should be administered with caution, the alleged unrecorded proceeding not being held established without clear evidence thereof." Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

96. Curren *v.* Schubmehl, 19 Pa. Co. Ct. 478; City of Benwood *v.* Wheeling R. Co. 53 W. Va. 465, 44 S. E. 271.

The words "received and filed" entered in the minutes of a city council by the proper officer in reference to a report made to the council have a clear and definite meaning and parol evidence is not admissible to show that the word "filed" meant "adopted." City of Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 45 S. W. 626.

The validity of an assessment ordered by the common council of a city cannot be affected by evidence *dehors* the record to show that the objections to the confirmation of the roll were not read to or heard by the common council. Pooley *v.* City of Buffalo, 15 Misc. (N. Y.) 240, 36 N. Y. Supp. 796.

97. Stevenson *v.* Bay City, 26 Mich. 44.

98. Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law. Rep. 128.

That an ordinance was not such as the records show cannot be established by parol evidence. The court here said: "These public bodies do what their acts show, and the testimony of the members cannot be received to impeach their recorded acts in this way. If the ordinance was not such as the body passed, to repeal, amend, and re-enact are all the remedies and they are ample for the ends of justice. Page *v.* Belvin, 88 Va. 985, 14 S. E. 843.

Ordinance Granting Franchise to Street Railway. — Where an ordinance grants a franchise to a street railway upon certain conditions specified therein, one of which is that the company should keep the space between, and for a certain distance outside of its rails paved, constitutes a contract between the city and the railway company, when accepted, and parol evidence is not admissible to show that a purchaser of such railway, to whom the city granted all the rights, privileges and franchises of the power company, agreed to be bound by a certain ordinance imposing additional burdens upon the former company and which the latter never accepted. Western Pav. & S. Co. *v.* Citizens Street R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770.

99. A Grant of Franchise by Resolution of the Trustees of a town

prove its existence,[1] or passage by the council,[2] or the date thereof.[3]

As to whether it can be shown by parol, when the record of the council is silent in regard thereto, how the members thereof voted on a particular measure, or the vote by which it was passed, the authorities are in conflict.[4] But when the record shows that members not voting were counted as voting a certain way, the fact that certain members did not vote at all may be shown by parol.[5]

It has been held that it cannot be shown that a vote included matters not specified in the record of the resolution on which it was had.[6]

constitutes a contract which cannot be varied by parol evidence although if there is an ambiguity arising out of the terms employed such evidence may be received, not to vary the instrument, but to enable the court to appreciate the words used in reducing the agreement to writing. Such ambiguity can not however arise as to a provision in respect to which the writing is silent. Trustees of Southampton *v.* Jessup, 173 N. Y. 84, 65 N. E. 949. The resolution in this case was in the following words: "Resolved that Nathan C. Jessup be and is hereby given liberty to make a roadway and to erect a bridge across the Great South Bay commencing at the south point of Potunk Neck; thence running southerly to the beach the said bridge to be a drawbridge of a width of not less than twenty feet, the height above the meadow three feet and the draw to be twenty feet wide, and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay." The court held that parol evidence was not admissible to show that it was the intention of the parties that the roadway should be of wood.

Resolution Creating Contract. Where by resolution a city council accepts the terms of a proposition in writing to it, the proposition and resolution become written memoranda of the agreement of the parties, and evidence is inadmissible to alter or vary the same. Curtiss *v.* City of Waterloo, 38 Iowa 266.

1. Stewart *v.* Clinton, 79 Mo. 603, 611.

The existence of an ordinance can not be established by parol where the statute requires a journal of proceedings to be kept and the passage of the ordinance is not shown by the journal. Lebanon Light & Magnetic W. Co. *v.* Lebanon, 163 Mo. 246, 63 S. W. 809.

2. As To Passage of an Ordinance. — Where records of city council show that an ordinance was passed by two boards on different days such statements of fact cannot be overcome by the recollection of a witness. Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128.

3. The attestation by city clerk of the date when an ordinance was approved by the mayor cannot be contradicted by extrinsic evidence. Ball *v.* Fagg, 67 Mo. 481.

4. Those voting for an ordinance cannot be shown by parol where the journal omits to show such fact. Pickton *v.* City of Fargo, 10 N. D. 469, 88 N. W. 90.

Gove *v.* Tacoma, 34 Wash. 434, 76 Pac. 73, *holding* that upon the question of whether an ordinance was properly passed parol evidence is admissible to show the actual vote by which it was passed.

5. Where a record of a city council shows on its face that three members voted yes and three no parol evidence is admissible to show that two of the latter did not vote at all, where the record also shows that members not voting were counted as voting no. State *v.* Alexander, 107 Iowa 177, 77 N. W. 841.

6. A Vote To Exempt From Taxation establishments for the manufacture of certain fabrics cannot be varied or explained by parol evidence showing that it was intended by such note to also exempt other manufacturing establishments.

A statement in the council's records that an ordinance is reasonable or is "for public purposes" may be disproved by parol.[7]

Adjournment. — Parol evidence is, of course, not admissible to show facts as to the adjournment of the council which the record should show, or to contradict the record in regard thereto.[8]

Where the Record Is Silent as to a fact or authority which, if it exists, should appear thereon, parol evidence cannot be received to show its existence.[9] Parol evidence is, however, admissible to show that there is in fact no valid record or right to make one.[10]

The general rule that the record of the council of a city cannot be attacked in a collateral proceeding is held not to apply where the purpose of the evidence is to show that the council could not have legally convened, and that no right to make a record had existed by reason of the want of a quorum as required by law,

Franklin Falls Pulp Co. *v.* Franklin, 66 N. H. 274, 20 Atl. 333.

7. Moore *v.* District of Columbia, 26 Wash. L. R. 343, 12 App. D. C. 537, 41 L. R. A. 208, so holding in the case of an ordinance prohibiting the use of streets by bicycles except under certain conditions which were unreasonable.

Action of Council in Excess of Authority. — Where a street is established by ordinance there is a *prima facie* presumption that it is established for public use, but parol evidence is admissible to show that this is not in fact so and that it is not for "public purposes" within the meaning of the law as to the authority of the council in such cases. Strahan *v.* Town of Malvern, 77 Iowa 454, 42 N. W. 369.

8. **Parol Evidence of the Adjournment** of a town meeting is inadmissible where the record is silent. Taylor *v.* Henry, 2 Pick. (Mass.) 397.

Parol evidence is not admissible to show that a city council in fact adjourned to a day other than that specified in the record. Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

9. **Omission From Record of Board of Trustees.** — Where the record of the board of trustees fails to show that a report of commissioners for the opening of a street was accepted by the trustees within the time required by law for its acceptance parol evidence is not admissible to show that such report was in fact accepted within the required time. "It would be going too far to hold that a municipal corporation might prove by parol that the essential steps required to be taken by the body representing the municipality, in proceedings to appropriate real estate had been taken, although the records of the corporation indicated nothing upon the subject. Whether the board might cause its record to be corrected, is quite different question, with the decision of which we are not concerned." Ryer *v.* Town of New Castle, 124 Ind. 86, 24 N. E. 578.

10. Power of municipal board to construct a sewer cannot be shown by parol testimony of mayor where municipal records show no such authority. Kitson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

Where a report must be accepted by town trustees, the acceptance should appear upon the record and cannot be shown by parol. Terre Haute & L. R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

That an agreement was acceded to by parish cannot be shown by parol, no vote to that effect appearing on the parish records. Manning *v.* Fifth Parish, 6 Pick. (Mass.) 6.

Compare Drott *v.* Village of Riverside, 4 Ohio Civ. Ct. 312, 2 Ohio Civ. Dec. 565, *holding* that parol evidence is admissible to prove certain resolutions passed by a village council appointing a superintendent for erection of a public building where such fact is omitted by accident from the minutes of the meeting.

though there is a recital in the record that a quorum was present.[11]

(2.) Private Corporations. — (A.) ARTICLES OF INCORPORATION. — The articles of association of a corporation cannot, as a general rule, be contradicted or varied by parol evidence.[12] But in the absence of elements of estoppel it has been decided that recitals in the articles of association, of the payment of money, may be viewed as the mere receipt or written acknowledgment of such money on hand and are only *prima facie* evidence and disputable with oral testimony.[13]

B. MINUTES AND LIKE RECORDS. — While there are cases which support the rule that parol evidence is not admissible to contradict or vary the record of a private corporation,[14] yet there are other decisions which are authority for the rule that the record of proceedings or acts of a corporation, while they are legal evidence of the facts which they recite, are not of such a character as renders

11. This point is considered in City of Benwood *v.* Railway Co., 53 W. Va. 465, 44 S. E. 271, wherein such evidence was held admissible to impeach the record of the meeting of the council at which a prior ordinance granting certain rights to a railway company was repealed. The entry stating that a quorum was present was shown to be false, there being only three of the eight members of the council present. The court said: "If three out of eight members of a body may come together and declare themselves to be a quorum, by a mere assertion to that effect spread upon the minute book, and that cannot be contradicted by showing who were actually present, the matter becomes serious indeed. A municipal board has no powers except such as are conferred by statute. It can transact no business without the presence of a quorum. That a quorum is present must appear upon its record as a fact, and not as a mere conclusion, or opinion and the only way to make it appear as a fact is to set forth on the minutes the name of the persons in attendance. The attendance of a quorum is a condition precedent to everything. Until then there is an absolute incapacity to consider or act in any way upon any matter. Until it comes into existence it cannot proceed nor make any record of its proceeding. It has no authority to make a record showing anything. Less than a quorum are without power to act or bind anybody in any manner. Their action being absolutely void may be ignored or attacked in any proceeding. The record of a legally constituted tribunal is aided and upheld by a presumption in favor of its regularity. Surely there can be no presumption in favor of a record made by persons who have no shadow of authority to act. By making what purports to be record, they cannot preclude an inquiry into their authority to make it, without so much as even disclosing who they are."

12. The articles of association of a corporation cannot be varied by evidence that at the time of the signing of the articles and during the negotiations which resulted in their execution there was a verbal agreement among those signing and becoming stockholders that they should not be individually liable for the corporate debts. Oswald *v.* Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15. See article "CORPORATIONS," Vol. III.

13. Hequembourg *v.* Edwards, 155 Mo. 514, 56 S. W. 490.

14. R. T. Davis Mill Co. *v.* Bennett, 39 Mo. App. 460, *holding* that where minutes of director's meeting show that three directors voted for a motion, it cannot be shown by parol that in fact four directors so voted. Peterborough R. Co. *v.* Wood, 61 N. H. 418; holding recorded vote of directors is to be construed by its terms alone. Dennis *v.* Joslin Mfg. Co., 19 R. I. 666, 36 Atl. 129, 61 Am.

them conclusive, but are subject to contradiction by parol evidence.[15] And though such records are by statute made *prima facie* evidence, they may be rebutted or discredited as to particular entries by internal or external evidence of falsity or error.[16] And this would seem to be the rule, though the charter or by-laws require the keeping of such record.[17]

(C.) To Invalidate. — Where action by less than the majority of the directors is void, parol evidence is admissible to show that when certain orders were passed, which appear on the records of the corporation, there was not a majority of the directors present.[18]

(D.) Omissions. Parol evidence is admissible to supply an omission from corporate records such as the minutes of the directors' or stockholders' meetings,[19] as where they allude to an officer's sal-

St. Rep. 805; *holding* corporate records conclusive as to the voting for a dividend.

15. Masonic Mut. Ben. Assn. *v.* Severson, 71 Conn. 719, 43 Atl. 192; Fouche *v.* Merchants' Nat. Bk., 110 Ga. 827, 36 S. E. 256 Saudek *v.* Tennessee Colonial Co., 1 Baxt. (Tenn.) 289; Supreme Lodge K. of H. *v.* Wickser, 72 Tex. 257, 12 S. W. 175.

"If a record is kept of the proceedings of the directors of a corporation, it constitutes legal evidence of those proceedings; but as such records consist merely of the written entries of their acts made by a clerk appointed by them for that purpose, for the convenience only of themselves, or of the corporation for whom they act, we think that they are not of so high or solemn a character as to be conclusive and that they may therefore be contradicted by any person whose interests may be affected by them. Such entries stand on the same ground only, as the entries of the acts of any other persons made in their private books." Goodwin *v.* United States Annuity & L. I. Co., 24 Conn. 591, 601.

The date to which a meeting is adjourned may be shown to be different from that recited on the records. Goodwin *v.* United States Annuity & L. I. Co., 24 Conn. 591.

As to Adoption of Resolution. The minutes of proceedings showing the adoption of a resolution by the board of trustees of a corporation may be varied by parol evidence showing that the proposition as voted by the board is not actually expressed therein. Gilson Quartz Min. Co. *v.* Gilson, 51 Cal. 341.

The records of a religious society are not conclusive as to who are its members in the matter of the making of a division by the selectmen of a town among different religious societies of the rents of lands granted to the use of the ministry. First Universalist Soc. *v.* Leach, 35 Vt. 108.

Parol evidence is admissible to explain or supplement the minutes of a corporation where meaning thereof is ambiguous. Rose *v.* Independent Chevra Kadisho, (Pa.), 64 Atl. 401.

16. Georgia Railroad & Bkg. Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235.

17. "It may be and is frequently required by the charter, or by-laws of a corporation, that its directors shall make a record of their proceedings in which case it is their duty to do so; in that case, however, it is at least questionable whether such requirement is not merely directory." Goodwin *v.* United States Annuity & L. I. Co., 24 Conn. 591, 601.

18. Hamilton *v.* Grand Rapids & Ind. R. Co., 13 Ind. 347; Price *v.* Grand Rapids & Ind. R. Co., 13 Ind. 58.

19. Lurton *v.* Jacksonville Loan & Building Ass'n., 187 Ill. 141, 58 N. E. 218; St. Louis Rawhide Co. *v.* Hill, 72 Mo. App. 142; Pickett *v.* Abney, 84 Tex. 645, 19 S. W. 859; Cameron *v.* First Nat. Bank (Tex. Civ. App.), 34 S. W. 178.

Where corporation minutes are silent as to a particular transaction

ary but do not mention the amount thereof;[20] or to show the action of a board of directors as to authority of officers to execute a mortgage,[21] or to show that action taken by the board of directors was subsequently rescinded,[22] or the expulsion of a member of a benefit association, in an action against it for a death benefit,[23] or the assent to, and acceptance of, a grant or deed beneficial to the corporation,[24] or the approval of the bond of one of the corporate officials.[25]

(E.) To Explain. — The records of a private corporation may, as a general rule, be explained by parol evidence where they are ambiguous.[26]

e. *Deeds and Mortgages.* — **(1.) In General.** — Though it is decided that parol evidence is not admissible to contradict or vary

it may be proved by parol, *contra* where it appears upon the minutes. Ehrlich *v.* Cheva Agurdas, etc., 86 N. Y. Supp. 820.

In the case of erasures and interlineations what did occur and was attempted to be recorded can be shown by parol evidence to aid in the construction of recitals in the record. St. Louis Ft. S. & W. R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544.

20. Where corporation minutes fail to state amount of secretary's salary alluded to therein, parol evidence is admissible to show the amount agreed upon. Grath *v.* Mound City Roofing Tile Co. (Mo. App.) 98 S. W. 812.

21. Authority of Officers to Execute Mortgages. — Upon the question of whether the board of directors of a corporation authorized the execution of a mortgage by the president and secretary, parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it. Allis *v.* Jones, 45 Fed. 148.

22. Parol evidence is admissible to prove that a written order entered among the proceedings of the board of directors of a bank, was rescinded and annulled, by a subsequent order, of which no minute in writing was made. Whittington *v.* Farmers' Bank, 5 Har. & J. (Md.) 489.

23. In an action against a beneficial association for a death benefit, where the defense is that the deceased member was not in good standing it may be shown by parol that he was in fact suspended, where the minutes of the association show that there was a motion to suspend but do not state what action was taken on such motion. Hamill *v.* Supreme Council of Royal Arcanum, 152 Pa. St. 537, 25 Atl. 645.

24. In respect to grants and deed beneficial to corporations, their assent to and acceptance of the same may be inferred from their acts as well as in the case of individuals and an omission to record the assent, if actually given, will not deprive the corporation of the property which it gained by virtue of such actual assent, as the validity of such a grant depends upon the acceptance, and not upon the mode by which it is proved. Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64, 72.

25. Thus it has been decided that the approval of the bond of a cashier by the directors of a national bank which by act of Congress was required to be satisfactory to the board of directors before the cashier could legally enter on his duties so as to bind his sureties, need not be in writing, but may be established by parol evidence in the same manner as the fact might be proved in the case of private persons. Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64.

26. Forest Glen Brick & T. Co. *v.* Gade, 55 Ill. App. 181; Tibbals *v.* Mt. Olympus Water Co., 10 Wash. 329, 38 Pac. 1120.

An entry in the record showing the number of votes cast for a reduction of the capital stock may be explained by parol evidence. Gade *v.* Forest Glen Brick & T. Co., 165 Ill. 367, 46 N. E. 286.

the record of a deed or mortgage,[27] yet the record itself is held to be only *prima facie* evidence of the authenticity of the instrument recorded; in other words, while the fact that the instrument was filed for record, at the time specified in the records is conclusively established by the record itself, yet this does not constitute conclusive evidence that the instrument recorded was itself authentic,[28] and as delivery and acceptance of a deed are essential to its validity, parol evidence is admissible to show that though entered on the public records it has never in fact been delivered to and accepted by the grantee,[29] or it may be shown that act of recording it was unauthorized.[30]

It has, however, been declared that it is only in a clear case, and where it is necessary to prevent manifest injustice, that the effect of a record of a mortgage or judgment lien should be changed by parol.[31]

(2.) Date of Registration. — Parol evidence is not admissible to contradict the date entered upon the record of when a mortgage was left for record so as to affect the rights of one who has acted in reliance thereon.[32] And where two mortgages are recorded on the same day, evidence is held inadmissible to show which was first delivered for record.[33] And such a rule has also been affirmed in

27. Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626.

Where a probate deed is duly proved and ordered by the court to be registered, no parol evidence should be heard to contradict it, so long as the entry on the record is permitted to remain though the fees have not been paid and the clerk informed the person who brought it that it should not be registered and offered it to him again. Ridley *v.* McGehee, 13 N. C. 40.

Mistake in Registration of Deed. An alleged mistake in the description in the registration of a deed can not be proved by the testimony of a witness that he saw the original and that it had a different description, where the action is not one brought for the purpose of correcting the record as provided by statute. Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626.

Where the satisfaction of a mortgage is entered upon the record evidence of declarations by the mortgage subsequent thereto is not admissible to vary or contradict the legal effect of the act of satisfaction. Safe Deposit & T. Co. *v.* Kelly, 159 Pa. St. 82, 28 Atl. 221.

28. Morris *v.* Keyes, 1 Hill (N. Y.) 540.

29. Blass *v.* Terry, 87 Hun 563, 34 N. Y. Supp. 475; Gilbert *v.* North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543. See Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 138.

One cannot be made a grantee without his consent. Corbett *v.* Norcross, 35 N. H. 99.

30. Unauthorized Recording of a Deed. — A deed placed upon a deed book of a county clerk's office by one without authority and being an unauthorized and void act may be assailed and set aside by parol evidence. Herring *v.* Lee, 22 W. Va. 661.

31. Clawson *v.* Eichman, 2 Grant Cas. (Pa.) 130.

32. Where the date where a mortgage was left for record is entered in the record, such date cannot be contradicted where it would affect the right of a purchaser who relied on the faith of such entry and will prevail over a certificate endorsed on the mortgage that it was left at an earlier date. Musser *v.* Hyde, 2 Watts & S. (Pa.) 314.

33. Hatch *v.* Haskins, 17 Me. 391, *holding* that where two mortgages dated at different times are recorded on the same day the question of priority must be determined from the

the case of a mortgage and judgment entered on the same day, though it is decided that evidence may be admitted of an agreement as to which should have priority,[34] unless it would affect the rights of an assignee of the judgment having no notice of such agreement.[35]

It has, however, been decided that the date endorsed on a deed or mortgage itself of when it was filed for record is not conclusive, but that parol evidence is admissible to show the true date.[36] And that where the date does not appear on the record the actual date may be shown by parol.[37]

(3.) Lost Deeds. — Where a deed is lost and the record does not show a seal thereon, parol evidence is held admissible to show that there was a seal on the original deed.[38]

A record copy of a lost deed is only *prima facie* evidence of the contents of such deed, based upon the presumption that public officers have properly discharged their duties and hence that the original deed was correctly recorded.[39] But it has been held in North Carolina that the record of a lost deed cannot be varied by

record alone and this not appearing they must both be regarded as recorded at the same time.

But see Spalding *v.* Scanland, 6 Mon. (Ky.) 353, *holding* that in the case of two mortgages executed and deposited for record on the same day parol evidence is admissible to show which was first deposited.

34. A mortgage and a judgment entered on same day are presumed to be of equal rank, and therefore payable pro rata, but the parties may by agreement change this general rule and give precedence to one or the other and such agreement may be proved by parol as between the parties. Hendrickson's Appeal, 24 Pa. St. 363; Claason's Appeal, 22 Pa. St. 359; Maze *v.* Burke, 12 Phila. (Pa.) 335.

Record Showing Fractions of Day. In a contest between a judgment and a mortgage, evidence of the time of day on which the judgment was entered should be rejected, for ordinarily a record of a mortgage made as required by law, by the recorder, to show fractions of a day, cannot be contradicted by him or any other persons in a contest between lien creditors. Clawson *v.* Eichbaum, 2 Grant Cas. (Pa.) 130.

35. Hendrickson's Appeal, 24 Pa. St. 363.

36. Horsley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393; *compare* Carper *v.* M'Dowell, 5 Gratt. (Va.) 212, 239.

Withdrawal of Mortgage Left for Record. — Though the certificate of the recorder is declared to be conclusive as to the date when a mortgage is left with him for record, yet it has been decided that parol evidence is admissible to show that the date endorsed on a mortgage is not the true date of its being filed, but the date that it was first left in the office of the recorder and that subsequently it was withdrawn by the mortgagee before being spread upon the records and was not returned until the following day. And after a mortgage to another had been recorded and that while it was out of the recorder's office the second mortgagee searched the record and found nothing showing such mortgage had been filed. Dawson *v.* Cross, 88 Mo. App. 292.

37. Miller *v.* Estill, Meigs (Tenn.) 479. See Baldwin *v.* Marshall, 2 Humph. (Tenn.) 116.

38. Strain *v.* Fitzgerald, 130 N. C. 600, 41 S. E. 872. See Todd *v.* Union Dime Sav. Institution, 118 N. Y. 337, 23 N. E. 299.

39. Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344.

evidence showing that the description in the original was different from that given in the record.[40]

(4.) A Transcript or Certified Copy of a Registered Deed is only *prima facie* evidence of the contents of the original and may be shown to be incorrect by comparing it either with the original deed or the record of it in the register's book and under certain circumstances it may be left to the jury to determine the correctness of the copy when taken.[41]

f. *Legislative Records.* — The journals of the various state legislatures constitute public records, and parol evidence will not be received to contradict the entries therein,[42] to show irregularities in the enactment of a law,[43] or that an act was not passed;[44] or that a bill merely shown thereby to have been vetoed had in fact been signed and afterward withdrawn and vetoed.[45]

g. *Maritime Records.* — **(1.) Registry of Vessel.** — The registry or enrollment of a vessel as required by law is not *per se* evidence of the fact of ownership,[46] but has been held merely *prima facie* evidence, rebuttable by parol, where the question of ownership is collateral or incidental,[47] or where it is sought to charge the owner.[48] But in favor of the party named therein as owner it is not even *prima facie* evidence.[49] Parol evidence is admissible to show that others than the person named as owner are jointly interested,[50] or to show that the extent of the interest of a person in the ship or voyage is greater than that stated.[51]

(2.) Log-Books. — A ship's log-book is not ordinarily regarded as conclusive, and an entry of desertion therein may be contradicted by parol evidence though such an entry is required by law to be made, the law, however, not making it conclusive.[52] But it has

40. Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626.

41. Congregational Church At Mobile *v.* Morris, 8 Ala. 182.

42. Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023, *holding* parol inadmissible to show that a bill was not read three times before passed.

43. Parol evidence will not be received to contradict the affirmative showing of the journal of the legislature to show irregularities in the passage of an act. Wade *v.* Atlantic Lumber Co. (Fla.), 41 So. 72.

44. Commissioners *v.* Armour Pckg. Co., 135 N. C. 62, 47 S. E. 411, *holding* that the journal of the general assembly is conclusive as to the passage of an act.

45. Where the records show a bill to have been vetoed parol evidence cannot be allowed to show that the governor had first signed it and then withdrawn and vetoed it. People *v.* McCullough, 210 Ill. 488, 71 N. E. 602.

46. Bas *v.* Steele, 3 Wash. C. C. 381, 2 Fed. Cas. No. 1,088; Colson *v.* Bonzey, 6 Me. 474; Scudder *v.* Calais Steamboat Co., 1 Cliff. 370, 21 Fed. Cas. No. 12,565; Ligon *v.* Orleans Nav. Co., 7 Mart. (N. S.) 682; Begley *v.* Morgan, 15 La. 162, 35 Am. Dec. 188; Baxter *v.* Wallace, 1 Daly 303.

47. Moore *v.* Anderson, 8 Ind. 18.

48. Bryan *v.* Bowles, 1 Daly 171.

49. Bradbury *v.* Johnson, 41 Me. 582. *Compare,* Brooks *v.* Minturn, 1 Cal. 481.

50. Card *v.* Hines, 35 Fed. 598; Vinal *v.* Burrill, 16 Pick. (Mass.) 401; Ward *v.* Bodeman, 1 Mo. App. 272.

51. Whiton *v.* Spring, 74 N. Y. 169.

52. Malone *v.* Bell, 1 Pet. Adm. 139, 16 Fed. Cas. No. 8,994; The

been declared that an entry upon a ship's log, if made with full knowledge and opportunity of ascertaining the truth, must be accepted as the truth if it tells against the party making it and can be no more denied than a deed.[53]

h. *Military Records.* — Military records kept by proper officers in accordance with the military law have been held to be conclusive of the facts which they recite and not subject to contradiction by parol evidence.[54]

i. *Official Boards and Commissions.* — **(1.) In General.** — Where the record of an official board is not made by statute the only evidence of its actions may be supplemented by parol evidence.[55]

(2.) Supervisors and County Commissioners. — Where a board of county commissioners or supervisors is required to keep a record of its proceedings it has been decided that such record cannot be

Hercules, 1 Sprague 534, 12 Fed. Cas. No. 6,401.

"The log-book is by act of Congress made legal evidence in proof of desertion, but is not incontrovertible and conclusive." Jones *v.* The Phœnix, 1 Pet. Adm. 201, 13 Fed. Cas. No. 7,489.

The falsity of such an entry may be shown. Orne *v.* Townsend, 4 Mason 541, 18 Fed. Cas. No. 10,583.

53. The Newfoundland, 89 Fed. 510.

54. Inhabitants of Fitchburg *v.* Lunenberg, 102 Mass. 358, *holding* that a discharge in writing to a soldier which set forth that he was discharged on a certain date "by reason of surgeon's certificate of disability" and which was shown to have been issued by the proper authorities and was signed by the commanding officer and had never been revoked or annulled was conclusive, in an action between two towns concerning his settlement as a pauper in one of the towns, of the cause of his discharge. The court said: "Considering the careful provisions made by the articles of war for the keeping of muster rolls showing the reasons and times of absence, for the trial and punishment of deserters, and for the granting of discharges; and the inconvenience, as well from the nature of the facts to be proved, as from the difficulty of obtaining the necessary evidence, of trying the issues of desertion, absence without leave, or cause of discharge, in the civil tribunals; we are of the opinion that the proceedings of the military authorities, at least when they involve a direct finding upon the fact in question, as in the case of an enlistment into the service, an acquittal or conviction for desertion, or an honorable discharge in writing are conclusive evidence upon a question of settlement. "The court then continued to say upon the question generally of the conclusiveness of such records, "It is no new thing in the law to depend upon military records as conclusive evidence of similar facts. At common law when a lord distrained for escuage his tenant holding by knight's fee, and the tenant pleaded that he was with the king in Scotland forty days, that issue was 'tried by the certificate of the marshal of the king's host in writing under his seal'; and his certificate when produced in a court of common law, was conclusive."

Any irregularity in the appointment of a sergeant in the militia cannot be shown by parol evidence in contradiction of his warrant. Lovett, Petitioner etc., 16 Pick. (Mass.) 84.

55. Rock Creek Twp. *v.* Codding, 42 Kan. 649, 22 Pac. 741, *holding* that where only a brief abstract of the proceedings of a board is entered of record and the question arises as to what the action of the board was, parol evidence is competent to supplement and to show all its acts and proceedings.

contradicted by parol evidence.[56] But where the proceedings of such a board are omitted from the record they may be shown by parol where the record is not made conclusive by statute,[57] and it is decided that where the record of such a board shows its action was in excess of jurisdiction, it may be collaterally attacked,[58] and the rule that parol evidence is admissible to show that a writing purporting to be a record is not one in fact applies to a record of a board of supervisors ordering work to be done upon which an assessment was founded, such evidence being admissible to show that the true record did not authorize the work.[59]

(3.) Education. — Parol evidence is not admissible to contradict or vary the records of a school district which are required by law to be kept.[60] Neither the private views nor the public declarations of members can be inquired into to ascertain the intention as this

56. Parol testimony cannot be received to supply, modify or extend the official record of the acts of county commissioners. Kidson *v.* Bangor, 99 Me. 139, 58 Atl. 900.

That the issuance of bonds was unauthorized by the county commissioners cannot be shown in contradiction of the record. Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

Entry of Acceptance of Road as Completed. — In Commissioners of Noble County *v.* Hunt, 33 Ohio St. 169, it was held that parol evidence was inadmissible to explain, modify or change the following entry in the journal of the board of county commissioners, "September 7, 1872. The macadamized road petitioned for by Hiram Haistings and others, under the law of April 30, 1869, and the act amendatory and supplementary thereto, having been completed according to contract, the same is hereby accepted as such."

Where contracts entered into by board of supervisors are evidenced by entries on the record required by statute to render the contracts binding on the countries they cannot be varied by evidence that the one contracting with the board did not understand the purport of the contract and that such mistake was shared by some members of the board who in open session misinformed him as to the requirements of the contract. Bridges *v.* Board of Supervisors, 58 Miss. 817.

57. Burrows *v.* Kinsley, 27 Wash. 694, 68 Pac. 332; Nickens *v.* Lewis County, 23 Wash. 125, 62 Pac. 763; Hinton *v.* Perry County, 84 Miss. 536, 546, 36 So. 565. See Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147; Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958.

Where all the papers pertaining to the establishment of a road are lost, including the field notes of the original survey and report of the commissioners, except the minutes of the board of supervisors extrinsic evidence is admissible to show that the original survey diverged from the section line, though the minutes of the board recite that it was established on such line, the evidence being declared not to be contradictory of the record but to supply the lost records. Ackerson *v.* Van Vleck, 72 Iowa 57, 33 N. W. 362.

58. Simpson County *v.* Buckley, 85 Miss. 713, 38 So. 104.

59. Dyer *v.* Brogan, 70 Cal. 136, 11 Pac. 589.

60. Everts *v.* Rose Grove Dist. Twp., 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264; Cowley *v.* School Dist. No. 3, 130 Mich. 634, 90 N. W. 680.

To Show Employment of Teacher. Where by statute a teacher cannot be employed without official action of the school board and the record of the proceedings of the meeting of such board recites that an application for employment as school teacher was presented but that "no action was taken on the application" parol evidence is not admissible to contra-

must be obtained from the language of the recorded acts.[61] But an omission in the minutes of the proceedings of a school board may be supplied by parol evidence,[62] as may an omission in a notice or "warning" of a school meeting to state the date thereof.[63]

In an action against a school district treasurer to recover a bal-

dict the record by showing that a contract with her signed by two members of the board was authorized by the action of the board. Cowley *v.* School District No. 3, 130 Mich. 634, 90 N. W. 680.

The Legal Effect of the Record of a Vote on a district teacher cannot be explained away by parol or by showing that it was intended by the vote to do something different from what its language and legal effect shows. Cameron *v.* School Dist. No. 2, 42 Vt. 507.

Vote Appropriating Money for Lighting. — The vote of a school district appropriating money for furnishing light in school-rooms not being illegal, parol evidence is inadmissible to show an intention to appropriate money to install a lighting plant not required for the convenient accommodation of scholars of the district. Brooks *v.* School Dist. of Franconia, 73 N. H. 263, 61 Atl. 127.

Authority of Clerk to Call Meetings. — Where the records of a school district show that the district voted to authorize their clerk to call and warn their annual meetings, parol evidence is not admissible to show that the real vote of the district was to authorize the clerk to call and warn all district meetings. The court said: "The authority conferred on the clerk by the vote of the district was to call and warn the annual meetings. And we do not feel authorized to allow the parol evidence offered to establish the fact that the real vote, passed by the district was one authorizing the clerk to call all district meetings. Such evidence would be in direct contradiction of the record. It differs entirely from the case of the admission of parol evidence to show the existence of certain facts omitted to be stated upon the record, as in the instances of evidence to show that the oath was duly administered to a public officer of a town or district, where the same is not recorded." Third District *v.* Atherton, 12 Metc. (Mass.) 105, 113.

61. Bartlett *v.* Kinsley, 15 Conn. 327.

62. School Dist. No. 1 *v.* Union School Dist., 81 Mich. 339, 45 N. W. 993, *holding* that where by the joint action of the boards of school inspectors of two townships territory is set off from one district and attached to another, and no record is made of such fact, and the action is acquiesced in for a long period of time, parol evidence is admissible to show such fact.

Where the Record of a School District Is Incomplete and not signed by any one and shows no adjournment of a meeting, it may be shown that a subsequent meeting which purports to have been held pursuant to an adjournment, was in fact held in pursuance of an adjournment at the prior meeting, no meeting being shown to have been held between the two dates. School Dist. No. 2 *v.* Clark, 90 Mich. 435, 51 N. W. 529.

But Compare Morgan *v.* Wilfley, 71 Iowa 212, 32 N. W. 265.

63. Braley *v.* Dickinson, 48 Vt. 599, *holding* that where the date of the warning is not by statute required to be stated therein parol evidence is admissible to show the actual date and when the warning was posted.

Warrant Issued by Justice of Peace for School Meeting. — Where a warrant for a school meeting is issued by a justice of the peace upon the failure of the proper school officers to issue it as provided by statute, if the fact of such neglect actually exists, it may be shown by evidence *aliunde* where not recited in the warrant, in the absence of a statutory requirement that the warrant should recite it. Pickering *v.* de Rochemont, 66 N. H. 377, 23 Atl. 88.

Compare Sherwin *v.* Bugbee, 17 Vt. 337.

ance of money alleged to be in his hands the account of moneys collected and expended by him as shown by his books and annual reports is not conclusive and may be explained or controverted by him.[64] Though the records of a school district show that a majority voted in favor of a proposition, parol evidence is admissible to show the actual facts in connection with such vote, and that more votes were recorded as cast than there were voters present.[65]

A certificate purporting to be issued by a superintendent of schools stating that a person is qualified to teach may be impeached by evidence showing that it never had any legal existence or binding force.[66] Where it is not necessary to the validity of the acts of a board of education that they should be recorded, parol evidence is admissible to prove acts of which the officers have omitted to make entries,[67] as where they show that a motion was passed but do not state what it was.[68]

(4.) **Election** — The assessor's list of polls is conclusive as to the number of voters in a district and cannot be varied or contradicted by parol,[69] but parol is admissible to contradict the voting register for the purpose of showing that a certain person voted at an election.[70]

(5.) **Highways.** — The recorded report of road viewers, as to opening of a highway, cannot be varied or contradicted by parol.[71]

64. Saville *v.* School District No. 27, 22 Kan. 529.

65. In this connection evidence has been held admissible that the teller counted twenty-nine votes in favor of, and twenty-six against the proposition, and that when the result was announced it was immediately alleged that more votes were cast than there were voters present, whereupon the chairman counted the voters in favor of and against the proposition by placing them in separate lines and found the vote a tie and that the proposition was defeated by his voting "no." State *v.* Hutchins, 33 Neb. 335, 50 N. W. 165.

66. Hopkins *v.* School Dist. No. 3, 27 Vt. 281.

67. Bartlett *v.* Board of Education of Freeport School Dist., 59 Ill. 364, 368.

Mandamus to Compel City Authorities To Admit Colored Children to School. — Where a petition for mandamus is brought to compel city authorities to admit colored children to a certain school, those injured are not remediless because the record kept by the authorities fails to show the illegal acts, but the existence of such acts may be shown by other competent evidence. People *v.* Alton, 179 Ill. 615, 54 N. E. 421.

68. **Omission To State What Motion Was.** — Where the records of a school board show that a motion was passed, but do not state what the motion was, parol evidence is admissible to show what such motion was. Morgan *v.* Wilfley, 71 Iowa 212, 32 N. W. 265.

69. **The Assessment of Polls,** as returned by the assessor, is conclusive as to the number of voters in the district covered by it, and the number so shown cannot be enlarged or diminished by parol evidence. Vance *v.* Austell, 45 Ark. 400.

70. On trial for misconduct of election officers a voter may testify that he voted at the election as against the objection that the registration book is the best evidence. State *v.* Matlack (Del.), 64 Atl. 258.

71. When the viewers have re-

Where the town clerk is made by statute clerk of the board of highway commissioners and required under their direction to record their proceedings, parol evidence is admissible to show facts omitted to be stated of record through neglect of the clerk.[72]

Where a certificate is issued by the governor of a state, as required by Congress, certifying to the completion of a road, evidence that the road had never been constructed, and that the issuance of the certificate was procured by fraud is not admissible against *bona fide* purchasers, where it does not appear and is not intended to be shown that the fraud was committed by the purchasers, or that they had any notice of it.[73]

(6.) Levee, Drainage and Irrigation. — Records of a board of levee commissioners in assessing a tax cannot be varied collaterally in a suit to which the commissioners are not a party.[74]

The records of an irrigation district as to the purpose for which an assessment was levied cannot be varied by parol for the purpose of showing that a different purpose was in fact contemplated.[75] But the acts of members of a drainage commission, not done entirely in their official capacity, may be proved by parol, irrespective of the records of such commission.[76]

j. *Land Patents.* — **(1.) In General.** — The record of proceedings in the public land department, and of grants and patents made by it, cannot, as a general rule, be contradicted or varied by parol evidence.[77]

ported and the road is ordered to be opened, they are then *functi officio*, and their opinions as to where the road should be can avail nothing. They cannot vary or change the legal import of their report by their parol testimony. Butler *v.* Barr, 18 Mo. 357.

72. Taymouth *v.* Koehler, 35 Mich. 22.

73. United States *v.* Dallas Military Road Co., 51 Fed. 629, 2 C. C. A. 419, so holding where a bill in equity was instituted by the United States to procure a decree of forfeiture of lands granted by Congress to aid in the construction of a military road, on the ground that the terms of the grant had never been complied with, and that the certificate had been procured by fraud. The company to which the grant was made had subsequently sold the lands under authority conferred by the act of Congress to a *bona fide* purchaser.

74. Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

75. Parol evidence is not admissible in a proceeding to compel the treasurer of an irrigation district to pay interest coupons on its bonds, to show that an assessment had been in fact levied for a different purpose from that declared in the resolution levying same. Hewel *v.* Hogin (Cal.), 84 Pac. 1002.

76. Where drainage commissioners acted as agents of adjoining owners rather than in their official capacity, their acts may be proved by parol. Dunn *v.* Youmans (Ill.), 79 N. E. 321.

77. McCormick *v.* Hayes, 159 U. S 332; Aurora Hill Con. Min. Co. *v.* Eighty-five Min. Co., 34 Fed. 515; Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388; Pearson *v.* Baker, 4 Dana (Ky.) 321; Goodloe's Heirs *v.* Wilson, 2 Overt. (Tenn.) 59.

The final judgment of the officers of the United States land department, as to matters of fact properly determinable by them cannot be contradicted by parol evidence in

(2.) To Show Lands Not of Character Described or Fraud in Obtaining Patent. — Where there has been an identification by the proper officers, acting in their official capacity of the land covered by a grant under the Swamp Land Act, parol evidence is not admissible to contradict the terms of the grant,[78] and it cannot be shown that the land was not in fact swamp land,[79] or that there was a want of

a collateral proceeding. Peyton *v.* Desmond, 129 Fed. 1.

Oral testimony of commissioner of land office, based upon the records of his office is not admissible. Patterson *v.* Knapp (Tex. Civ. App.), 99 S. W. 125.

"The validity of a patent cannot be inquired into in a collateral issue nor can a party travel behind it, to show it void. If it be void on its face, advantage may be taken of its defects, otherwise steps must be taken by a direct issue, to repeal it by *scire facias*, or to procure its release in obedience to a decree of a court of equity, and until this is done it must remain unimpeachable." Jennings *v.* Whitaker, 4 T. B. Mon. (Ky.) 50.

The Record of a Patent from the United States to a person for land cannot be varied by parol evidence, and a memorandum by a third person on the margin of the record constitutes no part of it and cannot be admitted in evidence to vary it. Branson *v.* Wirth, 17 Wall. (U. S.) 32.

Receiver's receipt and certificate upon which a United States patent issued cannot be contradicted by proof of unauthorized entries on Register in local United States Land Office. Foster *v.* Meyers (La.), 41 So. 551.

That land is not embraced in a patent as a portion of the pueblo of San Francisco cannot be shown by parol evidence where the patent was issued, in conformity to a survey which followed a decree of the United States court. Knight *v.* United States Land Assn., 142 U. S. 161.

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had lawful authority to make a conveyance of the title. But if officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void — void for want of power to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding with proper averments and evidence would be required to establish that it was voidable, and therefore should be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is nevertheless a clear distinction established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence if it be such evidence as by its nature is capable of showing a want of authority for its issue." Doolan *v.* Carr, 125 U. S. 618.

Reichart *v.* Felps, 6 Wall. (U. S. 160; Best *v.* Polk, 18 Wall. (U. S.) 112; Reynolds *v.* Iron Silver Mining Co., 116 U. S. 687; Mason *v.* Russell, 1 Tex. 721. See also Polk's Lessee *v.* Wendal, 9 Cranch (U. S.) 87; Wilcox *v*, Jackson, 13 Pet. (U. S.) 498, 509; Stoddard *v.* Chambers, 2 How. (U. S.) 284, 317.

78. Chandler *v.* Calumet & H. Min. Co., 149 U. S. 79; McCormick *v.* Hayes, 159 U. S. 332.

79. Where land is granted under the Swamp Land Act by patent to a state, parol evidence is not admissible to show that the land so granted was not in fact swamp land.

title in the grantor state.[80] And a patent may be shown to be void under a statute.[81]

The land department is not concluded by a final certificate of payment issued by an official of a local land office to a preemptor, but in an action of replevin by the government for logs cut, evidence is admissible of fraud in making the entry.[82]

(3.) To Explain and Identify. — Where entries in the records of the land office do not explain themselves parol evidence is admissible for the purpose of explaining the same.[83] And evidence may be received to identify the land covered by a patent,[84] or to prove

French *v.* Fyan, 93 U. S. 169; Connors *v.* Meservey, 76 Iowa 691, 39 N. W. 388.

Evidence to Render Inoperative Not Admissible. — A patent of the United States, regular on its fact, cannot in an action at law be held inoperative as to any lands covered by it, upon parol testimony that they were swamp lands and overflowed, and therefore unfit for cultivation, and hence passed to the state under the grant of such land on her admission into the Union. Ehrhardt *v.* Hogaboom, 115 U. S. 67.

80. Knight *v.* United Land Assn., 142 U. S. 161.

Where Prior Rights of Third Persons Are Affected. — While a patent and survey are generally conclusive upon the courts in action of ejectment when not in conflict with prior rights of third persons yet in such actions their conclusiveness may be assailed to the extent essential for the protection of such rights and the court may inquire whether or not the description includes lands which the government or its officers had no power to convey. United Land Assn. *v.* Knight, 85 Cal. 448, 23 Pac. 267, 24 Pac. 818.

81. Void Under Statute. — Where the legislature has declared that for any cause a patent shall be held void, parol evidence *dehors* the patent is admissible to prove the cause which renders it void. Ray *v.* Barker's Heirs, 1 B. Mon. (Ky.) 364.

82. Fraud in Making Entry. — A final certificate of payment issued by the receiver of a local land office to a pre-emptor may be canceled by the commissioner of the general land office for fraud in making the entry, and parol evidence is admissible in an action of replevin for logs cut against one claiming under such a certificate to show the fact of cancellation and that the entry was made by one not for settlement and improvement for his own benefit but under an agreement with another, a logging company, to transfer the land to it as soon as it could be done that the latter might strip the land of timber. United States *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552.

83. Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486.

84. Snow *v.* Morse, 18 Ky. L. Rep. 707, 37 S. W. 953.

State *v.* Hoff (Tex. Civ. App.), 29 S. W. 672, holding parol admissible to identify town limits, as defined by the town charter.

When land granted under Swamp Land Act has not been identified by the proper officer, parol evidence may be received to aid in its identification. Irwin *v.* San Francisco Sav. Union, 136 U. S. 578.

In Wright *v.* Roseberry, 121 U. S. 488, Mr. Justice Field said: "The result of these decisions is, that the grant of 1850 is one *in praesenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted, but when that officer has failed or neglected to make the identification, it is competent for the grantees of the state to prevent their rights from being defeated, to identify the lands in any other appropriate mode, which will effect that object."

that it was issued without authority.[85] Where, however, the instrument is free from ambiguity, parol evidence to aid in the construction is not admissible as in such a case this matter is one for the court to determine from the patent itself.[86]

k. *Patent Office Proceedings.* — Parol evidence is inadmissible for the purpose of collaterally attacking the proceedings of the patent office or the patent issued by it.[87] But the testimony of experts is admissible as to the meaning of technical terms in a patent, and where their testimony is conflicting, and the meaning is still in doubt, reference may be had to standard dictionaries, publications and books of science for such information, as in the judgment of the court is necessary to clarify the disputed point.[88]

l. *Prison Records.* — A sheriff's calendar which the law requires shall contain "distinctly and fairly registered the names of all prisoners committed to the jail under his charge" is held to be only *prima facie* evidence of the facts recited.[89]

Superintendent Penitentiary. — Where the superintendent is required by law to keep a "good time account" containing a record of the behavior of the prisoners, such record is not conclusive as to such entries as it contains, and may be contradicted by parol evidence, although it is *prima facie* evidence against a prisoner. And where such record is silent in regard to bad behavior, it will be presumed that the prisoner has earned all his credits.[90]

m. *Surveys, Plats and Maps.* — **(1.) In General.** — Parol evidence is not admissible in a collateral proceeding to contradict or vary a survey, plat or map which has been made by one acting in his official capacity.[91] The surveyor will not be permitted to impeach

85. In a Case in Missouri it is also said: "It is well settled under the decisions of this state and of the United States, that even in action at law the validity of a patent, though in due form is subject at all times to the inquiry whether the officers of the government who issued it had the lawful authority to make a conveyance of the title." Cummings *v.* Powell, 116 Mo. 473, 21 S. W. 1079, 38 Am. St. Rep. 610.

86. Stuart *v.* Easton, 170 U. S. 383.

87. Calculagraph Co. *v.* Wilson, 132 Fed. 20, *holding* that evidence was not admissible to show that the payment of the final fee for the issuance of the patent was not made within the six months prescribed by Rev. St. § 4885 (U. S. Comp. St. 1901, p. 3382).

88. Pauzl *v.* Battle Island Paper P. Co., 132 Fed. 607.

89. Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 409.

90. "It is the duty of the superintendent to keep, or have kept, under his vigilant personal supervision the record directed to be kept by the statute, and if he fails to keep it, the prisoner's right to good time shall not be left to the uncertainty of treacherous memories and oral testimony. In the absence of record to the contrary it will be conclusively presumed that he is entitled to the good time. The record when properly kept will be evidence against him, but subject to be contradicted if not in accordance with the fact." State *v.* McClellan, 87 Tenn. 52, 9 S. W. 233.

91. *United States.* — Jones *v.* Johnston, 18 How. 150.

Alabama. — State *v.* Bell, 5 Port. 365.

California. — Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764.

his official act.[92] Nor will evidence be admissible of statements or declarations made by him to contradict his official report.[93] And it cannot be shown that the survey could not have been made at the time it purports to have been made,[94] or that the surveyor never in fact surveyed the land.[95]

(2.) Map or Plat Evidencing Dedication. — (A.) IN GENERAL. — A map or plat evidencing an express dedication of land cannot be varied or contradicted by parol evidence showing an intention inconsistent therewith.[96] It cannot be shown that a street was to be of different

Iowa. — Schlosser *v.* Cruickshank, 96 Iowa 414, 65 N. W. 344.

Kentucky. — American Assn. *v.* Innis, 22 Ky. L. Rep. 1196, 60 S. W. 388; Cain *v.* Flynn, 4 Dana 499.

Ohio. — McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591.

Pennsylvania. — Bellas *v.* Levan, 4 Watts 294.

Tennessee. — White *v.* Crocket, 3 Hayw. 234.

Texas. — Anderson *v.* Stamps, 19 Tex. 460; Giddings *v.* Winfree, 32 Tex. Civ. App. 99, 73 S. W. 1066.

The Intention must be ascertained from the original survey made upon the ground. Kanne *v.* Otty, 25 Or. 531, 36 Pac. 537.

Where Proper Officers of the United States have made a survey of public land, and such survey has been confirmed by the land department, it is not open to collateral attack. Colorado Fuel Co. *v.* Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. 556. *citing* Russell *v.* Maxwell Land Grant Co., 158 U. S. 253, as deciding this identical question.

Parol evidence of the existence of certain marked trees and monuments not called for in the survey of a road, is inadmissible to establish by those marks and monuments, a line of road variant from that called for by the courses and distances by which alone such line is designated in the survey. Moore *v.* People, 2 Doug. Mich. 420.

The Lines and Corners as established by a survey cannot be changed by parol evidence. Jamison *v.* New York & T. Land Co. (Tex. Civ. App.), 77 S. W. 969.

To Show Land Not Surveyed. Parol evidence is not admissible to prove that a tract of land included in a certificate of survey was never actually surveyed by the surveyor. Hammond *v.* Norris, 2 Har. & J. (Md.) 130. *Compare* McCall *v.* Sybert, 4 Watts (Pa.) 431.

Recital That Copies Have Been Compared. — Where the record states that copies of land office maps have been compared with the original maps, it cannot be shown that they were made from copies. State *v.* Bell, 5 Port. (Ala.) 365, 4 Smith's Condensed Rep. 360.

92. "That the surveyor who has made the survey testifies to the fact avails nothing. When he has executed the trust confided to him by law, he sinks to the level of an ordinary witness, and can no more contradict his official act, or impeach the sanctity of the patent founded thereon, than any other witness." Cain *v.* Flynn, 4 Dana (Ky.) 499, 502.

93. Ratcliff *v.* May, 27 Ky. L. Rep. 164, 84 S. W. 731; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Ilwaco *v.* Ilwaco R. & N. Co., 17 Wash. 652, 50 Pac. 572.

94. Pollard *v.* Dwight, 4 Cranch (U. S.) 421; Cain *v.* Flynn, 4 Dana (Ky.) 499.

95. Cain *v.* Flynn, 4 Dana (Ky.) 499.

96. Rhodes *v.* Brightwood, 145 Ind. 21, 43 N. E. 942; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Village of Wayzata *v.* Great Northern R. Co., 46 Minn. 505, 49 N. W. 205; Hobson *v.* Monteith, 15 Or. 251, 14 Pac. 740; *Compare* Whelan *v.* Boyd, 93 Cal. 500, 29 Pac. 69, *holding* that the fact that a public street laid down as such on maps known as the "Engineers' Map" and "Humphrey's Map of the City and County of San Francisco" does not preclude evidence that there has been no dedication and acceptance and no user and that the land is private property.

width than is stated therein,[97] or that there was an intent to reserve a portion of the land platted into streets.[98]

(B.) Where Intention Doubtful. — Where the intention of the parties as shown by this map or plat evidencing a dedication is doubtful, resort may be had to parol evidence of the contemporaneous and subsequent acts of the parties as showing the practical construction given by them to the dedication.[99]

(3.) Non-compliance With Statute in Making Survey. — Parol evidence may be admitted to contradict or vary a survey where the provisions of a statute in regard to making it have not been complied with.[1]

(4.) To Explain or Locate. — Where a plat of a town is ambiguous it may be explained by parol evidence.[2] And such evidence is admissible to identify and fix the corners or stakes of a survey in case of an ambiguity.[3]

n. *Tax Records.* — **(1.) In General.** — Tax records by law to be kept have been held to be conclusive and not subject to contradiction by parol evidence,[4] and it is decided that the valuation fixed by a

97. Wood *v.* Mansell, 3 Blackf. (Ind.) 125.

98. "These acts, public and without restriction, are of such a high character as evidence showing an intent to dedicate to public use, that the proprietor, as a general rule, will be estopped to assert the contrary with respect to any portion of the land so designated as streets. . . . If there exist an *actual* intent to reserve any portion of the land so platted into streets, otherwise than by express reservation on the plat, certainly it should be made manifest in some manner not only of equal certainty, but of equal publicity as the plat, otherwise an *actual intent* can not be permitted to avail against an intent on which the law will and must insist, as being shown by unequivocal acts upon which the public had a right to rely." City of Denver *v.* Clements, 3 Colo. 484.

Clark *v.* City of Elizabeth, 40 N. J. L. 172.

99. City of Shreveport *v.* Drouin, 41 La. Ann. 867, 6 So. 656.

1. Where a statute requires notice to "the opposite party" where a survey is to be made, such survey is not conclusive or even presumptive evidence against him. Bridges *v.* McClendon, 56 Ala. 327.

2. Porter *v.* Carpenter, 39 Fla. 14, 21 So. 788.

3. Burke *v.* McCowen, 115 Cal. 481, 47 Pac. 367; Wilkins *v.* Clawson (Tex. Civ. App.), 83 S. W. 732.

When the Calls in the Field Notes are inconsistent, a resort may be had to parol evidence to establish the lines as actually run by the surveyor. Thompson *v.* Langdon, 87 Tex. 254, 28 S. W. 931.

Where the Boundary Line as Described in a Patent is not surveyed on the line indicated therein, parol evidence is admissible to show its original location. Kanne *v.* Otty, 25 Or. 531, 36 Pac. 537.

4. Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210; Case *v.* Dean, 16 Mich. 12.

In Ohio it is decided that the minutes of a taxing board are not conclusive, and that the real facts may be shown by parol even though such facts add to or contradict the record. State *v.* Aldridge, 66 Ohio St. 598, 64 N. E. 562. *Examine* Hagerty *v.* Huddleston, 60 Ohio St. 149, 53 N. E. 960.

For the Purpose of Supporting a Tax Title parol evidence is not admissible to impeach the records of the board of supervisors upon which a tax sale rests. Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958.

See Brothers *v.* Beck, 75 Miss. 482, 22 So. 944.

taxing officer or board within the scope of the authority conferred by law is conclusive where made in good faith, in the absence of gross mistake. A distinction, however, is made between such cases and where it is claimed that the tax is illegal.[5] But it has been held that the records of a city treasurer as to assessment and payment of taxes are not conclusive and that mistake or omission therein may be shown by parol.[6]

(2.) Assessment Rolls. — Where the record does not show a compliance with the statute as to the filing and approval of the assessment roll compliance therewith cannot be established by parol.[7]

Parol evidence is inadmissible to supply a fatal defect in a description of land given in an assessment roll for taxes, an assessment of land being required to be written in the public records,[8] though it may, under a statute or code provision, be admissible to apply a description where there is enough in the description to be applied to a particular tract by the aid of such evidence,[9] and it has also been held that parol evidence may be received to show what particular property was intended by a reference or description on the rolls, where that fact could not be determined by inspection thereof,[10] and that in case of conflict between various tax records,

5. "The valuation placed upon property by a taxing officer or board within the scope of authority conferred by law, when made in good faith, will be held and regarded by courts as conclusive of the value, unless it should appear that there was some gross mistake to the prejudice of the taxpayer. But when the complaint is not as to the valuation, but goes to the extent of claiming that under the statute the taxpayer is not liable to be taxed at all, under the peculiar circumstances of the case, that is that the tax is illegal then the determination of the taxing officers and boards is only *prima facie.*" Hagerty *v.* Huddleston, 60 Ohio St. 149, 53 N. E. 960.

6. Robbins *v.* Townsend, 20 Pick. (Mass.) 345.

7. Non-Compliance With Statute as to Filing Assessment Roll. Where the assessment roll of lands is required by statute to be filed with the clerk of, and approved by, the board of supervisors by a certain date, and the record does not show a compliance with such requirement, compliance cannot be shown by parol evidence. Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958. See Brothers *v.* Beck, 75 Miss. 482, 22 So. 944.

Compare Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002, *holding* that where there is nothing in the charter or ordinances of a city requiring proof of the publication of notice of filing an assessment roll in any particular way, parol evidence is admissible to establish such publication.

8. Paine *v.* Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303; Crawford *v.* McLawrin, 83 Miss. 265, 35 So. 209, 949; Sheets *v.* Paine, 10 N. D. 103, 86 N. W. 117, so *holding* where books did not show township or range in which located.

Ambiguity in description of land on the assessment rolls cannot be explained by parol. Leavenworth *v.* Greenville W. & S. Co., 82 Miss. 578, 35 So. 138.

Compare Vicksburg Bank *v.* Adams, 74 Miss. 179, 21 So. 401, *holding* that where the record is undergoing direct adjudication it may be shown that the assessment related to other personal property than that stated.

9. Crawford *v.* McLawrin, 83 Miss. 265, 35 So. 209, 949. See Miss. code 1892, § 3776.

10. In proceedings by the state to assess omitted property, where the assessment lists do not specify the property to which they refer, parol

such evidence will be received to show on which of several pieces of property taxes were in fact paid,[11] or where it is provided by statute that no error or omission in the assessment roll shall affect the legality of taxes levied.[12]

(3.) **Tax Sales.** — (A.) In General. — It is the general rule that the record which the law requires to be kept of proceedings in connection with sale of property by public officers, acting in their official capacity, cannot be contradicted or varied by parol evidence,[13] though it is decided that parol evidence may be admitted to explain the record of a tax sale.[14]

(B.) Omission From Record. — Where the statute requires evidence of a fact to appear of record it is a general rule that the record alone can be looked to as evidence of such fact and where there is a failure to set it forth in the record as required the defect cannot be supplied by parol evidence.[15] But it is decided that in proof of proceedings preliminary to a tax sale it is only necessary to

evidence may be given to show what property was intended. Com. *v.* American Tobacco Co. (Ky.), 96 S. W. 466.

11. Where tax records are conflicting as to which lot taxes were paid upon, parol evidence is admissible notwithstanding statement in tax list. Elbert *v.* Mitchell (Iowa) 109 N. W. 181.

12. Where It Is Provided by Statute That no Omission in assessment of property shall affect in any manner the legality of the taxes levied thereon, an omission to enter a fact upon the record may be cured by parol evidence.

The Cedar Rapids & M. R. Co. *v.* Carroll Co., 41 Iowa 153, wherein it was decided that the omission to note that an assessment was made by the treasurer in place of the assessor who had failed to assess the lands did not invalidate the assessment but that parol evidence was admissible to show that fact and the time when made.

13. Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494.

The Amount and Items for which land was sold at a tax sale must be determined from the record of sales which the statute requires shall be made after the sale and such record cannot be contradicted by parol evidence. Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494.

Recital That Lots Were Sold in Gross. — Where the record shows that lots were sold in gross for an unpaid street assessment, parol evidence is not admissible to show that they were sold singly. Bays *v.* Trulson, 25 Or. 109, 35 Pac. 26.

Record of Returns Made to County Auditor. — A record by the county auditor, required by statute to be kept of the returns made to him under oath, by the county treasurer and collector, of delinquent lands which returns are a pre-requisite to a forfeiture of lands for non-payment of taxes, cannot be altered or contradicted by parol evidence. Miner *v.* McLean, 4 McLean 138, 17 Fed. Cas. No. 9,630.

The Validity of a Tax Title, especially if it be of long standing, cannot be impeached in an action of ejectment against the holder by parol evidence to show the falsity of the supervisor's certificate of valuation attached to the assessment roll. Blanchard *v.* Powers, 42 Mich. 619, 4 N. W. 542.

14. Darter *v.* Houser, 63 Ark. 475, 39 S. W. 358, *holding* that parol evidence was admissible to show what was included in "costs" where the record of a tax sale recited that the land was bid in for taxes and for a lump sum as penalty and costs.

15. Miner *v.* McLean, 4 McLean 138, 17 Fed. Cas. No. 9,630; Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958.

show by the record such facts as the statute expressly requires to be of record and parol proof is admissible of any facts not required to be of record.[16]

V. RECORDS AND DOCUMENTS OF FEDERAL GOVERNMENT.

1. Act of Congress Relating to Records of Sister States Not Applicable. — The act of Congress relating to manner of authenticating the judicial records and proceedings of other states and territories have no application to the records of federal courts either in state or other federal courts,[17] though the contrary has been

As to Publication of Notice. Where by statute the record should show that the clerk has certified to the publication of the notice of sale, such fact cannot be proved by parol where the record fails to show it. Martin *v.* Allard, 55 Ark. 218, 17 S. W. 878, decided under Mansf. Ark. Dig., §§ 5762, 5763.

16. Lamb *v.* Gillett, 6 McLean 365, 14 Fed. Cas. No. 8,016; Gorden *v.* City of San Diego, 108 Cal. 264, 41 Pac. 301, *holding* that parol evidence is admissible to show that a tax sale and deed of land were authorized by city trustees where there is no record of any official action by such board unless the law requires all matters to appear of record and makes it the only evidence.

French *v.* Spalding, 61 N. H. 395, *holding* that parol evidence is admissible to show that a sale of property for taxes was made within the hours fixed by statute.

17. *United States.* — United States *v.* Wood, Brun. Col. Cas. 456, 2 Wheel. Cr. Cas. 325, 28 Fed. Cas. No. 16,757; National Acc. Soc. *v.* Spiro, 94 Fed. 750, 37 C. C. A. 388; Buford *v.* Hickman, Hempst. 232, 4 Fed. Cas. No. 2,114*a*; Mason *v.* Lawrason, 1 Cranch C. C. 190, 16 Fed. Cas. No. 9,242.

Alabama. — Allison *v.* Robinson, 136 Ala. 434, 34 So. 966.

Connecticut. — Adams *v.* Way, 33 Conn. 419.

Indiana. — Adams *v.* Lisher, 3 Blackf. 241, 25 Am. Dec. 102.

Missouri. — McGregor *v.* Hampton, 70 Mo. App. 98.

New York. — Pappoon *v.* Jenkins, 2 Johns. Cas. 119 (holding that in an action on a judgment rendered in the United States circuit court for the district of Massachusetts on a plea of *nul tiel record*, a copy of the record of such court certified by the clerk under the seal of the court was competent evidence). See also Baldwin *v.* Hale, 17 Johns, 272.

North Carolina. — Murray *v.* Marsh, 2 Hayw. 290.

Pennsylvania. — Williams *v.* Wilkes, 14 Pa. St. 228. See Headman *v.* Rose, 63 Ga. 458.

The record of a district court of the United States is not within the act of Congress prescribing the mode by which the records and judicial proceedings of the state courts shall be authenticated, but is when duly certified by the clerk under its seal admissible as evidence in every other court of the United States. The circuit and district courts of the United States certainly can not be considered as foreign in any sense of the term, either in respect to the state courts in which they sit or as respects the circuit or district court of another circuit or district, nor even as to the courts outside of the state in which they sit. Turnbull *v.* Payson, 95 U. S. 418.

Under a statute, providing that exemplifications or copies of records which are kept in any public office in the state shall be admissible if properly attested by the keeper of the records and under the seal of the office of such keeper, a transcript of the record of a bankruptcy proceeding in a federal district court held within the state, certified to by the clerk and under the seal of the court, is properly admitted in a court of the state. Federal courts held within the state are domestic and not

held.[18] Nevertheless a copy authenticated in the manner provided in that act is admissible.[19]

2. Method of Proof. — A. Certified Copies. — The records of a federal court may be proved in any state or federal court by a copy certified by the clerk under the seal of the court.[20] The seal proves itself.[21] A certificate by the judge is unnecessary.[22]

B. In State Courts. — a. *Generally.* — It has been held that as to the method of certifying copies of the records of federal officers the state courts will conform to the laws of the United States and the practice of its officers and departments;[23] and that no au-

foreign courts, and transcripts of their records require no other or different authentication to be admissible in evidence than a transcript of the record of a court of the state. Bradford *v.* Russell, 79 Ind. 64.

18. Lehmann & Co. *v.* Rivers, 110 La. 1079, 35 So. 296; United States *v* Bank of United States, 11 Rob. (La.) 418. See Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46.

Judgments of United States courts must be construed to be embraced in the act of Congress as to the authentication of judgments, or they must be esteemed as foreign judgments; in either case, the judgment must be properly authenticated to be introduced in evidence; therefore the certificate of discharge in bankruptcy by the clerk of the district court, under the seal of the court, is inadmissible without the authentication of the judge to the certificate. Dorsey *v.* Maury, 10 Smed. & M. (Miss.) 298.

19. Buford *v.* Hickman, Hempst. 232, 4 Fed. Cas. No. 2,114*a*; Redman *v.* Gould, 7 Blackf. (Ind.) 361.

A certificate of the district judge of the United States to a record of the circuit court offered as evidence of debt in state court, that attestation of clerk was in due form, was, in the absence of the circuit judge and associate justice, sufficient. Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46.

20. Adams *v.* Way, 33 Conn. 419; Adams *v.* Lisher, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102. See also Allison *v.* Robinson, 136 Ala. 434, 34 So. 966; McGregor *v.* Hampton, 70 Mo. App. 98.

And an exemplified copy of the record of a judgment in one federal court attested by the seal of the court and authenticated by the certificate of the deputy clerk of the court is admissible in another federal court without further proof, since federal courts are presumed to know the seals of all the other federal courts. And although the statute only authorizes a certificate by the deputy clerk in the absence of the clerk it will be presumed in favor of the proper performance of official duty that the clerk was absent. National Acc. Soc. *v.* Spiro, 94 Fed. 750, 37 C. C. A. 388.

United States Commissioner. — A copy of the United States commissioner's record certified by the commissioner with his official seal and signature as a true copy of his original record, in a proceeding within his jurisdiction, is admissible without oath. Frost *v.* Holland, 75 Me. 108; Ramsey *v.* Flowers, 72 Ark. 316, 80 S. W. 147.

21. Williams *v.* Wilkes, 14 Pa. St. 228.

22. The record of bankruptcy proceedings in the district court, certified by the clerk, is competent evidence in the federal circuit court without a certificate by the judge, the act of Congress not applying to federal courts. Murray *v.* Marsh, 2 Hayw. (N. C.) 290, 17 Fed. Cas. No. 9,965.

23. A copy of records from the general land office is not inadmissible because the commissioner's certificate does not comply with the form prescribed by the state statute. "The mode of authenticating the documents, records and proceedings of any of the departments or courts of the United States is governed by the laws of the United States and

thentication will be required other than what would be necessary in the courts of the United States.[24] Congress may prescribe a method by which the records of federal officers and offices may be proved.[25]

b. *State Statutes.* — Statutes exist in some states providing for the method of proving the records of federal officers and courts.[26]

3. Reports and Decisions of Interstate Commerce Commission. By act of Congress authorized publications of the reports and decisions of the interstate commerce commission are made competent evidence in all federal and state courts.[27]

4. Bankruptcy Court. — Under the Bankruptcy Act the records of the bankruptcy court, or certified copies thereof, are made competent evidence.[28]

5. Acts of Congress Providing For Certified Copies. — A. GENERALLY. — Numerous acts of Congress provide for the use in evi-

by the practice of such departments and courts, and not by the statutes of the state. Lacey *v.* Davis, 4 Mich. 140. The form of this certificate is the usual one and is sufficient." Gilman *v.* Riopelle, 18 Mich. 145.

24. The United States government is not foreign to the states, and in the courts of the latter no authentication of documents from a public office of the former should be required other than what would be sufficient in the courts of the United States. Wickliffe *v.* Hill, 3 Litt. (Ky.) 330.

25. McLane *v.* Bovee, 35 Wis. 27.

26. Where by statute it is provided that a copy of any record, document or other paper in any of the departments of the government of the United States shall be admissible with like effect as the original when certified by the head or acting chief of such department to have been compared by him with the original and to be a correct transcript, a copy of an account current between a postmaster and the post-office department as stated and filed in the office of the auditor of the treasury for the post-office department, certified by the auditor and the postmaster general, is competent evidence. Haddock *v.* Kelsey, 3 Barb. (N. Y.) 100.

Land Office Records. — Delauney *v.* Burnett, 9 Ill. 454, 487; Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132.

By statute in Mississippi and many other western and southwestern states a copy of the records pertaining to the land office, certified by the register, are admissible in evidence and need not be certified by the commissioner of the general land office. Best *v.* Polk, 18 Wall. (U. S.) 112.

Under §§ 1919, 1951, Code of Civil Procedure, a copy of a patent issued by the United States, certified to by the acting commissioner of the general land office as being a literal exemplification of the original, is admissible in evidence without proof of the loss of the original patent. Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647.

27. Under the act of Congress providing that the interstate commerce commission may provide for the publication of its reports and decisions and that such authorized publication shall be competent evidence of the reports and decisions of the commission in all the federal and state courts without further proof of authentication, a pamphlet purporting to be a decision of the commission and their report and order signed "By the commission, Edw. A. Moseley, Secretary," was held improperly excluded because within the provisions of the statute. Nichols *v.* Chicago & W. M. R. Co., 125 Mich. 394, 84 N. W. 470.

28. Fales & Jenks Mach. Co. *v.* Browning, 68 S. C. 13, 46 S. E. 545; Crayton *v.* Hamilton, 37 Tex. 269.

Under the terms of the Bankruptcy Act a copy of an order of confirmation of a composition in bankruptcy, certified by the clerk of

dence of copies of the records and archives of the various departments of state and other federal offices when certified in a specified manner.[29]

B. Land Office. — Certified copies of the records and documents

the court under his seal, is competent evidence. Mandell *v.* Levy, 47 Misc. 147, 93 N. Y. Supp. 545.

§ 42 of the Bankruptcy Act makes the docket entries of the referee a part of the record and therefore legal evidence of the matters stated in them. Davis *v.* Ives, 75 Conn. 611, 54 Atl. 922.

29. §§ 882-896 U. S. Rev. Stat. Crowel *v.* Hopkinton, 45 N. H. 9.

Under § 882, Rev. Stat. U. S., copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments respectively, are to be admitted in evidence equally with the originals. American Surety Co. *v.* United States of America, 77 Ill. App. 106 (*holding* admissible a copy of an agreement between a contractor and the United States, and endorsed "a true copy. Graham D. Fitch, Captain Corps of Engineers," to which was affixed the seal of the chief engineer of the war department).

In United States *v.* Cutter, 2 Curt. 617, 25 Fed. Cas. No. 14,911, an action against the sureties of a defaulting navy agent, authenticated copies of the letters of the principal to the secretary of the navy and of copies of the latter's letters to the former were held properly admitted; the original letters of the secretary to the principal being sufficiently accounted for by the fact that he had absconded and his whereabouts were unknown. It was held that these letters were "not mere naked declarations" but that they were "strictly part of the *res gestae* in the administration of that office, for the faithful conduct of which the sureties were bound," and as such were "admissible in evidence against the sureties, upon the same principle that his accounts, rendered to the department, are admissible."

Quartermaster General. — Under the act of Congress making competent copies of papers and records in the executive departments of the general government, copies of accounts and papers from the office of the quartermaster general of the United States, properly authenticated by the certificate of the third auditor of treasury as true copies, accompanied by the certificate of the secretary of the treasury as to the official character of the third auditor, were held properly admitted in evidence. Thompson *v.* Smith, 2 Bond 320, 23 Fed. Cas. No. 13,976.

Confederate Archives Office. Duly certified copies of the documents preserved in the confederate archives office of the war department of the United States are competent evidence of all matters to which they are relevant. The various acts of Congress providing for the collection and preservation of such documents indicate that they were intended to be used as evidence. And the Act of April 20, 1871, ch. 21, § 1, provides for the use of such records by the court of claims; so also § 882 Rev. Stat. U. S. provides that copies of any books, records, papers or documents in any of the executive departments authenticated under the seals of such departments respectively shall be admitted in evidence equally with the originals thereof. Oakes *v.* United States, 174 U. S. 778.

War Department. — Morrow *v.* Inhabitants of Vernon, 35 N. J. L. 490; Hawthorn *v.* City of Hoboken, 35 N. J. L. 247; Chapman Twp. *v.* Harrold, 58 Pa. St. 106.

A Certificate by the Commissioner of Pensions, that an accompanying paper "is truly copied from the original in the office of the commissioner of pensions," taken together with a certificate signed by the secretary of the interior and under the seal of that department certifying to the official character of the commissioner of pensions, is a substantial compliance with the provisions of Rev. Stat. § 882 and authorizes the paper so certified to be admitted in evidence although objected to because

properly on file in the general land office are competent evidence.[30] A copy of the record of a patent is evidence of an equal grade with the patent itself when certified by the commissioner under the seal of the office.[31]

C. PATENT OFFICE. — a. *Generally.* — Copies of the records, books and papers of the patent office and of letters patent are by act of Congress made competent evidence the same as the originals, when certified by the commissioner or acting commissioner under the seal of the office; and by virtue of the same act certified copies of the specifications and drawings of foreign letters patent are made *prima facie* evidence.[32]

b. *Assignments.* — Although there is some early authority to the effect that certified copies of assignments of patents filed or recorded in the patent office are competent primary evidence without proof of the execution of the original,[33] the later cases hold that since such assignments are not required to be filed or recorded certified

the certificate of the secretary of the interior referred only to the official character of the commissioner of pensions. Ballew *v.* United States, 160 U. S. 187.

Bond. — Proof of Execution. — In an action on a bond on file in the treasury department, a copy of such bond certified by the secretary of the treasury under the seal of the department in pursuance of § 882, Revised Statutes, is not admissible where the execution of the original has been denied; but a transcript certified by the register of the treasury as provided in § 886, Revised Statutes, should be obtained. United States *v.* Humason, 8 Fed. 71. See Lee *v.* Wisner, 38 Mich. 82.

30. Galt *v.* Galloway, 4 Pet. (U. S.) 332; Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389; Liddon *v.* Hodnett, 22 Fla. 442.

Certified copies of papers in the general land office are admissible in evidence if they properly form a part of the archives of that office. Hanrick *v.* Barton, 16 Wall. (U. S.) 166.

§ 891 of the Rev. Stat. authorizes certified copies of records of the land office at Washington concerning the location of land warrants to be introduced in evidence. "Copies of any records, books or papers in the general land office authenticated by the seal and certified by the commissioner thereof, or when his office is vacant by the principal clerk, shall be evidence equally with the originals thereof." Culver *v.* Uthe, 133 U. S. 655.

31. McGarrahan *v.* Mining Co., 96 U. S. 316; Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992; Liddon *v.* Hodnett, 22 Fla. 442; Smith *v.* Mosier, 5 Blackf. (Ind.) 51 *citing* Harris *v.* Doe, 4 Blackf. (Ind.) 369.

32. See article "PATENTS."

Under Rev. Stat. § 892, copies of any records, books, or papers belonging to the patent-office, and of letters patent, authenticated by the seal, and certified by the commissioner or acting commissioner of patents, are evidence where the originals would be evidence. And § 893 provides that copies of the specifications and drawings of the foreign letters patent, certified as provided in the preceding section, shall be *prima facie* evidence of the granting of such letters patent, and the date and contents thereof. Under the latter section a copy of letters patent of France, certified by the director of the national conservatory of arts and manufactures, under the seal of that department, verified by the seal of the minister of agriculture and commerce, and the minister of foreign affairs, under their seals, but not by the great seal of France, is sufficiently authenticated to be admissible. Schoerken *v.* Swift & Courtney & Beecher Co., 7 Fed. 469.

33. Goodyear *v.* Blake, 10 Fed. Cas. No. 5,560; Parker *v.* Haworth,

copies thereof are not admissible without proof of the genuineness of the originals,[34] and even then only after the original instruments are shown to have been lost or are otherwise properly accounted for.[35]

D. Treasury Department. — a. *Generally.* — Certified t r a n-

4 McLean 370, 2 Rob. Pat. Cas. 725, 18 Fed. Cas. No. 10,738.

A certified copy of an assignment of a patent on file in the patent office is *prima facie* evidence of the genuineness of the original. Lee *v.* Blandy, 1 Bond 361, 2 Fish. Pat. Cas. 89, 15 Fed. Cas. No. 8,182; *cited* in American Cable R. Co. *v.* Mayor etc. of New York, 56 Fed. 149. *Cited* but *not followed* in Paine *v.* Trask, 56 Fed. 233, 5 C. C. A. 497; *disapproved* in Mayor, etc. of New York *v.* American Cable R. Co., 60 Fed. 1016, 9 C. C. A. 336.

34. Certified copies of the patent-office record of instruments purporting to be assignments are not *prima facie* proof of the execution or genuineness of the instruments. "The assignment of a patent is not a public document, but is merely a private writing. There is no statutory provision requiring it to be recorded in the patent office. § 4898 of the Revised Statutes permits this to be done for the protection of the assignee against a subsequent bona fide purchaser or mortgagee. The section does not make the recorded instrument evidence, does not require the assignment to be executed in the presence of any public officer, or to be acknowledged or authenticated in any way before recording, and does not provide or contemplate that it shall remain subsequently in the custody of the office. It devolves upon the patent office merely the clerical duty of recording any instrument which purports to be the assignment of a patent. We are aware of no principle which gives to such a record the effect of primary evidence, or of *prima facie* proof of the execution or the genuineness of the original document. To give it such effect would enable parties to manufacture evidence for themselves. § 892 of the Revised Statutes does not touch the point. That section provides that written or printed copies of any records, books, papers, or drawings belonging to the patent office shall be evidence in all cases wherein the originals could be evidence. The original assignment does not belong to the patent office. The section makes a copy evidence of the same class as the original record, but has no application when the original record is not competent. The early cases of Brooks *v.* Jenkins, 3 McLean 432, Fed. Cas. No. 1,953, and Parker *v.* Haworth, 4 McLean 370, Fed. Cas. No. 10,738, in which it was held that a certified copy of the patent-office record of an assignment of a patent is *prima facie* evidence of the genuineness of the instrument, were decided at first instance, and apparently without much consideration. The rule of these cases has been accepted without discussion in the later cases of Lee *v.* Blandy, 1 Bond, 361, Fed. Cas. No. 8,182; Dederick *v.* Agricultural Co., 26 Fed. 763; National Folding Box & Paper Co. *v.* American Paper Pail & Box Co., 55 Fed. 488. It is not improbable that these decisions were influenced by the technical nature of the objection in the particular cases. But the rule opens the door to fraud, as any stranger can put an assignment upon record; and it imposes upon a defendant who honestly doubts whether a party who claims title to a patent is the owner the burden which ought to rest upon his adversary. Our conclusions are supported by the opinion of the circuit court of appeals in Paine *v.* Trask, 5 C. C. A. 497, 56 Fed. 233, where the question was considered with care, although its decision was unnecessary to the judgment." Mayor, etc. of New York *v.* American Cable R. Co., 60 Fed. 1016, 9 C. C. A. 336.

35. Certified copies of patent office records of assignments are not made evidence by any United States statute, and are only admissible when the original instruments are shown to have been lost or otherwise properly accounted for. National

scripts of the records and documents of the treasury department are competent evidence.[36]

b. *In Suits Against Delinquents.* — In suits against a delinquent revenue officer or other person accountable for public money, certified copies from the records of the treasury department are competent evidence. And certified copies of bonds, contracts and other papers relating to or connected with the settlement of any account between the United States and an individual may be annexed to transcripts from the books of the departments and are competent evidence to the same extent as the originals if produced and authenticated.[37] The first portion of this act does not apply to an action to recover money paid by a government disbursing officer through mistake, but only to suits against persons accountable for public money as such;[38] nor to moneys coming into the hands of the officer from a third person not in the regular course of business.[39] But the portion of the act relating to copies of bonds, contracts and other papers applies to all cases where the evidence is required.[40]

c. *Copies of Accounts.* — Under this statute a copy of the account of such a delinquent in the books of the treasury department is

Cash-Register Co. *v.* Navy Cash-Register Co., 99 Fed. 89; *citing* as to the same effect Paine *v.* Trask, 56 Fed. 233, 5 C. C. A. 497; City of New York *v.* American Cable R. Co., 60 Fed. 1016, 9 C. C. A. 336, and dissenting opinion of Woods, J., in Standard Elevator Co *v.* Crane Elevator Co., 76 Fed. 767, 22 C. C. A. 549.

36. Moses *v.* United States, 166 U. S. 571.

A transcript from the books of the treasury department certified by the fourth auditor, accompanied by a certificate of the secretary of the treasury that the certifying officer was the fourth auditor at the time of the certificate, is competent evidence. United States *v.* Bell, 111 U. S. 477.

37. § 886, U. S. Rev. Stat.

By Whom Certified. — § 886, Rev. Stat., providing for the admission of a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or certified by the auditors under certain circumstances, has been amended (U. S. Comp. Stats. 1901, p. 671) so that such transcripts and other papers must be certified by the secretary or assistant secretary of the treasury under the seal of the department. Laffan *v.* United States, 122 Fed. 333, 58 C. C. A. 495.

38. United States *v.* Radowitz, 27 Fed. Cas. No. 16,112.

Such a statement of account is only evidence of items disbursed through the ordinary channels known officially to the accounting officers, and appearing on their books. Nor is it evidence "against a collector or postmaster of the payments of moneys indirectly to him through the intervention of a third party, nor of a balance due on a former account, nor of items transferred from the account of any other person, nor of items re-charged which had been before credited." United States *v.* Harrill, 1 McAll. 243, 26 Fed. Cas. No. 15,310.

39. Hoyt *v.* United States, 10 How. (U. S.) 109, 132.

40. United States *v.* Lent, 1 Paine 417, 26 Fed. Cas. No. 15,593.

In an action brought by the United States to recover damages against contractor and surety for failure to comply with bid to furnish supplies at military post, the transcript of the treasury department, duly certified and authenticated, including notice of acceptance of bid containing contract and bond, and letter of defendant declining to enter into agreed contract and to furnish required bond, also itemized statement of account showing purchases by government in consequence of defendant's default, was

admissible against him.[41] While the transcript of the account should not be a garbled one but should contain a complete statement of both sides of the account,[42] it is not essential that every item of allowed or disallowed credits should appear.[43]

d. *Organization Certificates of National Banks.* — By act of Congress copies of the organization certificate of any national bank, certified by the comptroller of currency under his seal of office, are competent evidence of the corporate existence of the bank and

held improperly excluded under provision of § 886 Rev. Stat. U. S. United States *v.* Drachman, 5 Ariz. 13, 43 Pac. 222.

41. Hoyt *v.* United States, 10 How. (U. S.) 109, 132.

Limits of Rule. — In an action against the paymaster of the marine corps, a transcript of the statement of his account on the books of the treasury department is not evidence *per se* of a balance due on a former account, nor of items transferred from the account of any other person, nor of items re-charged which had before been credited. And where the United States offers such an account in evidence which shows a balance in favor of the defendant the burden is on the plaintiff to rebut this showing. United States *v.* Kuhn, 4 Cranch C. C. 401, 26 Fed. Cas. No. 15,545.

Form of Certificate. — See United States *v.* Harrill, 1 McAll. 243, 26 Fed. Cas. No. 15,310.

42. See Ewing *v.* United States, 3 App. Cas. (D. C.) 353.

A certified transcript from such books showing the balance in question was held inadmissible because not showing the original items from which the balances were obtained, and hence being merely the conclusion or judgment of the accounting officers and not the facts upon which they act. "It has long since been decided by the supreme court—(United States *v.* Jones) 8 Pet. (33 U. S.) 383—that the 'act of congress in making a transcript from the books and proceedings of the treasury evidence does not mean the statement of an account in gross, but a statement of the items both of the debits and credits as they were acted upon by the accounting officers of the government.'" United States *v.* Edwards, 1 McLean 467, 25 Fed. Cas. No. 15,026; United States *v.* Patterson, Gilp. 44, 27 Fed. Cas. No. 16,008.

"While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books." United States *v.* Gaussen, 19 Wall. (U. S.) 198.

43. "The omission to set forth, item by item, each item of either class of credits (allowed and disallowed), would not render less competent the accounts as evidence, though the omission might interfere with their sufficiency as testimony in the face of counter-evidence. They still are statements properly certified by the proper officer, and as such are competent testimony under the law. Not only such statements duly certified are made evidence, but so are all other papers pertaining to the account, certified in like manner. Each in itself, and independently of all others pertaining to the account, is competent evidence. They are not less so because unaccompanied by other documents." United States *v.* Harrill, 1 McAll. 243, 26 Fed. Cas. No. 15,310; *citing* United States *v.* Hodge, 13 How. (U. S.) 478, as holding that the failure of the account to show the items of credit disallowed was no objection to its competency; And also Postmaster General *v.* Rice, 1 Gilp. 554, 19 Fed. Cas. No. 11,312, and distinguishing the apparently contrary cases of United States *v.* Jones, 8 Pet. (U. S.) 375; United States *v.* Patterson, Gilp. 44, 27 Fed. Cas. No.

of every other matter which could be proved by the production of the original certificate.[44]

e. *Post-Office Records.* — § 889 U. S. Rev. Stat. provides for the admission of copies of the records of the post-office department certified in a specified manner.[45]

VI. STATE RECORDS IN FEDERAL AND TERRITORIAL COURTS.

1. In Federal Courts. — It has been held that judicial records or copies thereof from states other than the one in which a federal court is sitting to be admissible in such court must be authenticated in the manner provided in the act of Congress relating to proof of the records of sister states,[46] but there is authority to the

16,008; United States *v.* Edwards, 1 McLean 467, 25 Fed. Cas. No. 15,026. The court also distinguishes between the act of March 3, 1797, which makes competent "a transcript from the books and proceedings of the treasury," and the Act of July 2, 1836, providing for the admission of "a statement of the account."

44. U. S. Rev. Stat., § 885; National Bank of Memphis *v.* Kidd, 20 Minn. 234; Tapley *v.* Martin, 116 Mass. 275, holding that such copies would be competent independent of any act of Congress, since the certificates are part of the public records.

45. An Order of the Postmaster General fixing a definite compensation for a postmaster in place of commissions theretofore allowed him was held admissible under this act in an action against the postmaster and his sureties to recover money illegally obtained. United States *v.* Marks, 5 Ariz. 404, 52 Pac. 773.

Quarterly Reports. — Certified copies of the postmaster's quarterly reports were held admissible in criminal actions in McBride *v.* United States, 101 Fed. 821, 42 C. C. A. 38 (prosecution of assistant postmaster for embezzlement); United States *v.* Snyder, 14 Fed. 554.

A transcript showing a mere balance of the postmaster's account which was struck and acknowledged by the postmaster himself was held properly admitted in Lawrence *v.* United States, 2 McLean (U. S.) 581.

Actions on Postmaster's Bond. Under this act in an action upon a postmaster's bond, a certified transcript of the statement of the postmaster's account as it appears on the books of the treasury department shall be competent *prima facie* evidence of his indebtedness. And under this statute it is not necessary that the account show the items of credit which have been allowed. United States *v.* Hodge, 13 How. (U. S.) 478. See also United States *v.* Dumas, 149 U. S. 278; United States *v.* Marks, 5 Ariz. 404, 52 Pac. 773; United States *v.* Carlovitz, 80 Fed. 852, 26 C. C. A. 188.

46. Trigg *v.* Conway, Hempst. 538, 24 Fed. Cas. No. 14,172.

In Tooker *v.* Thompson, 3 McLean 92, 24 Fed. Cas. No. 14,097, it is held that although the act of Congress relating to proof of judicial records of other states "in terms applies to the state courts," nevertheless the rule is equally applicable to the courts of the United States.

In Gardner *v.* Lindo, 1 Cranch C. C. 78, 9 Fed. Cas. No. 5,231, the circuit court for the District of Columbia held that the record of a court in Virginia to be admissible must be authenticated by the presiding magistrate.

Agreement by Bar Recognized. In Smallwood *v.* Violet, 1 Cranch C. C. 516, 22 Fed. Cas. No. 12,962, the court recognized an agreement of the members of the bar in the District of Columbia that copies of records of any state court should be received in evidence if certified and authenticated in such manner as

contrary.[47] When authenticated in that manner they are of course admissible.[48]

But judicial records of the state in which the federal court is sitting are admissible when certified by the clerk under the seal of the court.[49]

And it has been held that the act of Congress does not render inadmissible a copy of a record from another state when certified merely by the custodian under his official seal.[50]

2. In Territorial Courts. — Records or copies thereof from a state to be admissible in the courts of a territory must be authenticated in the manner provided by the act of Congress.[51]

VII. RECORDS AND DOCUMENTS FROM OTHER STATES AND TERRITORIES.

1. Generally. — The various states of the United States are foreign to each other except in so far as their relations have been changed by the federal constitution and legislation in pursuance thereof. Hence the records and documents of one state when of-

would make them evidence in the courts of the state whence they were brought.

47. The national and state courts are not foreign to each other and the records of the latter need not be authenticated in accordance with the act of Congress providing for proof of the records of other states. And the federal courts have judicial knowledge of the laws of the several states and therefore of the mode of authenticating the judicial records thereof. Bennett *v.* Bennett, 1 Deady 299, 3 Fed. Cas. No. 1,318. In this case the district court for the district of Oregon held admissible a judicial record of the state of California, although it contained no certificate of the judge of the court. The court *disapproves* of previous intimations to the contrary in Craig *v.* Brown, Pet. C. C. 352, 6 Fed. Cas. No. 3,328; Mewster *v.* Spalding, 6 McLean 24, 17 Fed. Cas. No. 9,513; Tooker *v.* Thompson, 3 McLean, 92, 24 Fed. Cas. No. 14,097.

48. Taylor *v.* Carpenter, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785; Hade *v.* Brotherton, 3 Cranch C. C. 594, 11 Fed. Cas. No. 5,892.

Taylor *v.* Carpenter, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785; Hade *v.* Brotherton, 3 Cranch C. C. 594, 11 Fed. Cas. No. 5,892.

49. Mewster *v.* Spalding, 6 McLean 24, 17 Fed. Cas. No. 9,513.

50. In Logansport Gas Light & Coke Co. *v.* Knowles, 15 Fed. Cas. No. 8,466, it was held by the United States circuit court sitting in the district of Minnesota that a copy of the plaintiff's articles of incorporation, the original of which was on file in a county in Indiana, certified by the recorder of that county and accompanied by a certificate of the secretary of state that the copy was a correct transcript of a certified copy in his office, was sufficiently authenticated to be admissible although not authenticated according to the act of Congress. "I do not understand that this act excludes every other mode of authentication or abrogates any principle of evidence previously established. It is the settled rule that when a copy of an instrument is certified to by the officer whose duty it is by law to keep the original on file in his office it must be received as evidence of the original."

51. In Stewart *v.* Gray, Hempst. 94, 23 Fed. Cas. No. 13,428*a*, one of the territorial courts of Arkansas held that a copy of the record of the supreme court of Tennessee attested by the clerk under the seal of the court was not admissible because the

fered in another must be proved and authenticated according to the rules governing any other foreign records or documents except in so far as these rules have been modified by constitution and valid legislation.[52]

A. Certified Copy Made Under Former Government. Where a new state has been formed from a portion of an old one, a copy of a record of the parent state certified before the division, which record relates to land in the new state, is competent evidence in the latter without further authentication, at least where the laws of the parent state have been continued in force in the new state.[53]

B. Documents Under Great Seal. — A document from a sister state and bearing the great seal of such state is admissible without other authentication or proof.[54]

2. Under Act of Congress. — A. Generally. — Pursuant to the power given in the constitution of the United States[55] Congress has by enactments at various times provided a method for proving the public acts, records and judicial proceedings of one state in the courts of a sister state.

B. Inconsistent State Statutes. — Although the states are not prevented by the action of Congress from legislating upon the same subject,[56] nevertheless a record which is authenticated according to the act of Congress is admissible in evidence even though the provisions of a state statute have not been complied with.[57]

C. Records of State Formerly Foreign Territory. — The records of a state which was a foreign state at the time the records were made, but has subsequently become a part of the United

certificate of the judge was not in accordance with the act of Congress relating to proof of records from other states.

52. See *infra*, VII, 2, and the discussion thereunder.

53. A copy of a grant for land in West Virginia, certified according to the laws there in force by the register of the land office of the commonwealth of Virginia before the division of the state of Virginia and formation of West Virginia is evidence of title without other authentication, and is as valid in West Virginia since its formation as before; the laws of Virginia having been continued in force here, unaffected by division of Virginia where not repugnant to constitution of this state. Ott *v.* McHenry, 2 W. Va. 73.

54. Groover *v.* Coffee, 19 Fla. 61; Lessee *v.* Hicks, 1 Overt. (Tenn.) 207.

55. Art. IV, § 1: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."

56. See *infra*, "Authentication in Other Ways."

57. Ansley *v.* Meikle, 81 Ind. 260 (*holding* that the Indiana statute was not intended to be exclusive of the method provided by the act of Congress, "nor, if so intended, could it have that effect," as it might be necessary to prove the existence of a foreign statute before it had been printed in any book).

A certified copy of a judicial record of another state authenticated by the certificates of the clerk of the court, the clerk of the county and the presiding judge is competent evidence, although not attested by the secretary of state under the great seal as provided by § 952 of the Code

States, come within the provisions of the act of Congress relating to proof of records.[58]

D. Judicial Records. — a. *Generally.* — By act of Congress records and judicial proceedings of the courts of any state or territory or of any country subject to the jurisdiction of the United States shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form, and such records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.[59]

This act applies not only to what may be termed judicial proceedings,[60] but also to instruments which have properly become judicial records.[61]

It applies not only to records themselves but also to copies,[62]

of Civ. Proc., since it substantially complies with the act of Congress, which is sufficient "where specific defects are not pleaded." Talamo *v.* Ermano, 62 N. Y. Supp. 246.

A copy of the record of a judicial proceeding of another state authenticated in accordance with the act of Congress is admissible, although not authenticated according to the law of the state whence it comes. Taylor *v.* Carpenter, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785.

58. Steere *v.* Tenney, 50 N. H. 461 (since its former government, laws and courts no longer exist and it can have no seal to authenticate any record, nor any officer to keep or use such seal).

59. Rev. Stat. U. S., § 905; 3 Fed. Stat. Ann. p. 37.

In Massachusetts the docket entries of judicial proceedings in her insolvency courts are records; hence a duly certified transcript of them constitutes proper proof in this state that such proceedings have been had. "Every state has the right to determine for itself how fully the judicial proceedings in its courts shall be recorded. Massachusetts has deemed it sufficient, in her courts of insolvency, simply to minute all the proceedings, upon a voluntary petition, on the docket, down to the point of the actual assignment of the insolvent estate. This does not affect their judicial character or evidential weight. . . . The docket entries are entries of judicial proceedings, and a certified transcript of them constitutes the proper proof that such proceedings have been had." Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

60. Supplementary Proceedings on a judgment "are judicial proceedings" within the meaning of the act of Congress, and an exemplified copy thereof is therefore competent evidence. *In re* Rooney, 20 Fed. Cas. No. 12,032.

61. Virginia *v.* Himel, 10 La. Ann. 185; Strode *v.* Churchill, 2 Litt. (Ky.) 75.

A copy of an indenture of apprenticeship purporting to be made by the overseers of the poor of a sister state, the original of which is on file in the office of the clerk of a county court of that state, although authenticated in the manner prescribed by the act of Congress relating to judicial records is not admissible in evidence without proof of its execution, or that it was placed on record by the authority or direction of the court or proof as to the effect of such an instrument in the state from which it comes, since it is not a judicial proceeding. Moore *v.* Ann, 9 B. Mon. (Ky.) 36.

62. Celisie *v.* Himel, 10 La. Ann. 185.

which when authenticated as therein specified are admissible in evidence;[63] but a record or a copy not authenticated in this manner or in the manner followed at common law or provided by statute of the state where it is offered in evidence is not admissible.[64]

b. *Whole Record Admissible.* — The transcript of the record of a judicial proceeding in a court of another state authenticated in accordance with the act of Congress must be admitted as a whole. Portions thereof cannot be excluded merely because they would not properly form part of the record in the state in which the transcript is offered.[65]

c. *Force and Effect of Authenticated Record.* — The act of Congress providing for the force and effect of the authenticated record is limited to its use in courts, but this is not the rule under some state statutes.[66]

The authenticated record or copy is entitled to full faith and credit although it does not correspond in form with the requirements of the law of the state where it is offered.[67]

d. *Courts to Which Applicable.* — **(1.) Courts of Record.** — (A.) GENERALLY. — The act applies to all courts of record and a court

63. Helm *v.* Shekleford, 5 J. J. Marsh. (Ky.) 33.

64. Tarlton *v.* Briscoe, 1 A. K. Marsh. (Ky.) 67; United States *v.* Biebusch, 1 Fed. 213.

65. Where a judgment rendered by a court of another state is proved by a copy of the record authenticated as required by act of Congress, an opinion by the court upon a review of the proceedings after the trial incorporated in the record and shown by the transcript is admissible in evidence. "We think that the court below had no right to refuse to receive any portion of what was contained in the record as exemplified. That record is made up by the court which sent it here, and it must be presumed to have been made under the provisions of the law of the state where the judgment was recovered, and whatever the courts of that state have certified as a part of the record must be, as we apprehend, received here as such, and no part of it can be excluded because it would not have been certified as part of the record in this state." Burnham *v.* Pidcock, 58 App. Div. 273, 68 N. Y. Supp. 1007.

In Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758, an authenticated copy of the record of a court of another state showing an assignment of the judgment as part of the files in the case was held competent evidence of such assignment. "Being one of the files in the cause, the clerk was bound to include it in his transcript, and the superior court was bound to admit the entire document in evidence."

66. Under the Kentucky statute in effect enacting the act of Congress relating to the proof of the judicial records of courts of the United States and sister states, but giving the attested copies such faith and credit "in this state" as they would have in the place whence they came, a copy of a record of naturalization presented by a voter to the judges of election to entitle him to vote must be authenticated in the manner therein provided, since this act is not confined to the use of such records in courts as in the case of the act of Congress, but applies to their use as evidence for any purpose in any place in the state. Caulfields *v.* Bullock, 18 B. Mon. (Ky.) 494.

67. See Stephen & Benjamin *v.* Coleman, 1 Brev. (S. C.) 232; McCormick *v.* Deaver, 22 Md. 187; Bowman *v.* St. Paul German Ins. Co., 58 Minn. 176, 59 N. W. 943.

Though the paper offered as evidence of the plaintiff's representative capacity does not correspond in form

which has a judge, clerk and seal is presumptively a court of record.[68]

(B.) Courts of Chancery. — Courts of chancery are within the scope of the act of Congress, and their records may be proved in the manner therein provided.[69]

(C.) Probate Courts. — (a.) *Generally.* — The proceedings of courts of probate are within the scope of the act providing for the method of proving judicial proceedings of the courts of a sister state,[70] and

with our statute, yet having been certified by the proper officer to be a true and perfect transcript of the record of the letters of administration, we are to presume that it is in accordance with the law of that state. Carmichael *v.* Saint, 16 Ark. 28.

Where a record is sent from another state, authenticated according to the act of Congress, it must be given full faith and credit as a record of the judicial proceedings of such state, without regard to the peculiar forms of procedure therein. Miles *v.* Collins, 1 Metc. (Ky.) 308; Wadsworth *v.* Litson, 2 Spears (S. C.) 277.

The judgment of a court of general jurisdiction in another state may be proved by a duly certified copy or transcript which contains merely a copy of the summons, the return of the officer thereon showing personal service on the defendant, a copy of the declaration, a copy of the "continued docket entry" showing the names of the parties, issuance of summons, filing of the declaration and entry of judgment, and a copy of the "judgment docket entry" showing the names of the parties, date of the judgment, amount of the debt and amount of the costs. "It is not extended with the formality and accuracy required in the records of our own courts, but it is sufficient in substance and contains all the essential requisites of a judicial record. It shows the parties to the suit, subject-matter of the suit, jurisdiction over the parties, and final judgment of the court for fixed sums in damages and costs and the date of the judgment." Brainard *v.* Fowler, 119 Mass. 262.

68. The Thames *v.* Erskine, 7 Mo. 213; Hughes *v.* Harris, 2 Ala. 269.

A court whose title is the "Superior Court for the State of Connecticut within and for New Haven county," and which has a presiding judge, a clerk and a seal is within the scope of the act of Congress as to the proof of judicial records of other states, although courts of justices of the peace have been held not to be within the meaning of this act. Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139.

69. Scott *v.* Blanchard, 8 Mart. N. S. (La.) 159; Patrick *v.* Gibbs, 17 Tex. 275; Burtners *v.* Keran, 24 Gratt. (Va.) 42.

A decree in chancery from a sister state to be admissible must be authenticated according to the act of Congress. Barbour *v.* Watts, 2 A. K. Marsh (Ky.) 290, *holding* that the certificate of the clerk with the seal of the court annexed, together with the testimony of the witness as to the official capacity of the clerk at the date of the attestation, was not sufficient authentication.

70. *United States.* — Catlin *v.* Underhill, 4 McLean 199, 5 Fed. Cas. No. 2,523.

Alabama. — Kennedy *v.* Kennedy's Admr., 8 Ala. 391.

Delaware. — State *v.* Adams, 5 Har. 107.

Georgia. — Cox *v.* Jones, 52 Ga. 438.

Illinois. — Spencer *v.* Langdon, 21 Ill. 192; Atwood *v.* Buck, 113 Ill. 268.

Iowa. — Roop *v.* Clark, 4 Greene 294.

Kentucky. — Williams *v.* Duncan, 92 Ky. 125, 13 Ky. L. Rep. 389, 17 S. W. 330.

Louisiana. — Pagett *v.* Curtiss, 15 La. Ann. 457.

Mississippi. — Jordan *v.* Thomas,

this rule has been applied to letters of administration,[71] and the appointment of a guardian.[72]

(b.) *Probate of Will.* — The probate of a will is a "judicial proceeding" within the meaning of the act of Congress, and the record thereof or a copy from a sister state may be proved in the manner provided in the act.[73]

(2.) Courts Not of Record. — (A.) GENERALLY. — The provisions of the constitution relating to the proof and effect of judicial records and proceedings are broad enough to cover all courts, including those not of record;[74] but whether the latter are included within the scope of the act of Congress the courts are not agreed, some holding that they are,[75] and others that they are not because the method of authentication therein provided cannot ordinarily be followed by such a court.[76]

It has been held, however, that the test is not whether a court

31 Miss. 557; Hope *v.* Burt, 59 Miss. 174.

Pennsylvania. — Washabaugh *v.* Entriken, 34 Pa. St. 74.

Texas. — Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196.

The proceedings of probate courts of other states are judicial proceedings which may be authenticated under the act of Congress, and are presumed to have been taken in conformity with law. Houze *v.* Houze, 16 Tex. 598.

71. Hope *v.* Hart, 59 Miss. 174.

72. Williams *v.* Duncan, 92 Ky. 125, 13 Ky. L. Rep. 389, 17 S. W. 330.

73. *Alabama.* — Dozier *v.* Joyce, 8 Port. 303.

Iowa. — Greasons *v.* Davis, 9 Iowa 219.

Kentucky. — Robertson *v.* Barbour, 6 T. B. Mon. 523.

Louisiana. — Bowles' Succession, 3 Rob. 33; Balfour *v.* Chew, 5 Mart. N. S. 517.

Maryland. — Case *v.* Peter, 8 Md. 9.

Michigan. — Wilt *v.* Cutler, 38 Mich. 189.

Minnesota. — Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234.

Missouri. — Bradstreet *v.* Kinsella, 76 Mo. 63; Lewis *v.* St. Louis, 69 Mo. 595; Haile *v.* Hill, 13 Mo. 612; Keith *v.* Keith, 80 Mo. 125.

North Carolina. — Lancaster *v.* McBryde, 27 N. C. 421.

Pennsylvania. — Criswell *v.* Altemus, 7 Watts 565.

Texas. — Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

Vermont. — Walton *v.* Estate of Hall, 66 Vt. 455, 29 Atl. 803.

Virginia. — Gornto *v.* Bonney, 7 Leigh 234.

Necessity of Domestic Probate. See *supra*, III, 2, E, e, (7.), (B.), (b.).

74. Stockwell *v.* Coleman, 10 Ohio St. 33; Pelton *v.* Platner, 13 Ohio 209; Taylor *v.* Barron, 30 N. H. 78, 95; Draggoo *v.* Graham, 9 Ind. 212.

The acts of Congress relative to the authentication of public acts, records and judicial proceedings of other states have no reference to inferior tribunals created by municipal law, such as justices of the peace, but they refer to the proceedings of courts possessing general jurisdiction, and the method of authenticating the correctness of a justice's transcript is left to the statutory regulations of the respective states and should conform to the law of the state in which they are to be adduced in evidence. Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499. But see Roop *v.* Clark, 4 Greene (Iowa) 294.

75. See *infra*, VII, 2, D, d, (2.), (B.).

76. Draggoo *v.* Graham, 9 Ind. 212; Ault *v.* Zehering, 38 Ind. 429; Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344. See Smith's Lessee *v.* Redden, 5 Har. (Del.) 321.

is a court of record but whether it is so constituted that the method provided by the act can be followed.[77]

(B.) Justice Court. — (a.) *Generally.* — In some jurisdictions the record and proceedings of a justice court are held to be within the scope of the act of Congress.[78] But by the weight of authority they are not; the reason given being that they ordinarily have neither clerk nor seal and hence are not so constituted that they can follow the method of authentication provided in the act.[79]

77. No distinction is made either by the constitution or law of Congress, between courts of record and those which are not such, nor between courts of the highest and most general jurisdiction, and those tribunals whose authority is of the most inferior and limited character. "All judicial proceedings," is broad enough to include the judgments of the most inferior and most transient tribunals. But in order that the judgment may be authenticated in the manner prescribed by the act of Congress it must have both a clerk and a judge; hence many inferior tribunals which have no clerk or which have no officer that could properly be called a judge or presiding magistrate do not come within the meaning of the act. Taylor *v.* Barron, 30 N. H. 78, 95.

While the act of Congress relating to proof of records may not apply to a certain extent to records of justices of the peace and of courts of limited jurisdiction, yet all records and judicial proceedings of courts are included in the terms and meaning of the act of Congress when the nature of the tribunal would admit of the required proof. A seal is not absolutely necessary. If there is one it must be used. If there is none that fact must appear in the clerk's certificate. Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19 (holding that the act applies to the record of a municipal court of Massachusetts).

78. Scott *v.* Cleveland, 3 Mon. (Ky.) 62.

79. *Arkansas.* — Blackwell *v.* Glass, 43 Ark. 209.

Indiana. — Draggoo *v.* Graham, 9 Ind. 212 (holding that the act does not apply where the justice court is not a court of record).

Iowa. — Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

New Hampshire. — Robinson *v.* Prescott, 4 N. H. 451; Mahaurin *v.* Bickford, 6 N. H. 567.

Ohio. — Stockwell *v.* Coleman, 10 Ohio St. 33; Pelton *v.* Platner, 13 Ohio 209.

Pennsylvania. — Snyder *v.* Wise, 10 Pa. St. 157.

Vermont. — King, Admr., *v.* Van Gilder, 1 Chip. 59.

An exemplification of a judgment of a justice of the peace in another state, made by another justice, in whose custody under the laws of the state the docket and papers of said first justice are, is not evidence under the act of Congress nor the laws of this state. Bryan *v.* Farnsworth, 19 Minn. 239.

The act of Congress has no application to the judgments of a court not of record; hence a copy of the record of a justice of the peace of another state certified by him under his official seal, authenticated by a certificate of the clerk of a circuit court as to the official capacity of the justice and the genuineness of his signature, followed by a certificate of the presiding judge of the same court as to the official capacity of the clerk, the genuineness of his signature and the due form of his attestation, is not admissible. "The act of Congress does not provide a method of authenticating judgments rendered by a court which has no clerk. It has been held that where a judge of a court of record is ex-officio clerk of his own court, he may, in the different capacities as judge and clerk, sign the certificates required by the act of Congress, and that proceedings thus authenticated would be admissible in evidence in the courts of this state. Cox *v.* Jones, 52 Ga. 438. It does not appear in the present case that the court over which Harmon presided

It has been held that where such courts are courts of record they come within the act.[80]

(b.) *Justice's Judgment Recorded in Superior Court.* — A certified transcript of a justice's judgment recorded with the circuit court of the county is not properly authenticated by the officers of the latter court under the act of Congress, unless by statute the recording of such transcript makes it a judgment of the court in which it is recorded; and such law cannot be judicially noticed, but must be proved as a fact.[81]

e. *Attestation.* — **(1.) By Whom Made.** — (A.) GENERALLY. — The record or copy must be attested by the clerk and not the judge of the court.[82]

Prothonotary. — A certificate by a prothonotary authenticated by the judge's certificate is sufficient, the presumption being that the prothonotary is the clerk of the court.[83]

(B.) BY DEPUTY. — Under the act of Congress the attestation of a copy of a judicial record of another state must be by the clerk of the court. A certificate by a deputy is not sufficient, nor is such a defect in the certificate cured by the certificate of the judge that

was a court of record. In the absence of proof that under the law of Missouri a justice's court is a court of record, the presumption would be that it was not. But even if it be treated as a court of record, in order to properly authenticate, under the act of Congress, proceedings had in that court, it should appear either that there was a clerk of the court, in which case he should authenticate the proceedings, or that the justice was himself ex-officio clerk, in which case he should as clerk authenticate the proceedings. It is clearly inferable from the transcript as a whole that the court was not a court of record, and that it had no clerk either in the person of the judge ex-officio or otherwise." Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344.

80. The act of Congress relating to proof of judicial records of other states applies to the records of courts of justices of the peace where they are courts of record, and the court cannot judicially know whether the justice court of a particular state has a clerk and a seal. "In those states where justices of the peace hold courts of record, where they are the sole judges, and have no other persons to be their clerks, they are the presiding magistrates, and clerks of their own courts, and may certify their records, in a manner conformable to the act of Congress. After attestation of the record, a justice of the peace may certify, that he is the presiding magistrate, and clerk of the court; that there is no seal, and that the attestation is in usual form; and then subscribe it, as justice of the peace. This would be a literal compliance with the act, and the copy of the record, so certified, would be admissible evidence." Bissell *v.* Edwards, 5 Day (Conn.) 363. But see the dissenting opinion. See Draggoo *v.* Graham, 9 Ind. 212.

81. Rosenthal Millinery Co. *v.* Lennox (Tex. Civ. App.), 50 S. W. 401.

82. A copy of the record of the probate of a will certified by the judge of the court is not sufficiently authenticated under the act of Congress and is not admissible. Grimes *v.* Smith, 70 Tex. 217, 8 S. W. 33; Stewart *v.* Swanzy, 12 Smed. & M. (Miss.) 502; Washabaugh *v.* Entrikess, 34 Pa. St. 74.

83. Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470; Murphy *v.* Marscheider, 52 Hun 611, 4 N. Y. Supp. 799.

Where a copy of the record of a judgment of the court of common pleas of a certain county in Pennsylvania was certified by the prothon-

the attestation is in due form and authorized by the state law, since he is only authorized to certify as to the form of the attestation.[84]

And this is true notwithstanding the law of the state whence the record comes, authorizes the deputy to perform the duties of his principal.[85]

Contra. — The contrary, however, has been held on the ground that the certificate of the judge that the attestation is in due form is conclusive as to the authority of the deputy,[86] and a distinction has been attempted between a certificate by a deputy and one by the clerk through his deputy.[87]

(C.) Official Capacity. — The official capacity of the attesting officer must appear from his certificate,[88] but this is sufficiently shown where he certifies and signs as clerk of the court.[89] It is not necessary to show that the latter is the legal custodian of the record.[90] But it must appear that he was clerk at the date of his certificate.[91]

(2.) How Made. — (A.) Generally. — No particular form of attestation need be used except that it should be the form in use in the

otary of the court, and his official capacity as prothonotary and the fact that his attestation was in due form were certified by the presiding judge, the copy was held properly authenticated under § 905 U. S. Rev. Stat., as the court could presume that the prothonotary was the chief clerk of the court and therefore the proper person to make the attestation. Trebilcox *v.* McAlpine, 46 Hun (N. Y.) 469.

84. Morris *v.* Patchin, 24 N. Y. 394, 82 Am. Dec. 311; Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; Williams *v.* Williams, 53 Mo. App. 617.

85. Lothrop *v.* Blake, 3 Pa. St. 483.

86. An objection to the admission of a certified copy of a judicial record of another state on the ground that the certificate is signed by the deputy clerk instead of the clerk is not well taken. "The certificate of the presiding judge that the attestation is in due form of law is conclusive as to the authority of the deputy clerk to certify" in such state. Stedman *v.* Patchin, 34 Barb. (N. Y.) 218.

87. Where the certificate appended to a transcript of a judgment rendered in another state was attested "D. H. N., Prothonotary, by P. Q., Deputy Prothonotary," it was held that the act of the deputy should be considered as the act of the principal and that the certificate was not defective; and also in such case the office of deputy prothonotary should be presumed until the contrary is shown. Greasons *v.* Davis, 9 Iowa 219, *distinguishing* Lothrop *v.* Blake, 3 Pa. St. 483. See also Steinke *v.* Graves, 16 Utah 293, 52 Pac. 386.

Where a presiding judge certifies that the attestation of a record made by a deputy clerk, in the name of his principal, is in due form of law, it is sufficient, without going behind the certificate, to inquire whether a deputy has a right to so attest a writ by the laws of his state. It is the office of such a certificate to advise courts of other states that such authentication is in due form of law. "It is true, that it has been held, that an attestation by an under clerk is not sufficient, nor would an attestation of a deputy, in his own name; but the attestation in this case is in the name of the clerk, by an officer of the law, we presume duly authorized." Young *v.* Thayer, 1 Greene (Iowa) 196.

88. Kirkland *v.* Smith, 2 Mart. N. S. (La.) 497.

89. Vanwick *v.* Hills, 4 Rob. (La.) 140. See also Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380.

90. Ordway *v.* Conroe, 4 Wis. 45; Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380; Kingman *v.* Cowles, 103 Mass. 283.

91. Johnson *v.* Howe's Admrs., 2 Stew. (Ala.) 27.

state whence the record comes.[92] The certificate of the judge is conclusive evidence that the form used is correct.[93]

(B.) SEAL. — The attestation of the clerk must be under the seal of the court if it has one,[94] and it is not sufficient that the seal is affixed merely to the certificate of the judge.[95] If the court has no seal the certificate should show this fact.[96] An impression of the seal on paper is sufficient — the use of wax or a paper wafer is not required.[97]

92. Simons & Co. *v.* Cook, 29 Iowa 324; White *v.* Strother, 11 Ala. 720; Trigg *v.* Conway, Hempst. 538, 24 Fed. Cas. No. 14,172; Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500; Craig *v.* Brown, Pet. C. C. 352, 6 Fed. Cas. No. 3,328; Crawford *v.* Exrs. of Simonton, 7 Port. (Ala.) 110; Regan *v.* McCormick, 4 Har. (Del.) 435.

93. *United States.* — Craig *v.* Brown, Pet. C. C. 352, 6 Fed. Cas. No. 3,328.

Alabama. — White *v.* Strother, 11 Ala. 720.

Delaware. — Regan *v.* McCormick, 4 Har. 435.

Indiana. — Gatling *v.* Robbins, 8 Ind. 184.

Iowa. — Young *v.* Thayer, 1 Greene 196; Simons & Co. *v.* Cook, 29 Iowa 324; Lewis *v.* Sutliff, 2 Greene 186.

Missouri. — Grover *v.* Grover, 30 Mo. 400.

New Hampshire. — Folsom *v.* Blood, 53 N. H. 434.

North Carolina. — Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500.

South Carolina. — Schoonmaker *v.* Lloyd, 9 Rich. L. 173.

Wisconsin. — Ordway *v.* Conroe, 4 Wis. 45.

The certificate of the presiding judge is the only evidence which can be received as to the fact that the clerk's attestation is in due form. Trigg *v.* Conway, Hempst. 538, 24 Fed. Cas. No. 14,172; Harper *v.* Nichol, 13 Tex. 151.

94. Turner *v.* Waddington, 3 Wash. C. C. 126, 24 Fed. Cas. No. 14,263; Allen *v.* Thaxter, 1 Blackf. (Ind.) 399.

Where the clerk used the words "my seal of office" instead of "the seal of the court," it was held sufficient. McClain *v.* Winchester, 17 Mo. 49; Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717. See Coffee *v.* Neely, 2 Heisk. (Tenn.) 304.

The seal need not be attached to records, but only to a clerk's certificate. Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380.

95. Turner *v.* Waddington, 3 Wash. C. C. 126, 24 Fed. Cas. No. 14,263; Kirschner *v.* State, 9 Wis. 140.

Contra. — It is immaterial to which certificate the seal of the court stands in juxtaposition, the clerk's or that of the presiding judge. The court will consider it as annexed to the proper certificate. Coffee *v.* Neely, 2 Heisk. (Tenn.) 304; Foster *v.* Taylor, 2 Overt. (Tenn.) 190.

96. McFarland *v.* Harrington, 2 Bay (S. C.) 555; Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

Wherever the court whose record is certified under the act of Congress has no seal this fact should appear in the certificate of the clerk or in that of the judge. Craig *v.* Brown, Pet. C. C. 352, 6 Fed. Cas. No. 3,328.

Where the attestation of the clerk to a transcript of a judgment of another state is not under seal, but the fact that the court has no seal is recited in the attestation clause and not in the body of the certificate, and the judge certifies that the clerk's certificate is in due form of law, that he is clerk, that his signature is genuine and that his official acts are entitled to full faith and credit, the authentication is sufficient. Simons & Co. *v.* Cook, 29 Iowa 324, *distinguishing* Craig *v.* Brown, Pet. C. C. 352, where the justice's certificate failed to state that the clerk's certificate was in due form, and the clerk "only certified as to the seal used as a substitute, that none had been *provided by the state*, thus leaving the fact of the non-existence of the proper seal to argument.

97. Hunt *v.* Hunt (N. J. Eq.), 9 Atl. 690.

Private Seal. — Where the court has no seal, an attestation by the clerk under his private seal has been held proper.[98]

f. *Judge's Certificate.* — **(1.) Generally.** — The act requires a certificate by the judge or presiding magistrate that the clerk's attestation is in due form; hence a record or copy not so certified is not admissible.[99] A certificate attesting merely the official capacity of the clerk and the genuineness of his signature is not sufficient;[1] nor is a certificate to those facts necessary under the act; all that is required is a certificate that the attestation is in due form.[2]

(2.) Seal. — The certificate of the judge provided for in the act need not be under seal.[3]

(3.) Connection of Certificate With Attestation. — The judge's certificate must be so connected with the preceding attestation as to show that it refers to the attestation.[4]

(4.) By Whom Made. — (A.) GENERALLY. — The act provides that the certificate shall be by "the judge, chief justice, or presiding magistrate" of the court from which the record comes, and this fact

98. The certificate of the clerk to the judicial record of a sister state although under his private seal is sufficient if he certifies that there is no seal of the court, and the presiding judge certifies that the clerk's certificate was in due form. Strode *v.* Churchill, 2 Litt. (Ky.) 75.

99. *Alabama.* — Holly *v.* Flournoy, 54 Ala. 99.

Connecticut. — Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

Illinois. — Brackett *v.* People, 64 Ill. 170.

Missouri. — Duvall *v.* Ellis, 13 Mo. 203; Williams' Admr. *v.* Hall, 16 Mo. 426.

Nebraska. — Westerman *v.* Sheppard, 52 Neb. 124, 71 N. W. 950.

New York. — Smith *v.* Blagge, 1 Johns. Cas. 238.

Oregon. — Pratt *v.* King, 1 Or. 49.

Pennsylvania. — Snyder *v.* Wise, 10 Pa. St. 157.

Virginia. — Gornto *v.* Bonney, 7 Leigh 234.

Wisconsin. — Ordway *v.* Conroe, 4 Wis. 45.

A certificate by the presiding judge that the person attesting the record as clerk was such at the time and that full faith and credit was due to his official acts, is not a sufficient compliance with the act of Congress requiring a certificate that the attestation is in due form. Trigg *v.* Conway, Hempst. 538, 24 Fed. Cas. No. 14,172.

"The certificate of such judge or magistrate being the evidence prescribed by law that due form has been observed in the attestation is at once indispensable and conclusive." Folsom *v.* Blood, 53 N. H. 434.

1. Craig *v.* Brown, Pet. C. C. 352, 6 Fed. Cas. No. 3,328; Shown *v.* Barr, 33 N. C. 296.

2. *United States.* — United States *v.* Wood, Brun. Col. Cas. 456, 2 Wheel. Cr. Cas. 325, 28 Fed. Cas. No. 16,757; Ferguson *v.* Harwood, 7 Cranch 408; Craig *v.* Brown, Pet. C. C. 352, 6 Fed. Cas. No. 3,328.

Alabama. — Brown *v.* Adair, 1 Stew. & P. 49; Linch *v.* McLemore, 15 Ala. 632. See Merriwether *v.* Goran, 2 Port. 199, 27 Am. Dec. 650.

Delaware. — Regan *v.* McCormick, 4 Har. 435. But see Hollister *v.* Armstrong, 5 Houst. 46.

Illinois. — Ducommun *v.* Hysinger, 14 Ill. 249.

Kansas. — Haynes *v.* Cowen, 15 Kan. 637.

Missouri. — McQueen *v.* Farrow, 4 Mo. 212.

3. Greasons *v.* Davis, 9 Iowa 219.

4. A certificate on a separate piece of paper and not on the proceedings themselves is insufficient. McFarland *v.* Harrington, 2 Bay (S. C.) 555; Norwood *v.* Cobb, 20 Tex. 588, and see *supra*, III, 2, D, x, (4.).

Where a copy of the record of a foreign judgment was attested by the clerk under the seal of the court, and

must appear from the certificate or the record itself,[5] an additional certificate by the clerk to this effect is unavailing.[6]

But if there is nothing to show that the court is composed of more than one judge, a certificate purporting to be by the judge of the court is sufficient without designating him as the sole or presiding judge.[7]

And where it otherwise appears that the judge certifying is the

attached thereto was a copy of an execution attested in like manner except that it was of a subsequent date, and immediately following the last attestation and attached thereto was a certificate of the chief justice of the court to the effect that the one who signed as clerk was the clerk of the court, and "that the foregoing signature purporting to be his is genuine and that the seal thereto by him affixed is the seal of said Supreme Judicial Court, and that the foregoing attestation is in due form of law," it was held that the judge's certificate was not a sufficient compliance with the act of Congress because it referred only to the last preceding attestation, the one to a copy of the execution. Burnell *v.* Weld, 76 N. Y. 103.

5. *United States.* — United States *v.* Biebusch, 1 Fed. 213.

Alabama. — Brown *v.* Johnson, 42 Ala. 208; Elliott *v.* McClelland, 17 Ala. 206; Johnson *v.* Howe's Admrs., 2 Stew. 27.

Georgia. — Settle *v.* Alison, 80 Ga. 201, 52 Am. Dec. 393 (in which the copy was from the records of a county court. The judge's certificate stating that he was the presiding magistrate of that county was held insufficient because not showing that he presided over the county court).

Kentucky. — Waller *v.* Cralle, 8 B. Mon. 11.

Louisiana. — Kirkland *v.* Smith, 2 Mart. N. S. 497.

Mississippi. — Strong *v.* Runnels, 2 How. 667; Bates *v.* McCully, 27 Miss. 584.

Missouri. — Barlow *v.* Steel, 65 Mo. 611.

Oregon. — Pratt *v.* King, 1 Or. 49.

Pennsylvania. — Lothrop *v.* Blake, 3 Pa. St. 483.

Texas. — Harper *v.* Nichol, 13 Tex. 151; Randall *v.* Burtis, 57 Tex. 362.

The certificate of a judge styling himself "one of the judges" of a court is not a sufficient compliance with the act. Stewart *v.* Gray, Hempst. 94, 23 Fed. Cas. No. 13,428*a*.

A certificate to the record of another state which recites "I, A. K., *first* justice of county court of *M.*, in state of Virginia, do hereby certify," etc., is not sufficient under act of Congress, at best, without proof that by the law of that state, the *first*, or oldest justice of the court was chief or presiding justice or magistrate. Hudson *v.* Daily, 13 Ala. 722.

The certificate of the judge that he is the presiding judge is good evidence of the fact. Hutchinson *v.* Patrick, 3 Mo. 65.

A certificate to the record of a sister state as follows: "I, J.J., one of the chancellors of the said state, and in turn presiding chancellor for said district, do hereby certify," etc., appears on its face to be made by the proper person and conforms to the requisites of the act of Congress. Taylor *v.* Kilgore, 33 Ala. 214.

Successor. — Although the judgment of a court of another state was rendered by one judge, the transcript thereof may be certified by his successor. Young *v.* Thayer, 1 Greene (Iowa) 196.

6. Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672.

7. Keyes *v.* Mooney, 13 Or. 179, 9 Pac. 450; Low *v.* Burrows, 12 Cal. 181; Jones *v.* Hunter, 6 Rob. (La.) 235; Butler *v.* Owen, 7 Ark. 369; Central Bank of Georgia *v.* Veasey, 14 Ark. 671; People *v.* Smith, 121 N. Y. 578, 24 N. E. 852, *distinguishing* Morris *v.* Patchin, 24 N. Y. 394.

A certificate by the judge that he

sole judge it is not necessary for the certificate to recite this fact.[8]

Where, however, it appears that there are other judges of the court or that another judge is chief justice or presiding magistrate, a certificate by a judge of the court is not sufficient.[9]

It is not essential that the judge in describing himself use the words of the act if the language used sufficiently shows his official position.[10]

Nor is it necessary that his position appear from the certificate; it is enough that the record or transcript shows it.[11]

(B.) When Certificate Is by Presiding Judge of a Circuit, District or Department. — When the certificate is made by the presiding judge of a specified circuit, district or department it must be made to appear that the court from which the record or transcript comes is within the designated circuit, district or department.[12]

But the fact that a record purporting to be from one circuit or district is attested by the clerk and judge of a differently numbered

is "the judge of the court" sufficiently shows that he is the sole judge under the federal statute. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757.

8. State *v.* Hinchman, 27 Pa. St. 479 (where it appears from the record); Mudd *v.* Beauchamp, Litt. Sel. Cas. (Ky.) 142.

The omission to state in the certificate appended to an exemplification of a will and of the probate thereof in another state, that the judge who certifies to the correctness of the copy is presiding judge, is immaterial, where it is well known that probate courts of that state are composed of but one judge. Jones *v.* Hunter, 6 Rob. (La.) 235.

Although the judge's certificate that the attestation of the clerk is in due form does not show whether he was sole judge, chief justice or presiding magistrate of the court whose record is sought to be proved, it is sufficient where it appears from the law of the state governing the organization of a court that it consisted of a single judge, and for this purpose the court takes judicial notice of the state law. Bennett *v.* Bennett, 1 Deady 299, 3 Fed. Cas. No. 1,318.

9. Lothrop *v.* Blake, 3 Pa. St. 483; Van Storck *v.* Griffin, 24 N. Y. 394, 82 Am. Dec. 311.

10. McKenny *v.* Gordon, 13 Rich. (S. C.) 40 (certificate by "chairman" of the court). See also Geron *v.* Felder, 15 Ala. 304; Williams *v.* Williams, 53 Mo. App. 517.

President Judge. — A signature J. T., "president judge of the court of common pleas for said county," is a sufficient compliance with the requirements of the act of Congress as to the certificate by the presiding judge. Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470. See also Erb *v.* Scott, 14 Pa. St. 20. And a certification as "president" of the court omitting the word "judge" has been held sufficient. Gavitt *v.* Snowhill, 26 N. J. L. 76.

11. Mudd *v.* Beauchamp, Litt. Sel. Cas. (Ky.) 142. But see Pratt *v.* King, 1 Or. 49; Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672; Randall *v.* Burtis, 57 Tex. 362.

12. Elliott *v.* McClelland, 17 Ala. 206; Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672; Buck *v.* Grimes, 62 Ga. 605; Brown *v.* Johnson, 52 Ala. 208.

A judge's certificate reciting that he is the "presiding judge of the supreme court of the state of New York in the seventh judicial district," and that the said C. R. is clerk of said court, was held insufficient because it did not appear that the judge was of the same court as the clerk whose certificate recited merely that he was clerk of the county of Livingston. The judge's certificate should have shown that Livingston county was within the seventh judicial district. Phelps *v.* Tilton, 17

circuit or district does not render the transcript inadmissible where it sufficiently appears that they were the officers of the court in question.[13]

(C.) Court Consisting of Several Judges of Equal Rank. — Where the court from which the record comes consists of several judges of equal rank, it seems that in some jurisdictions authentication in the manner provided by the act of Congress is impossible unless one of them is actually presiding.[14] In other jurisdictions, however, it

Ind. 423. To the same effect, Barlow *v.* Steel, 65 Mo. 611.

13. The transcript of a judgment purporting to be rendered in the county of A., state of Illinois, before Judge S., judge of tenth judicial circuit, and attested by the clerk of the sixth judicial circuit, and certified to be in due form by Judge W., as judge of sixth judicial circuit, is properly admitted in evidence where it sufficiently appears that Judge S. was judge of the circuit court held in A. county, Illinois, where judgment was rendered,— the difference in numbering of circuits which are subject to legislative change is immaterial. Taylor *v.* Heitz, 87 Mo. 660.

Where a transcript of a judgment rendered in Mississippi was attested by the "clerk of the circuit court in and for the county of Adams" and showed that the judgment was rendered in 1842 in the circuit court held before the presiding judge of the third judicial district, and the judge described himself in his certificate, dated in 1857, as the "Presiding Judge of the first judicial district of the State of Mississippi, which includes the county of Adams;" it was held that the judge's certificate was sufficient *prima facie* evidence of his official character and of the fact that Adams county was within the district over which his jurisdiction extended. Since the constitution of the state authorized the legislature to arrange the counties into judicial districts and to change such arrangement at its discretion, it would be assumed that Adams county was within the third judicial district in 1842, and in the first judicial district in 1857. "The precise point of the exception is, that the plaintiff was bound to prove, otherwise than by the certificate, that Adams county was in the first district at the time it was given. We think that, *prima facie,* we are to regard the magistrate as holding the official situation which, by his certificate, he professes to occupy, and his certificate imports, as has been mentioned, that he is the presiding judge of the court before which the judgment was rendered. If it were strictly a foreign judgment which was in question, the law would be different. In such cases, the existence of the court and the official characters of the officers must be proved before effect can be given to the judgment. But courts, in this class of cases, recognize without proof the courts and judges of the same common government." Hatcher *v.* Rocheleau, 18 N. Y. 86.

14. In Stephenson *v.* Bannister, 3 Bibb (Ky.) 369, a copy of a judicial record from another state was attested by the clerk with the seal of the court, and this attestation was certified by two judges to be in due form. One of the judges stated himself to be the judge "that presided, and one of the judges of the superior courts of law of said state;" the other judge called himself "the senior judge of the courts of law of the state of South Carolina." These certificates of the judges were held not a sufficient compliance with the act of Congress, since they do not show that either judge was *the judge* or the presiding judge or magistrate of the court at the time the certificates were given. "Cases no doubt may occur in which no judge can with truth or propriety, except at particular times, be denominated *the judge, chief justice,* or *presiding* judge or magistrate of a particular court; as where different judges constitute the same court at different times by rotation, an instance of

has been held that any one[15] or all[16] of the judges may make the required certificate.

g. *Certificate by Clerk to Official Capacity of Judge.* — A certificate by the clerk to the official capacity of the judge or presiding justice is unnecessary,[17] and is not evidence of what it states.[18]

But where a transcript is properly authenticated in the manner required by the act of Congress, the fact that the clerk of the court has appended such an additional unnecessary certificate does not render the transcript inadmissible.[19]

h. *Defects in Certificate.* — (1.) **Generally.** — Defects in a certificate which are merely clerical do not render the copy or record inadmissible,[20] and the same is true as to the defects or omissions

which is to be found in the organization of the general court of this state. But it does not follow that any judge of a court thus organized may certify a record when he is not the *judge, chief justice* or *presiding judge*, because he had been before, or might be thereafter possessed of that character. The only inconvenience that results from cases of that kind, is the delay that in some instances must occur in waiting until some judge is qualified by his situation to give the requisite certificate. This inconvenience, though perhaps of more frequent occurrence, is not greater than may be produced in other cases by the absence, death, resignation or removal of a judge; and these are evidently cases not provided for by the act of Congress. Whether they were not foreseen, or were intentionally omitted, cannot be certainly told, nor is it material for in neither case is it competent for a court to supply the defect." See also Stewart *v.* Gray, Hempst. 94, 23 Fed. Cas. No. 13,428*a*.

15. Orman *v.* Neville, 14 La. Ann. 392; Woodley *v.* Findlay, 9 Ala. 716 (it must be shown that such is the organization of the court).

A certificate by "one of the judges of the supreme court of errors and appeals of Tennessee," is sufficient, the law appointing no chief justice or presiding magistrate of the court. Such peculiarity may be shown by the certificate of the judge. Huff *v.* Campbell, 1 Stew. (Ala.) 543. See also Foster *v.* Taylor, 2 Overt. (Tenn.) 190.

16. Jordan *v.* Black, 1 Rob. (La.) 575; Arnold *v.* Frezier, 5 Strobh. (S. C.) 33.

17. Gavit *v.* Snowhill, 26 N. J. L. 76; Hackney *v.* Williams, 6 Yerg. (Tenn.) 340.

18. Taylor *v* McKee, 118 Ga. 874, 45 S. E. 672.

19. A chancery record from another state attested by the clerk and presiding judge in the form required by the act of Congress cannot properly be objected to because there is appended an additional clerk's certificate not inconsistent with the proper one but rather corroborative of it. Such additional certificate could not vitiate the transcript. Weeks *v.* Downing, 30 Mich. 4.

Where the authentication of a judicial record from another state is in accordance with the act of Congress, an additional certificate by the clerk as to the official character of the presiding judge though not required is a mere superfluity and does not vitiate the preceding certificates or render the copy inadmissible. Young *v.* Chandler, 13 B. Mon. (Ky.) 252.

20. Where the judge's certificate to record from court of sister state bears date anterior to the date of attestation by the clerk, but refers to latter as then in existence, the discrepancy is presumed to be clerical and disregarded. Keyes *v.* Mooney, 13 Or. 179, 9 Pac. 400.

Date. — Where the certificate of the judge was not dated but was preceded and followed by certificates of the clerk, the first as to the correctness of the transcript, dated the 18th, and the other as to the official capac-

which are supplied by other portions of the certificate itself.[21]

(2.) Defective Certificates Supplementing Each Other. — Although the certificates to two transcripts, which are both fatally defective, when taken together supplement each other in the respects in which each is defective, they are not admissible.[22]

i. *When Judge Is Also Clerk of His Court.* — **(1.) Generally.** The fact that the judge of a foreign court is also clerk of his own court does not prevent him from authenticating his record or a copy under the act of Congress, where he certifies in both capacities.[23]

(2.) A Single Certificate is sufficient if it embraces an attestation

ity of the judge, dated the 31st of July, it was held that the defect in the judge's certificate was cured, although the last certificate of the clerk was superfluous. Lewis *v.* Sutliff, 2 Greene (Iowa) 186.

Signature. — The transcript of a judgment of a sister state is not inadmissible merely because the presiding judge in his certificate signed his Christian name merely by the initials. Old Wayne Mut. L. Assn. *v.* McDonough, 164 Ind. 321, 73 N. E. 703.

21. Although there is a blank in the certificate where the word "record" or judicial proceedings should have been inserted the copy is nevertheless admissible if sufficient appears in the certificate to supply the deficiency. Schoonmaker *v.* Lloyd, 9 Rich. L. (S. C.) 173.

22. Where the clerk's certificate to a transcript of the judgment of a justice of another state is fatally defective in failing to state that the officer before whom the proceedings were had was justice of the peace of the same county as the clerk, and the clerk's certificate to a second transcript of the same proceedings obtained to correct the mistake in the first was defective in another essential particular but supplied the defect in the first, it was held that the two transcripts were not admissible when offered together, although they supplemented each other in the respects in which each was defective. Guesdorf *v.* Gleason, 10 Iowa 495.

23. *United States.* — Catlin *v.* Underhill, 4 McLean 199, 5 Fed. Cas. No. 2,523.

Alabama. — Dozier *v.* Joyce, 8 Port. 303; Huff *v.* Cox, 2 Ala. 310.

California. — Low *v.* Burrows, 12 Cal. 181.

Illinois. — Spencer *v.* Langdon, 21 Ill. 192.

Iowa. — Rowe *v.* Barnes, 101 Iowa 302, 70 N. W. 197; Roop *v.* Clark, 4 Greene 294.

Mississippi. — Jordan *v.* Thomas, 31 Miss. 557.

Pennsylvania. — State *v.* Hinchman, 27 Pa. St. 479.

South Carolina. — Sally *v.* Gunter, 13 Rich. L. 72.

Texas. — Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

West Virginia. — Wilson *v.* Phoenix Powder Mfg. Co., 40 W. Va 413, 21 S. E. 1035.

Wisconsin. — Keith Bros. & Co. *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

A certificate of proceedings before the court of ordinary in a sister state, where the judge acts as clerk of his own court, is good evidence under act of Congress, when such certificate has seal of the court, is certified by the clerk, and the same person, in his capacity of judge, declares attestation to be in due form. Pagett *v.* Curtis, 15 La. Ann. 451.

Where an exemplification of the proceedings of the probate court of a sister state is offered in evidence it will be presumed that the probate court is a court of record, and the certificate of the judge that he is ex-officio clerk, that he has no official seal and that he has jurisdiction under the laws of his state, is a sufficient authentication of the rec-

as clerk and the required certificate as judge; it is not necessary that there be two separate certificates.[24] It is essential, however, that there be an attestation as clerk and a certificate as judge as to the method of attesting, one certificate by the judge as to the correctness of the copy or authenticity of the record is not enough,[25]

ord under the act of Congress. "The act of Congress . . . . contemplates, it is true, that the court shall have a clerk and a judge. But there is nothing in this act which makes it necessary that these officers be the same persons. The implication, is perhaps, a clear one, that the court shall be a court of record, as this seems to follow from the existence of a clerk. It has been often decided that where, by the law organizing the court, the judge is *ex-officio* the clerk, as is common, especially in probate courts, the certificate setting forth these facts, and signed by the judge, is sufficient. . . . There are decisions to the effect that the law of the state organizing the court, must, in cases of statutory courts, be produced: 3 Wend., 263; 7 Wend. 435. But there are many authorities the other way: Ripple *v.* Ripple, 1 Rawle, 386; Thomas *v.* Tanner, 6 Monroe, 53; 4 Phillip's Ev., (Cowan) 61, 62, 71, 77; and we think this latter view most consistent with principle, since it facilitates the operation of the constitutional provision to give full faith to the records and judicial proceedings of other states. *Prima facie* the certificate of the judge of the court, as to its powers and the mode of its organizaion, may well be accepted for true. If the fact be different, it seems to us that the burden of producing the law ought, in such cases, to be on the other party." Cox *v.* Jones, 52 Ga. 438.

Justice Court. — Bissell *v.* Edwards, 5 Day (Conn.) 363. See *infra*, VII, 2, D, d, (2.).

24. Keith Bros. & Co. *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860; Low *v.* Burrows, 12 Cal. 181.

A copy of the probate of a will from another state was held sufficiently authenticated by a certificate signed by S. C. B., who certified that he was register and as such both clerk and judge of the register's court, and certified in both capacities. "The objection to the authentication to the probate of the will from Delaware that it consisted of only one certificate made by the same officer in his capacities of judge and clerk is not well taken." Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

Where under the laws of another state the ordinary is both judge and clerk of the court of ordinary, a single certificate therefore, made by him as "ordinary" to a transcript of a record from that court, is sufficient to entitle record to admission in this state, if it contain the essential statements of the certificate of both judge and clerk according to act of Congress, and it is not necessary that the ordinary should certify separately. Jordan *v.* Thomas, 31 Miss. 557.

25. Sherwood *v.* Houston, 41 Miss. 59.

Since a surrogate acts as his own clerk he may certify to the correctness of a copy of his records in that capacity and also make a certificate as the judge of the court. But one certificate as to the correctness of the copy is not a sufficient compliance with the act of Congress. Catlin *v.* Underhill, 4 McLean 199, 5 Fed. Cas. No. 2,523.

Under the code requiring a copy of a judicial record from another state to be authenticated in substantially the same manner as provided by the act of Congress, the certificate of the judge reciting that by the laws of the state he is both clerk and judge is not sufficient. "The authentication in question was not signed by the clerk of the court as such with the seal annexed, nor did the certificate of the county judge show that the attestation was in due form of law." Rowe *v.* Barnes, 101 Iowa 302, 70 N. W. 197.

though in some cases it seems to have been held to the contrary.[26]

j. *Transferred Records.* — Where the records of a court of another state have on a change in the form of government or in the organization of the courts been transferred to another court, a copy of such record authenticated by the officers of the latter court in accordance with the act of Congress is competent evidence without proof of the law authorizing the transfer, or showing that the clerk of the latter court was the proper custodian of such record.[27]

The fact that the transfer has been made may sufficiently appear from the certificate of either the clerk[28] or the judge.[29]

k. *Other Modes of Authentication.* — **(1.) Act of Congress Not Exclusive.** — The act of Congress providing a method for authenticating judgments is not exclusive, and the states may provide other

26. Wilson *v.* Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035.

Letters of administration from another state certified under the seal of the probate court by the sole presiding judge, by whom the records are kept, there being no clerk, are admissible in evidence. Spencer *v.* Langdon, 21 Ill. 192.

27. Capen *v.* Emery, 5 Metc. (Mass.) 436; Taylor *v.* Barron, 35 N. H. 484; Gatling *v.* Robbins, 8 Ind. 184; Manning *v.* Hogan, 26 Mo. 570; Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410.

Thomas *v.* Tanner, 6 Mon. (Ky.) 52, holding that a transcript of the records of a probate court for the territory from which the state of Missouri was afterwards made, certified after the establishment of the state in accordance with the act of Congress by the officers of the county court where the record purported to be kept, was competent evidence without proof of the laws of the state causing the transfer of the records, or without showing that the clerk of the county court was the proper custodian thereof.

A copy of the records of one court of a sister state which have been transferred to another court of that state if authenticated by the certificates of the clerk and presiding judge of the latter court is admissible in evidence. The fact that the clerk does not style himself clerk of the former court but states that he is keeper of the records of that court is no objection to the competency of the evidence. It is presumed that such former court was abolished or that the laws of that state have placed the records thereof in the custody of another clerk. Strode *v.* Churchill, 2 Litt. (Ky.) 75.

28. Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Darrah *v.* Watson, 36 Iowa 116; Gatling *v.* Robbins, 8 Ind. 184.

The transcript of a judgment of a county court of the state of Virginia before its division by the formation of the state of West Virginia therefrom, authenticated by a certificate of the clerk of a circuit court of West Virginia showing that the said county court of Virginia has been abolished or discontinued and its records and proceedings transferred to the said circuit court of West Virginia, and that the clerk of the latter is the lawful custodian of the records and proceedings of the former and under seal of the court, and further authenticated by the certificate of the judge of such circuit court as to the official character of the clerk and the fact that his attestation is in due form, was held properly admitted against the objection that the certificate of the clerk was not proper evidence of the fact of the transference of the records, but that the statutes of the states should have been produced. Darrah *v.* Watson, 36 Iowa 116.

29. Capen *v.* Emery, 5 Metc. (Mass.) 436.

methods not inconsistent therewith, or the common law method may be resorted to.[30]

Thus an examined or sworn copy may be used.[31]

The records and proceedings of a court to which the act does not apply may be proved by the common law methods.[32]

(2.) **Statutes.** — In many states are statutes regulating the method of proving the records and proceedings of the courts of sister states.[33] Authentication in the manner specified in such a statute is

30. *Georgia.* — Sloan *v.* Wolfsfeld, 110 Ga. 70. 35 S. E. 344; Goodwyn *v.* Goodwyn, 25 Ga. 203.

Illinois. — People *v.* Miller, 195 Ill. 621, 63 N. E. 504.

Indiana. — Ansley v. Meikle, 81 Ind. 260.

Iowa. — Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135; Lattourett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Massachusetts. — Kingman v. Cowles, 103 Mass. 283.

Michigan. — Dean *v.* Chapin, 22 Mich. 275.

Missouri. — Etz *v.* Wheeler, 23 Mo. 449.

Pennsylvania. — Lothrop *v.* Blake, 3 Pa. St. 483; Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786.

Tennessee. — Coffee *v.* Neely, 2 Heisk, 304.

Wisconsin. — Ordway *v.* Conroe, 4 Wis. 45.

The federal statute providing for the method of authenticating records of the courts of a foreign state is not exclusive, and although the record in a particular case is not authenticated in accordance therewith if the authentication is sufficient under the statute of the state where it is offered in evidence the copy of the record is admissible. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224.

31. Goodwyn *v.* Goodwyn, 25 Ga. 203.

32. Duvall *v.* Ellis, 13 Mo. 203.

33. *California.* — Bean *v.* Loryea, 81 Cal. 151, 22 Pac. 513.

Iowa. — Simons & Co. *v.* Cook, 29 Iowa 324 (judge's certificate need not be by presiding judge but may be made by any judge of the court).

Minnesota. — Merz *v.* Chicago & N. W. R. Co., 86 Minn. 33, 90 N. W. 7 (certificate must show that comparison between copy and original was made).

Mississippi. — Johnson *v.* Martin, 68 Miss. 330. 8 So. 847.

Nebraska. — Linton *v.* Baker, 96 N. W. 251; Comstock *v.* Kerwin, 57 Neb. 1, 77 N. W. 387.

Pennsylvania. — Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786.

Washington. — Ritchie *v.* Carpenter, 2 Wash. 512 (certificate by judge not required).

West Virginia. — Thrasher *v.* Ballard, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894 (relating to Virginia records).

A certificate by the clerk under "his seal of office" is in literal compliance with the Tennessee statute and is therefore sufficient. Coffee *v.* Neely, 2 Heisk. (Tenn.) 304.

Where an offered copy is not attested according to the act of Congress the certificate of the clerk must conform to the state statute and must recite that he has compared the copy with the original and that it is a correct transcript therefrom. Hackett *v.* Bonnell, 16 Wis. 471; Ordway *v.* Conroe, 4 Wis. 45.

Under the Georgia code the judgments of other states must be authenticated either in the manner prescribed by act of Congress or by the great seal of the state, and parol evidence alone or in connection with docket entries, whether an original or a copy, is not admissible to establish the rendition of a judgment by a justice of the peace in Alabama, or to prove the contents of such a judgment. Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46.

§ 13, ch. 51, p. 860, Hurd's Stat. 1899, provides that the records of courts may be proved by a copy thereof, certified under the hand of the clerk having the custody thereof and the seal of the court. This stat-

sufficient.[34] But states have no lawful power to prescribe anything in addition to the requirements of the act of Congress.[35]

Under a statute providing for the admission of a record or a copy certified by the clerk, the certificate need not show that the clerk is the legal custodian of the record.[36]

(3.) Justice Court. — The records and proceedings of a justice court may be proved in any method competent at common law for proving foreign judicial records and proceedings.[37] The matter is provided for by statute in some states.[38]

(4.) Proceedings Not of Record. — The proceedings of a court of a

ute is not inconsistent with the act of Congress providing a method of authenticating the judgments of sister states and applies to foreign judgments as well as domestic. People *v.* Miller, 195 Ill. 621, 63 N. E. 504; Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753.

34. Ordway *v.* Conroe, 4 Wis. 45; Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753; Matthew Ellis Estate, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287; Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344; Goodwyn *v.* Goodwyn, 25 Ga. 203; Coffee *v.* Neely, 2 Heisk. (Tenn.) 304.

A record certified under the clerk's seal of office, if that be not the seal of the court, though not in compliance with United States statute, is admissible under the code, as the method of authentication prescribed by Congress is not exclusive. Coffee *v.* Neely, 2 Heisk. (Tenn.) 304.

"While it is clear that a legislature of a state could not require a greater amount of proof than that prescribed by act of Congress, it would seem clear that a statute of a state may require less, and that such an act would not be in derogation of the constitution of the United States." Parke *v.* Williams, 7 Cal. 247.

Probate of Will. — For statutes relating to the method of proving wills probated in a sister state, see Conrad *v.* Kennedy, 123 Ga. 242, 51 S. E. 299; Porter *v.* Bevill, 2 Fla. 528; Harris *v.* Anderson, 9 Humph. (Tenn.) 779; Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89; Knight *v.* Wall, 19 N. C. 125; and article "Wills."

35. Parke *v.* Williams, 7 Cal. 247.

36. Bean *v.* Loryea, 81 Cal. 151, 22 Pac. 513.

"The clerk is the proper custodian of the records and the seal of the court attached to his certificate attests the possession of the record in the person who certifies. Records so certified are always received as true *prima facie* without proof in the first instance of their genuineness or of the official character of the person who assumes to act in such official capacity." Kingman *v.* Cowles, 103 Mass. 283.

37. Mahaurin *v.* Bickford, 6 N. H. 567; Robinson *v.* Prescott, 4 N. H. 451; Blackwell *v.* Glass, 43 Ark. 209; Pelton *v.* Platner, 13 Ohio 209; King *v.* Van Gilder, 1 Chip. (Vt.) 59; Winham *v.* Kline, 77 Mo. App. 36.

38. Smith *v.* Petrie, 70 Minn. 433, 73 N. W. 155; Draggoo *v.* Graham, 17 Ind. 427; Ault *v.* Zehering, 38 Ind. 429; McGee & Richardson *v.* Sheffield, 3 Stew. & P. (Ala.) 351; Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135. See Pelton *v.* Platner, 13 Ohio 209; Kuhn *v.* Miller's Admr., Wright (Ohio) 127; Trade *v.* McKee, 2 Ill. 557.

Where a statute provides for the admission of transcripts of the judgments of justices of the peace within an adjoining state, it applies only to contiguous states. Bent *v.* Glaenzer, 17 Misc. 569, 40 N. Y. Supp. 657.

Under a Michigan statute providing that proceedings before a foreign justice of the peace may be proved by a transcript certified by the justice and authenticated by a certificate of the clerk of any court of record of the same county or district under his official seal, setting forth the genuineness of the justice's signature and his official capacity at the date of the proceedings, a certificate signed as "county clerk of Anador County, California" without any certification

sister state which properly rest in parol must be proved according to the common law method, since they are not covered by the act of Congress.[39]

E. Non-Judicial Records and Documents. — a. *Generally.* By act of Congress it is provided that all records and exemplifications of books which may be kept in a public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the state, or territory, or country that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified; or if given by such governor, secretary, chancellor or keeper of the great seal it shall be under the great seal of the state, territory or country aforesaid in which it is made, and the said records and exemplifications so authenticated shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory or country as aforesaid from which they are taken.[40]

b. *Effect of Act.* — This act merely provides a method of proof and does not render competent any record or document which would not in its nature or quality be competent without the act.[41]

c. *Proof of Law Authorizing the Record.* — Before an authenticated copy of a non-judicial record[42] or of a document on file in a

or proof that the person signing was the clerk of the court of record was held insufficient because the "certificate failed to show that the county clerk who signed this certificate was the clerk of the court of record." Howard *v.* Coon, 93 Mich. 442, 53 N. W. 513.

Under the Iowa Statute the certificate of the clerk of the superior court that the justice who rendered the judgment was at the time of its rendition an acting justice of the peace is unauthorized and unnecessary. It is sufficient if the certificate of such justice's successor shows this fact. Railroad Bank *v.* Evans, 32 Iowa 202. But the certificate should show that the justice signing the same was a justice in the same county as the clerk at the date of his certificate. It is not sufficient where it merely recites his official capacity at the time the judgment was rendered. Guesdorf *v.* Gleason, 10 Iowa 495.

39. Therefore when a judicial proceeding consisting chiefly of matters of record contains matters properly resting in parol, so much as rest in parol may be proved thereby. Campbell *v.* Home Ins. Co., 1 Rich. (S. C.) 158.

40. Rev. Stat. U. S. § 906.

41. Snell *v.* United States, 16 App. Cas. (D. C.) 501.

42. Haile *v.* Palmer, 5 Mo. 403; Martin's Heirs *v.* Martin, 22 Ala. 86; Lee *v.* Mathews, 10 Ala. 682, 44 Am.

public office[43] in a sister state is admissible, the law of that state authorizing such record or providing for the filing or retaining of the document in such office must be shown.

d. *Records and Documents to Which Applicable.* — **(1.) Private Writings.** — The act applies to private writings on file in a public office[44] or the public record thereof.[45] Though the contrary has been held.[46]

An authenticated copy of the record of a deed or other private writing is admissible to the same extent and under the same conditions that it would be in the state from which it comes.[47] Hence

Dec. 498. See Hamilton *v.* Schoaff, 99 Ind. 63; Dixon *v.* Thatcher, 14 Ark. 141; Munkres *v.* McCaskill, 64 Kan. 516, 68 Pac. 42; McClardy *v.* Richardson, 24 Mo. 295; State *v.* Engle, 21 N. J. L. 347.

Where a certified copy of a foreign record of a private writing, such as a deed, is offered in evidence there must be affirmative proof of the law authorizing such a record to be made. The copy is then competent secondary evidence of the original instrument. Bryant *v.* Kelton, 1 Tex. 434; Powell *v.* Knox, 16 Ala. 364.

43. Under a statute relating to exemplification of public records of the United States or a sister state, the certificate of the secretary of state of sister state, of incorporation of plaintiff, whose corporate existence is put in issue, is not admissible unless it is shown that the laws of that state required the paper to be kept or recorded. Florsheim & Co. *v.* Fry, 109 Mo. App. 487, 84 S. W. 1023.

44. Martin's Heirs *v.* Martin, 22 Ala. 86 (bond given by intended husband preliminary to obtaining a license of marriage).

45. *Alabama.* — Smoot *v.* Fitzhugh, 9 Port. 72 (deed of marriage settlement).

Delaware. — Pennell's Lessee *v.* Weyant, 2 Har. 501.

Illinois. — Dunlap *v.* Daugherty, 20 Ill. 397.

Kentucky. — Strode *v.* Churchill, 2 Litt. 75; Rochester *v.* Toler, 4 Bibb 106.

Louisiana. — Smith *v.* McWaters, 7 La. Ann. 145; Graham & Anderson *v.* Williams, 21 La. Ann. 594 (copy of deed of trust and assignment held admissible as primary evidence); Reynolds *v.* Rowley, 3 Rob. 201.

Maryland. — Bruce *v.* Smith, 3 Har. & J. 499.

Mississippi. — James *v.* Kirk, 29 Miss. 206.

Missouri. — Paca *v.* Dutton, 4 Mo. 371.

New Jersey. — Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024.

Pennsylvania. — Hilliard *v.* Enders & Co., 196 Pa. St. 587, 46 Atl. 839 (assignment for benefit of creditors).

Tennessee. — Hackney *v.* Williams, 6 Yerg. 340.

Texas. — Watrous *v.* McGrew, 16 Tex. 506; Trinity County Lumb. Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015. See Warren *v.* Wade, 52 N. C. 494.

46. The act of Congress does not extend to the case of exemplifications of the record of a private writing recorded under the registration law. "Such a writing after being recorded leaves the office of record and returns to the hands of the private owner. It is still as much an original as ever and must therefore be better evidence of itself than a copy of the record can be." Russell *v.* Kearney, 27 Ga. 96.

47. Where by the statute of a sister state copies of all instruments of writing permitted to be recorded may be received as primary evidence, the act of Congress makes the copy competent in our courts, and it is not objectionable as being a copy of a copy. Smith *v.* McWaters, 7 La. Ann. 145. See also Graham *v.* Williams, 21 La. Ann. 594.

Where under the laws of a sister state as provided, a certified copy of a recorded deed is not admissible unless the loss of the original is proved, a certified copy offered here will be

it must appear that such a copy is admissible in the latter.[48]

(2.) Notary's Record of Conveyance. — Where the law provides for the making of conveyances in a notary's book and regards such book as a public record, a copy of its contents may be authenticated under the act of Congress.[49]

e. *Mode of Authentication.* — The act specifies the method of authentication and its provisions must be complied with to render the record or document admissible.[50] Thus the custodian's certificate should be under the seal of his office[51] except where he has none,[52] in which case his certificate should so state.[53] The presiding judge's certificate must be supported by the clerk's certificate that the former is duly commissioned and qualified[54] and is the presiding judge.[55]

f. *Other Modes of Authentication.* — The method of authentication provided by the act of Congress is not exclusive of any competent common law[56] or statutory[57] method; thus the use of a

governed by the same rule. Whaun *v.* Atkinson, 84 Ala. 592, 4 So. 681.

Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024; Smoot *v.* Fitzhugh, 9 Port. (Ala.) 72. See Griffin *v.* Reynolds, 17 How. (U. S.) 609; Saunders *v.* Harris, 5 Humph. (Tenn.) 345.

48. Mitchell *v.* Mitchell, 3 Stew. & P. (Ala.) 81.

49. James *v.* Kirk, 29 Miss. 206; Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794. See also Watrous *v.* McGrew, 16 Tex. 513; Smith *v.* Townsend, Dall. (Tex.) 571; Williams *v.* Conger, 49 Tex. 582.

50. *Alabama.* — Key *v.* Vaughn, 15 Ala. 497.

Delaware. — Hollister *v.* Armstrong, 5 Houst. 46.

Indiana. — Henthorn *v.* Doe, 1 Blackf. 157.

Kentucky. — Waller *v.* Cralle, 8 B. Mon. 11.

Louisiana. — Reynolds *v.* Rowley, 3 Rob. 201.

Mississippi. — Kidd *v.* Manley, 28 Miss. 156.

Tennessee. — Brock *v.* Burchett, 2 Swan 27.

Virginia. — Petermans *v.* Laws, 6 Leigh 523.

51. Paul *v.* Chenault (Tex. Civ. App.), 44 S. W. 682; Brock *v.* Burchett, 2 Swan (Tenn.) 27.

52. Hackney *v.* Williams, 6 Yerg. (Tenn.) 340.

53. Brock *v.* Burchett, 2 Swan. (Tenn.) 27.

54. Paca *v.* Dutton, 4 Mo. 371; Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672, distinguishing in this respect this section from the preceding section 905 relating to judicial records.

55. Paca *v.* Dutton, 4 Mo. 371.

The certificate of the clerk of the county court that Wm. Jones, whose name is signed to the foregoing certificate, is chairman of O. county court, duly elected and appointed, is not sufficient under act of Congress to admit the copy of the record, it must show that the person certifying is presiding judge. Hackney *v.* Williams, 6 Yerg. (Tenn.) 340.

An authentication by a "judge of the county court" attested by a certificate of the clerk that the person making the certificate was at the time thereof "judge of the county court . . . duly commissioned and qualified, is not sufficient." Nolan *v.* Nolan, 35 App. Div. 339, 54 N. Y. Supp. 975.

56. Logansport Gaslight & Coke Co. *v.* Knowles, 15 Fed. Cas. No. 8,466; Elmore *v.* Mills, 2 N. C. 359; Kaw *v.* Jackson, 28 Mo. 316.

To authenticate a grant according to common law, the governor's certificate under the great seal of the state should itself verify the copy. The attestation of the official character of the officer whose certificate verifies the copy is not sufficient. Brock *v.* Bushett, 2 Swan (Tenn.) 27.

57. Davis *v.* Rhodes, 39 Miss. 152; Johnson *v.* Martin, 68 Miss. 330,

sworn or examined copy is not excluded by the force of this act.[58]

F. LEGISLATIVE ACTS. — Under the act of Congress the legislative acts of a sister state may be proved by a copy under the great seal of the state.[59] This subject is more fully discussed elsewhere.[60]

VIII. FOREIGN RECORDS AND DOCUMENTS.

1. Generally. — Before a foreign record or a copy thereof is admissible it must appear that the record is one required or authorized by law to be made.[61] The record itself when otherwise relevant and competent may be introduced if properly authenticated,[62] or

8 So. 847; Pabst Brew. Co. *v.* Smith, 59 Mo. App. 476.

Where a certified copy of the articles of incorporation of a corporation of another state is made competent by statute, it need not be authenticated in the manner provided by § 906, Rev. Stat. U. S. United States Vinegar Co. *v.* Foehrenbach, 74 Hun 435, 26 N. Y. Supp. 632.

Under the Mississippi statute copies of the records of sister states certified by the clerk in whose office they are kept are admissible. Since a port warden's record of his survey is competent evidence by the Louisiana statute, a copy of his record certified by himself is competent, if not by the express terms of the statute at least by its spirit and implication. Johnson *v.* Martin, 68 Miss. 330, 8 So. 847.

58. Karr *v.* Jackson, 28 Mo. 316; Smith *v.* Strong, 14 Pick. (Mass.) 128; Louisville, etc. R. Co. *v.* Shires, 108 Ill. 617; Condit *v.* Blackwell, 19 N. J. Eq. 193; Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

A tax list of another state may be proved by a sworn copy. Though it is in the nature of a public document it is not a judicial record. "The provision in the statute of the United States that certified copies of records may be introduced in evidence does not preclude the party from proving the instrument by a sworn copy. The statute does not abridge the common law right to prove by an examined and sworn copy, but adds a more convenient and less expensive method of proof." Hall *v.* Bishop, 78 Ind. 370.

59. Rev. Stat. U. S. § 905. State *v.* Carr, 5 N. H. 367.

And in the absence of contrary proof the seal is presumed to have been affixed by an officer having the custody thereof and competent authority. United States *v.* Amedy, 11 Wheat. (U. S.) 392.

The Seal of the Secretary of State can not be regarded as the seal of the State. Sisk *v.* Woodruff, 15 Ill. 15.

A legislative act certified by the secretary of the state to which is appended a certificate of the governor with the seal of state affixed, certifying to the official character of the person signing himself as secretary, and that full faith and credit are to be given to his official acts, is not admissible because not a compliance with the act of Congress. Lafayette Bank *v.* Stone, 2 Ill. 424.

60. See articles "FOREIGN LAWS," Vol. V, and "STATUTES."

61. Richmond *v.* Patterson, 3 Ohio 368; Bryant *v.* Kelton, 1 Tex. 434; Hamilton *v.* Schoaff, 99 Ind. 63; Powell *v.* Knox, 16 Ala. 364; Florsheim & Co. *v.* Fry, 109 Mo. App. 487, 84 S. W. 1023. See Stephenson *v.* Piscotoqua, 54 Me. 55.

A transcript of a record of marriage in a foreign country however well authenticated it may otherwise be is not competent *prima facie* evidence of marriage therein declared and recorded, without proof of the laws of such foreign country requiring such record to be kept. Straughin *v.* State, 17 Ohio St. 453; State *v.* Dooris, 40 Conn. 145.

62. Williams *v.* Conger, 125 U. S. 397; Louisville, N. A. & C. R. Co. *v.* Shires, 108 Ill. 617.

it may be proved by the means of a properly authenticated copy.[63]

2. Authentication. — A. Necessity. — Foreign records and documents are not admissible in evidence unless properly authenticated.[64]

B. Method of. — a. *Generally.* — In the absence of statute a foreign record or document must be authenticated either by the testimony of some competent witness or by the certificates of the proper officers under a seal which proves itself.[65] It has been held

63. United States *v.* Delespine, 15 Pet. (U. S.) 226; United States *v.* Wiggins, 14 Pet. (U. S.) 334. See *infra,* "Judicial Records."

Where a foreign record does not come within the provisions of the act of Congress it must be proved either by an exemplification under the great seal, by a copy proved to be a true copy, or by a certificate of an officer authorized by law, which certificate must itself be properly authenticated. Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19, *citing* Mahurin *v.* Bickford, 6 N. H. 567; Church *v.* Hubbart, 2 Cranch (U. S.) 238.

64. A document purporting to be an entry in the "Marriage Register Book" in the office of the superintendent registrar of births, marriages and deaths for a certain district in Ireland, and certified by a person signing himself superintendent registrar of births, marriages and deaths for that district, was held inadmissible without further authentication because it did not appear that the law of Ireland required the registration of marriages, that the person certifying was what he purported to be, or that his signature was genuine. State *v.* Dooris, 40 Conn. 145.

65. Where the statutes make no provision as to the mode of authenticating official copies of documents found in foreign registries or public offices, the sufficiency of the authentication must be determined by the courts, as occasion may require, in such cases as arise, according to the rules of the common law or the usages of nations. "The object of any such authentication is to afford satisfactory evidence that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy, having due authority to make such certification. Any evidence is sufficient for this purpose which is calculated to give reasonable assurance of the facts in question. Of this nature is whatever legitimately tends to prove that the document was obtained from the office where the original is kept; that the signature of the certificate was made by the individual whose name is thus subscribed; that he held, at the time, the official position indicated by his subscription; and that it is one of the functions of those holding that position to certify to such copies. State *v.* Dooris, 40 Conn. 145. It is difficult and expensive to produce oral testimony to these points, and hardly less so to resort to written depositions. By the usages of civilized nations, therefore, proof is allowed of all or some of them in the shape of certificates from public officers under their official seals, when these seals are such that the court takes judicial notice of them. The seal of a notary public is one of this description, whenever it is used to attest a document which by the usages of nations may be so attested. . . . . A notary public, furthermore, is an officer to whom, in many countries, resort is had for documents in public archives. . . . It is also one of the proper and essential functions of consuls, under the rules of international law, to aid in the authentication of documents of foreign origin, for use in their own country. . . . The certificates authenticating copies of are so far representatives of the several states that the courts in each consular officers of the United States may properly take judicial notice of their seals of office." Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758, *holding* that such a copy was sufficiently authenticated

that a document under the great seal of state needs no further authentication.[66]

b. *Copies.* — **(1.) Exemplified Copy.** — An exemplification of a foreign record or document under the great seal of the state is competent.[67]

(2.) Examined Copy. — A foreign record or document is properly proved by an examined or sworn copy,[68] but it must be shown that the record itself was in the proper custody.[69]

(3.) Certified Copy. — A copy certified by the legal custodian or other officer entitled to make certified copies, whose official status is shown by a seal which proves itself, is competent evidence of a foreign record or document.[70]

c. *Certificate of Consular Officer.* — It has been held that a certified copy of a foreign record is sufficiently authenticated by the seal and certificate of a consular officer representing the country where the copy is to be used,[71] though the contrary has also been held.[72]

by the certificate of the custodian followed by a certificate of a notary under his official seal as to the official capacity of the custodian, the genuineness of his signature, the fact that the original was properly recorded and that the authentication was according to law, supported by a further certificate by the vice and deputy consul-general of the United States at London, under his seal of office, as to the official capacity of the notary.

66. A British patent authenticated by the great seal of that government proves itself and is admissible without further evidence of genuineness. Gatling *v.* Newell, 9 Ind. 572.

67. Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19. See Church *v.* Hubbart, 2 Cranch (U. S.) 187; Los Caygas *v.* Larionda, 4 Mart. (La.) 283; Brock *v.* Bushet, 2 Swan (Tenn.) 27; and *infra*, VIII, 3.

A patent from the King of England may be proved by an exemplified copy of the record of the proper office in England. McKineron *v.* Bliss, 31 Barb. (N. Y.) 180.

68. Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; American Life Ins. etc. Co. *v.* Rosengale, 77 Pa. St. 507. See also Louisville, N. A. & C. R. Co. *v.* Shires, 108 Ill. 617.

A compared copy of a document on file in the proper office of a foreign country is admissible in evidence, and this is true notwithstanding that the copy contains memoranda which were not part of the original and which are not offered in evidence. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

69. Where a foreign record is proved by an examined copy it must appear that the record from which the copy was taken was found in the proper place of deposit or in the hands of the officer in whose custody the records are kept, and this must be made to appear outside of the record itself. Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19; *citing* 1 Greenl. Ev. § 508. See also Thompson *v.* Mason, 4 Ill. App. 452.

70. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758. Woods *v.* Banks, 14 N. H. 101. See *infra*, VIII, 3.

Self Proving Seals. — Some seals are regarded as self proving, or as it is frequently expressed, are judicially noticed. For a discussion of this matter, see article "JUDICIAL NOTICE," Vol. VII, p. 982.

71. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Rtl. 758. For a full note of this case, see *supra*, VIII, 1, B, a.

72. Church *v.* Hubbart, 2 Cranch 187. See also Stein *v.* Bowman, 13 Pet. (U. S.) 209. See State *v.*

An authentication of foreign records and documents by representatives in such countries is sometimes provided for by statute.[73]

3. Judicial Records. — A. GENERALLY. — The records of foreign courts while themselves competent evidence of the proceedings shown therein[74] are not ordinarily available and may be proved by authenticated copies,[75] either sworn[76] or certified.[77] So also an exemplification under the great seal of the state is competent;[78] but it has been held that oral evidence is not admissible until it appear that none of these other methods is available.[79]

B. METHOD OF CERTIFICATION. — a. *Generally.* — A clerk or prothonotary is presumed to be competent to certify to the records of the court of which he is an officer.[80]

But it is not enough that the copy is certified by the proper officers of the court under the seal thereof,[81] except where the existence

Behrman, 114 N. C. 797, 19 S. E. 220; Stephenson *v.* Piscataqua, 54 Me. 55.

73. Succession of Justus, 48 La. Ann. 1096, 20 So. 680; Jerman *v.* Tenneas, 44 La. Ann. 620, 11 So. 80. But see Williams *v.* Crescent Ins. Co., 15 La. Ann. 651.

74. Spaulding *v.* Vincent, 24 Vt. 501.

75. See *supra*, II, 2 E, b, Teter *v.* Teter, 88 Ind. 494.

The usual and proper if not the only means of authenticating foreign judgments was either by an exemplification under the great seal, or by a copy proved to be a true copy by a witness who has personally compared it with the original record in the proper custody, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated by proving the signature of the certifying officer and the genuineness of the seal affixed. Thompson *v.* Mason, 4 Ill. App. 452.

76. State *v.* Cardenas, 47 Tex. 250; Lincoln *v.* Battell, 6 Wend. (N. Y.) 475; Spaulding *v.* Vincent, 24 Vt. 501; Thompson *v.* Mason, 4 Ill. App. 452; Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513 (decree of divorce).

One recognized mode of proving foreign judgments is by a copy proved to be a true copy. A copy of a judgment recovered in Canada certified by one B. as clerk and purporting to be under the seal of the court was held sufficiently authenticated by the testimony of the witness that he had long known B. to act in the capacity of clerk and that he was with him when the copy in question was made, and helped to compare it with the original by reading the record while the clerk looked over the copy, and knew it to be correct, and that he was also acquainted with the seal of the court and knew that the seal affixed to the copy was genuine. Pickard *v.* Bailey, 26 N. H. 152.

The testimony of one who assisted the clerk of a foreign court in comparing a copy of the judgment of such court with the original and saw him attest the same, is a sufficient verification of the judgment. Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105.

77. State *v.* Cardenas, 47 Tex. 250; Spaulding *v.* Vincent, 24 Vt. 501; Thompson *v.* Mason, 4 Ill. App. 452.

78. State *v.* Cardenas, 47 Tex. 250; Lincoln *v.* Battell, 6 Wend. (N. Y.) 475; Thompson *v.* Mason, 4 Ill. App. 452.

79. State *v.* Cardenas, 47 Tex. 250. But see *supra*, II, 2, I, c, (4.); and Young *v.* Gregorie, 3 Call (Va.) 446, 2 Am. Dec. 556.

A decree of a foreign court can only be proved by a duly authenticated transcript of the record. Teter *v.* Teter, 88 Ind. 494; James *v.* Kerby, 29 Ga. 684.

80. Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466. See *supra*, III, 2, E, e, (12.), (B.).

81. Delafield *v.* Hand, 3 Johns. (N. Y.) 316.

A copy of the record of a foreign

of the court and the genuineness of the seal and signature are admitted.[82]

There seems, however, to be no prescribed method in which foreign judicial records must be certified except that there must be some seal and certificate which authenticates those of the officers of the court and which are themselves recognized without proof.[83]

court certified by the register of the court, without any seal or certificate as to his official capacity by the judge or other proper officer is not admissible. Spegail *v.* Perkins, 2 Root (Conn.) 274.

A copy of the record of a justice of the peace of another state, certified by the justice, is not admissible because not authenticated either in accordance with the common law or with the act of Congress. Bissell *v.* Edwards, 5 Day (Conn.) 363.

82. A copy of the record of a judgment of the "Queen's Bench for Upper Canada at Toronto in Upper Canada," certified by the clerk of the court under the seal of the court, was held properly admitted without further proof, where at the time it was offered it was expressly admitted by the objecting party that the court mentioned in the copy was in existence at the time therein specified and possessed the necessary jurisdiction to render the judgment, and also that the signature of the clerk and the seal of the court affixed to the copy were both genuine. The fact that there was no certificate by the chief justice as to the official character of the clerk and the genuineness of his signature, and no certificate by the secretary of state or other officer holding the great seal as to the existence and jurisdiction of the court and the genuineness of the seal and signatures of the clerk and chief justice as required by law to render copies of foreign judicial records admissible was held immaterial because the only facts which these certificates were designed to show had been expressly admitted. "His written admissions must be taken as dispensing with the formal proof which the statute specifies. But if this were otherwise we think that the judgment was sufficiently proved at common law; and the statute itself expressly authorizes the proving of foreign judgments according to the rules of the common law." Capling *v.* Herman, 17 Mich. 524.

83. Hadfield *v.* Jameson, 2 Munf. (Va.) 53.

A copy of the record of a Nova Scotia court was held sufficiently authenticated by the certificate of the prothonotary under the seal of the court and the great seal of Nova Scotia affixed by its keeper, the prothonotary being presumed competent to certify his records and the great seal proving itself. Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466.

In Packard *v.* Hill, 7 Cow. (N. Y.) 434, a document in Spanish and a translation into English purporting to be extracts from the proceedings of a court in Havana, certified by one of the clerks of the court whose certificate was verified by the certificate of one of the royal college of notaries with the seal of the college affixed, and certified by the American consul, was held sufficiently authenticated to be admissible where a witness was produced at the trial who proved the signature of the clerk, that the court had no seal and that the record was authenticated in the manner customary in that court when to be sent to foreign countries.

In Calhoun *v.* Ross, 60 Ill. App. 309, an exemplification of the record of a judgment was certified to as a correct copy by the local registrar of the High Court of Justice for the Province of Ontario, Common Pleas Division at Sault Ste. Marie under his official seal. There was also a certificate, apparently under the same seal, of the inspector of public offices, that the signature to the first certificate was the signature of the local registrar, and also under the same seal a certificate of the president of that court that the person

Consul. — An American consul in a foreign country has no authority to authenticate copies of judicial records.[84]

b. *Seal of Court.* — The seal of a foreign court does not prove itself,[85] except in the case of an admiralty court which is regarded as a sort of international court.[86] Such a seal may, however, be authenticated by parol.[87]

c. *Great Seal Alone Sufficient.* — Since courts take judicial notice of the public seal of a sovereign state, a document purporting to be the record of a judicial proceeding needs no further authen-

certifying as local registrar was such, and the signature genuine. And finally a sweeping certificate by the lieutenant-governor of the Province of Ontario, under the seal of the province, to the existence of the court, the official positions of the persons certifying as president and local registrar, the genuineness of their signatures, and that the local registrar has the legal custody of the records of the court. The last certificate was signed, "By Command, J. W. Insor, Secretary of the Province of Ontario." The court, "with some misgivings," held that they were to assume, or take judicial notice of the organization of the Dominion of Canada, and therefore to treat the certificates as competent proof of what they state.

A copy of the proceedings of a foreign court under the seal of arms of the secretary of state is not admissible. Vandervoort *v.* Smith, 2 Caines (N. Y.) 155.

84. Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2,517. See *supra*, VII, 2, B, c.

85. De Sobry *v.* De Laiste, 2 H. & J. (Md.) 191, 3 Am. Dec. 535.

86. The seal of a court of admiralty proves itself, and the record of a court of vice admiralty in Bermuda purporting to be certified by the deputy register under the seal of the court is competent evidence without other proof of its authenticity. "By common consent and general usage, the seal of a court of admiralty has been considered as sufficiently authenticating its records. No objection has prevailed against the reception of the decree of a court acting on the law of nations, when established by its seal. The seal is deemed to be evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested as a party." Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; *citing* Green *v.* Waller, 2 Ld. Raym. (Eng.) 891.

Contra. — A copy of the proceedings of a foreign vice admiralty court showing a survey and condemnation of a vessel, and certified by the register under the seal of the court accompanied by a certificate of the American consul under his seal of office as to the official capacity of the register, is not competent evidence. "The seal does not prove itself. There is no impression from which any conclusion can be drawn that it is the seal of that or any other court: and some proof *aliunde* is always required either that it is the seal of the court by a witness who knows the fact, or by proof of the handwriting of the judge or the clerk, or by an examined copy, . . . or some other evidence of a similar character" Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2,517.

87. De Sobry *v.* De Laiste, 2 H. & J. (Md.) 191, 3 Am. Dec. 535. See Catlett *v.* Pacific Ins. Co., 1 Paine 594, 5 Fed. Cas. No. 2,517.

Whether the seal of a foreign court of admiralty is evidence of itself *quaere*. But a copy of a sentence of such a court under the seal of the court, signed by the actuary in the absence of the register, and accompanied with a deposition of a witness proving the seal and the signature and official character of the person whose name was subscribed, was held sufficient authentication. Gardere *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 514.

tication than such a seal. A certificate by an officer of the court whose judgment is exemplified need not accompany it.[88]

d. *Statutes.* — The method of certification is regulated by statute in some states,[89] and a record or copy certified in accordance with such a statute is admissible without regard to the method prescribed in the country or state from which the record comes.[90]

A statute providing for the admission of properly authenticated copies of the records and judicial proceedings of the courts of foreign countries does not refer alone to independent sovereignties, but includes any foreign country which has a government and courts, although it may be subject to another government.[91]

88. Griswold *v.* Pitcairn, 2 Conn. 85, holding that such a seal proves itself as well as the genuineness of the instrument to which it is affixed. See *supra,* VII, 2, A.

89. See the following cases:

United States. — O'Brien *v.* Woody, 4 McLean 75, 18 Fed. Cas. No. 10,398 (Indiana statute).

California. — Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

Illinois. — Thompson *v.* Mason, 4 Ill. App. 452.

Iowa. — Morrison Mfg. Co. *v.* Rimerman, 127 Iowa 719, 104 N. W. 279.

Louisiana. — Lorenz's Succession, 41 La. Ann. 1091, 6 So. 886, 7 L. R. A. 265.

Nebraska. — Linton *v.* Baker, 96 N. W. 251.

New Jersey. — McCarthy *v.* McCarthy, 57 N. J. Eq. 587, 42 Atl. 332.

New York. — Johnson *v.* Johnson, 59 Hun 628, 14 N. Y. Supp. 83; Jarvis *v.* Sewall, 40 Barb. 449.

Pennsylvania. — Chew *v.* Keck, 4 Rawle 163.

Under the Georgia Civil Code, § 5232, foreign judgments may in all cases be authenticated under the great seal of the state in which they are rendered. Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344. An authentication under the great seal of the state is required in all cases where the act of Congress is not applicable. Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46.

Neither at common law nor under § 952 Code Civ. Proc. providing that "a copy of a record or other judicial proceeding of a court of a foreign country is evidence when authenticated," etc., is the report of commissioners appointed by a probate court of another state to ascertain and report the debts aginst a decedent's estate competent evidence to prove the debts therein said to exist, where no judgment or adjudication of the court has been entered upon it. "This section has reference to a record of an adjudication made by a court. It does not include a report made by commissioners appointed by the court, which report by its terms was to be made to the court." Johnson *v.* Johnson, 59 Hun 628, 14 N. Y. Supp. 83.

90. A foreign judgment certified in conformity with code provision, § 4646, is sufficiently authenticated to be admissible in evidence, regardless of the requirements of the statute in the state where the judgment was rendered, since the *lex fori* governs as to the sufficiency of the certification. Morrison Mfg. Co. *v.* Rimerman, 127 Iowa 719, 104 N. W. 279.

91. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404, construing the New York statute and holding that a transcript of a judgment of a court of common pleas of the province of Upper Canada, authenticated by the attestation of the clerk under the seal of the court and proper certificates of the chief justice, of the assistant secretary of state of the province, and the governor in chief, attested by the great seal of the province, was held properly admitted. "The court will take judicial notice that the province of Upper Canada is a foreign country, and forms no part of our own: Ennis *v.* Smith, 14 How. 430; that it has a government and courts, and that those courts proceed according to the course of the common law. The

4. Foreign Statutes. — The method of proving foreign statutes is elsewhere discussed.[92]

record produced was therefore the record of a court of a foreign country."

92. See article "FOREIGN LAWS," Vol. V, p. 821, and article "STATUTES."

RECOURSE.—See Assignments; Bills and Notes.


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